

# Implementing effective trade remedy mechanisms: A critical analysis of Nigeria's Anti-Dumping and Countervailing Bill, 2010

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Faculty of Law, Centre for Human Rights  
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31 May 2014



## Declaration

I declare that this mini-dissertation is my original work and that to the best of my knowledge; it has not been previously, in its entirety or in part, been submitted at this or any other university or institution for a degree or diploma. Other works cited or referred to are accordingly acknowledged. It is in this regard that I hereby present it in partial fulfillment of the requirements for the award of the LLM Degree in International Trade and Investment Law in Africa.

Ikeagwuchi Godwin Andrew

31 May 2014

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## List of Acronyms

ADA	Anti-Dumping Agreement
ADR	Anti-Dumping Regulations
CIF	Carriage Insurance and Freight
CVD	Countervailing Duty
FOB	Free on Board
GATT	General Agreement on Tariffs and Trade
ITA	International Trade Act
ITAC	International Trade Administration Commission
ITO	International Trade Organization
MFN	Most Favoured Nation
PAIA	Promotion of Access to Information Act
SCMA	Subsidies and Countervailing Measures Agreement
SGA	Selling, General and Administrative costs
TRALAC	Trade Law Centre
USDOC	United States Department of Commerce
WTO	World Trade Organization

## **List of Treaties and Instruments**

### **International Treaties**

The General Agreement on Tariffs and Trade 1947

Kennedy Round Anti-dumping Code 1967

Tokyo Round Anti-dumping Code 1979

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)

Agreement on Subsidies and Countervailing Measures 1994 (SCM Agreement)

The Agreement Establishing the World Trade Organization 1995

The General Agreement on Tariffs and Trade 1994

### **Statutes, regulation and case law report**

Customs Duties (Dumped and Subsidized Goods) Act 1958

Anti-Dumping and Countervailing Bill, 2010

International Trade Administration Act, 71 of 2002

The International Trade Administration Commission: Anti-Dumping Regulations 2003

Laws of the Federation of Nigeria (LFN) 1990 Vol. V Cap 87

Promotion of Access to Information Act 2 of 2000

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## **Abstract**

Anti-dumping duties, safeguards and countervailing duties are collectively, within the context of the WTO, referred to as ‘trade remedies.’ More specifically, the imposition of anti-dumping duties is a remedial measure for dealing with imports that cause or threatens to cause injury to local producers. Under the WTO framework, Article VI of the General Agreement on Tariffs and Trade 1994 and the Agreement on the Implementation of the General Agreement on Tariffs and Trade 1994 provides the rules for applying anti-dumping duties by member countries. Nigeria has been a member of the WTO since 1995 and can only apply anti-dumping duties provided it adheres to the rules governing anti-dumping. The purpose of this study is to ascertain whether the proposed Anti-dumping and Countervailing Bill, 2010 is consistent with WTO jurisprudence on anti-dumping. This study also highlights landmark developments in South Africa’s anti-dumping system with a view to providing direction to Nigeria in order for its proposed national legislation on anti-dumping to be WTO compliant.

# Chapter 1

## 1.1 Introduction

The General Agreement on Tariffs and Trade<sup>1</sup> (GATT) is a multilateral agreement between governments which aims at reducing government-initiated trade protection and strengthening the rules for the conduct of international trade. The GATT negotiating governments agreed to apply various provisions including the most-favoured-nation, or MFN clause,<sup>2</sup> national treatment on internal taxation and regulation,<sup>3</sup> freedom of transit,<sup>4</sup> anti-dumping and countervailing duties,<sup>5</sup> valuation for customs purposes<sup>6</sup> and state trading enterprises.<sup>7</sup> During the GATT regime, tariffs and quantitative restrictions were categorized as ‘pure trade instruments.’<sup>8</sup> Reduction of tariff-volatility and progressive reduction of all tariffs were the key aims of the GATT.<sup>9</sup> Whilst the former was achieved through the obligation on contracting parties<sup>10</sup> not to impose duties above the agreed levels, the latter was realized through a progressive series of multilateral rounds of negotiations which focused, at the initial stages, on tariffs and subsequently on trade in general.<sup>11</sup>

International trade liberalization necessitated opening of domestic markets for freer trade. In order to achieve one of the key aims of the multilateral trade system that is, a high level of tariff liberalization on the basis of reciprocity, the ability of members to have recourse to trade remedies became imperative.<sup>12</sup> Within the framework of the World Trade Organization (WTO), ‘trade remedies’ is used to refer to – anti-dumping duties,

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<sup>1</sup> GATT was concluded between January and February 1947 and came into force 1 January, 1948 [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm) (accessed 1 April 2014); See the preamble to GATT 1947.

<sup>2</sup> Part I Article I of the GATT (n 1 above).

<sup>3</sup> Article III GATT (n 1 above).

<sup>4</sup> Article V GATT (n 1 above).

<sup>5</sup> Article VI (n 1 above).

<sup>6</sup> Article VII (n 1 above).

<sup>7</sup> Article XVII (n 1 above).

<sup>8</sup> PC Mavroidis *The General Agreement on Tariffs and Trade - A commentary* (2005) 7.

<sup>9</sup> As above.

<sup>10</sup> GATT negotiating governments were referred to as ‘Contracting Parties’; See the preamble to GATT 1947.

<sup>11</sup> Mavroidis (n 8 above) 7-8.

<sup>12</sup> Caribbean Export Development Agency ‘An introduction to trade remedies in the multilateral trade system’ (2010) 1:1 <http://www.carib-export.com/login/wp-content/uploads/2010/01/trade%20wins%20trade%20remedies%20final%20june%202010.pdf> (accessed 3 April 2014).

countervailing duties and safeguards.<sup>13</sup> The use of trade remedies for the protection of indigenous industries against the negative impact of trade liberalization is increasingly becoming a part of national trade policy in many countries.<sup>14</sup> Trade remedies have become strategic trade policy tools in the hands of governments which have found these contingent measures reliable, in reducing the political cost and internal domestic pressure involved in giving unlimited access to foreign goods in domestic markets.<sup>15</sup>

The WTO agreements on anti-dumping measures, subsidies and countervailing measures and safeguards all form part of a single package that automatically binds all members.<sup>16</sup> Whilst WTO members are not obliged to adopt national legislations on anti-dumping, members that decide to adopt and apply anti-dumping rules, must do so in accordance with the provisions of the Anti-Dumping Agreement<sup>17</sup> (ADA) and in a manner consistent with commitments to which they have subscribed.<sup>18</sup>

As pointed out by Mavroidis, a country (or customs territory, such as the European Union) upon acceding to the WTO might be bound by three different sets of obligations which are enumerated as follows:

(a) Obligations reflected in the multilateral agreements, which are obligations which a WTO Member must respect because of its accession to the WTO. In other words, there is no possible opt-out from this set of obligations. (b) Obligations reflected in the plurilateral agreements, which are obligations which a WTO Member might want to assume, by acceding to a WTO plurilateral agreement. Participation in these agreements is optional. (c) Ad hoc obligations, that is obligations which bind the acceding country (and not necessarily each and every acceding country) and regulate its legal relationship with the WTO Membership. Such obligations are usually imposed on countries which are not, what is understood to be, market economies.<sup>19</sup>

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<sup>13</sup> As above.

<sup>14</sup> W Denner 'Trade remedies and safeguards in Southern and Eastern Africa' in *Monitoring regional integration in Southern Africa: yearbook* (2009) 43

<sup>15</sup> As above.

<sup>16</sup> Caribbean Export Development Agency (n 12 above) 1.

<sup>17</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 <http://www.worldtradelaw.net/uragreements/adagreement.pdf> (accessed 31 January 2014); also commonly called the Anti-Dumping Agreement (ADA). Following the Uruguay Round of negotiations, the ADA was signed in 1994 and entered into force in 1995.

<sup>18</sup> E Vermulst *The WTO anti-dumping Agreement: A commentary* (2005) 4; Part I Art 1 Anti-Dumping Agreement (n 17 above).

<sup>19</sup> n 8 above, 9-11.

The ADA falls within the first category (a) mentioned in the list above.<sup>20</sup>

At the national level, Nigeria's external trade policy has been geared towards achieving economic development by promoting oil and non-oil exports; protecting existing indigenous industries and a determined effort to reduce reliance on imports; and attracting foreign investors across major sectors of the economy.<sup>21</sup> More specifically, Nigeria's policy objective in the manufacturing sector is to promote and protect local investments and exports. Nigeria is almost entirely dependent on crude oil export which leaves the economy highly volatile and vulnerable to external shocks, often occasioned by unpredictable global oil prices.<sup>22</sup> By implication, the nation is left with no choice other than to pursue appropriate policy objectives and instruments in major sectors of the economy.<sup>23</sup>

Nigeria's Customs Duties (Dumped and Subsidized Goods) Act 1958 was enacted for the protection of indigenous industries from unfair foreign competition.<sup>24</sup> However, Nigeria acknowledged in its notification<sup>25</sup> to the WTO Committees on Anti-Dumping Practices and; Subsidies and Countervailing Measures<sup>26</sup> that it has not taken any anti-dumping measures to date. It states as follows:<sup>27</sup>

Nigeria has not undertaken any anti-dumping or countervailing measures since 1998. The existing legislation Customs Duties (Dumped and Subsidized Goods) Act, which provides for imposition of special duty on any good, deemed to be dumped or subsidized by any company or Government authority outside Nigeria has therefore not been used. Nigeria recognizes the need to protect local industries from dumping and unfair competition within the framework of the remedies provided for by the WTO. Accordingly, a Bill on anti-dumping and countervailing measures is under preparation to streamline the Act with Nigeria's WTO obligations. This notification covers the period up to 2006.

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<sup>20</sup> Caribbean Export Development Agency (n 12 above) 1.

<sup>21</sup> EO Ogunkola & YF Agah 'Nigeria and the world trading system' in A Oyejide & D Njinkeu (eds) *Africa and the world trading system* (2007) 247.

<sup>22</sup> As above.

<sup>23</sup> As above.

<sup>24</sup> Contained in the Laws of the Federation of Nigeria (LFN) 1990 Vol. V Cap 87.

<sup>25</sup> WTO member countries are required to give notices under arts 18.5 & 32.6 of the Agreement on Implementation of Article VI of the GATT 1994 and the Subsidy and Countervailing Measures Agreement (SCM Agreement).

<sup>26</sup> Established under Article 24 of the SCM Agreement.

<sup>27</sup> Report by the Secretariat – World Trade Organization [www.wto.org/english/tratop\\_e/tpr\\_e/s147-3\\_e.doc](http://www.wto.org/english/tratop_e/tpr_e/s147-3_e.doc) (accessed 17 March 2014).

Nigeria has no anti-dumping legislation yet, this makes the proposed Bill quite significant. This Bill is critical for Nigeria's global trade relations for two reasons. First, the use of import prohibition as a policy tool is no longer acceptable within the WTO framework and its use by Nigeria has attracted criticism from member countries and several discussions with GATT/WTO committees.<sup>28</sup> Second, Nigeria has not imposed any anti-dumping duty since 1989 when the government increased tariff from 35% - 70% to 200% because of the indiscriminate dumping of certain commodities on its domestic market.<sup>29</sup> Some of the products affected were: glass shells, tomato paste and puree, batteries, corrugated iron/steel roofing sheets, starch, aluminum foil and fluorescent tubes. However, this tariff increase was also followed by a lot of criticisms from trading members as it was raised on an MFN basis.<sup>30</sup>

Nigeria, is on the verge of introducing a new legislative framework on trade remedies (covering two specific areas: anti-dumping and countervailing measures) for the protection of its ailing indigenous industries. By implication, the country, until the Bill becomes law, currently trades without 'remedies' or at least, 'remedies' as defined within the framework of the WTO.

## 1.2 Research problem

In Nigeria, local industries are becoming increasingly marginalized in the regional and international industrial arena. Cumulatively, value added and manufactured exports have declined to worrisome levels and there has been a technological downgrading of the traditional manufacturing sectors. One of the critical challenges facing the nation's industrial sector is 'dumping', and its injurious consequences threatening their survival. Many small and infant industries are closing down due to inability to compete with imports and loss of employment resulting from closure of such companies.

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<sup>28</sup> Ogunkola & Agah (n 21 above) 249; V Treichel et al 'Import bans in Nigeria increase poverty' (2012) Africa trade policy notes [http://siteresources.worldbank.org/INTAFRREGTOPTRADE/Resources/PN28\\_Import\\_bans\\_Nigeria\\_3\\_12.pdf](http://siteresources.worldbank.org/INTAFRREGTOPTRADE/Resources/PN28_Import_bans_Nigeria_3_12.pdf) (accessed 29 March 2014).

<sup>29</sup> Ogunkola & Agah (n 21 above) 249.

<sup>30</sup> As above.

Nigeria's Anti-dumping and Countervailing Bill 2010 was proposed to deal with 'dumped' and subsidized imports, but it does not cover many important aspects and may not be compatible with the country's WTO obligations. This study highlights the irregularities and inconsistencies of the proposed Bill against the background of WTO standard provisions on anti-dumping. The study further investigates and makes recommendations as to ways through which the WTO/GATT compatibility can be achieved with a view to ensuring a balance between compliance with WTO obligations and domestic industries protection against dumping.

### **1.3 Research questions**

The writer will in the course of this study answer the following research questions:

1. What are the substantive elements of the Anti-Dumping Agreement?
2. What are the procedural elements of the Anti-Dumping Agreement?
3. In light of information provided to questions 1 and 2 above, is the proposed Anti-Dumping and Countervailing Bill, 2010 consistent with the WTO rules on anti-dumping?
4. What are the lessons that can be drawn from South Africa's experience?

### **1.4 Thesis statement**

This paper argues that whilst Nigeria's Anti-Dumping and Countervailing Bill 2010 may generally be regarded as a positive legislative intervention, to a large extent, the proposed regulatory regime goes against the spirit, object and purport of the WTO Antidumping Agreement.

### **1.5 Significance of the study**

Nigeria, as a member of the WTO has agreed to global trade liberalization. Traditional trade barriers used by Nigeria, such as import bans, are no longer a sustainable defense tool within the WTO framework. Consequently, it has become imperative for domestic



industries to be guaranteed legal protection from unfair foreign trade practices within the framework of the WTO trade defense mechanisms, by implementing an effective legislation on anti-dumping. The significance of this research is also underscored by the fact that, Nigeria, is for the first time in the history of its anti-dumping regime, seeking to streamline the current Act with her WTO obligations. This work will significantly contribute to the information available to policy makers and proponents of the current Bill towards the formulation and implementation of an effective anti-dumping law for domestic industry protection consistent with the nation's WTO obligations.

## **1.6 Literature review**

The Uruguay Round Agreements on Safeguards, Implementation of Article VI of the GATT 1994 (ADA), and the Agreement on Subsidies and Countervailing Measures are part of a single undertaking to which all WTO states countries agree to be bound.<sup>31</sup> The substantive and procedural rules on the discipline of 'dumping' are elaborated upon in Article VI of the ADA. Article 18 of the ADA provides that '[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.' As such, we can take three key results from the Uruguay Round; firstly, the Agreements set forth rules regarding anti-dumping; secondly, the Subsidies and Countervailing Measures set out the rules regarding application of subsidies by member state governments; and finally, the Agreements also set forth safeguards which can be imposed if there is a surge in imports in a member state market. These are all trade remedies that can be invoked by a member state.

Having established what came out of the Uruguay Round, and in order to relate these results back to the proposed Bill in Nigeria, it is important to survey academic scholarship on these remedies. The following paragraphs analyses relevant academic literature and debate on trade remedies and their application. The specific trade remedy that this study focuses upon is anti-dumping measures. As such, the literature review has been limited to focus solely on this aspect of trade remedies.

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<sup>31</sup> Caribbean Export Development Agency (n 12 above) 1.

A considerable amount of literature exists on the Anti-Dumping Agreement and the use, potential, and constraints of ‘anti-dumping duties’ as a trade policy measure. Globally, the use of trade remedies by developing countries has reached a significant high. Although, developed countries were the first major users of trade remedies as a trade policy tool for the protection of local industries, statistics have shown that many developing countries have adopted and implemented national legislation on trade remedies.

As noted by Illy, early statistics from GATT illustrate that developing countries were not active in the trade remedies arena until the 1980s.<sup>32</sup> From the 1980s onwards, these countries became more active and represent just less than two thirds of these remedy actions today.<sup>33</sup> However, developing countries are not just applicants of these remedies, but also the principal targets of such. For example, ‘China has become the single biggest target of anti-dumping actions in the world (WTO 2010).’<sup>34</sup>

Gantz, has captured the reason for this remarkable increase in trade remedy adoption by WTO member countries from the developing world. He states that, since tariffs are no longer available to protect local industries and non-tariff barriers, such as quotas, are no longer as legitimate as they have been in the WTO system, the only viable and effective option for protecting local industry is through the implementation of trade remedy laws.<sup>35</sup>

Literature reveals the controversial nature of the use and application of trade remedies, and more specifically, anti-dumping duties. Ahuja, argues that anti-dumping duties are a ‘subtle form of non-tariff barrier to be used as a tool to restrict market access rather than to stop predatory pricing.’<sup>36</sup> His argument finds support in the views of Bown, who noted that many developing countries are no longer using ‘other forms of flexibility in trade policy’ but have resorted to WTO disciplines and, in particular, anti-dumping as a trade policy to

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<sup>32</sup> O Illy ‘*Trade remedies in Africa: experience, challenges, and prospects*’ (2012) Draft paper prepared for the 4th global leaders’ fellowship program annual colloquium, Princeton.

<sup>33</sup> As above.

<sup>34</sup> As above.

<sup>35</sup> DA Gantz ‘*A commentary on the Stewart and Dwyer Overview*’ in KW Bagwell et al (eds) *Law and economics of contingent protection in international trade* (2010) 243.

<sup>36</sup> S Ahuja ‘*Anti-dumping mechanism as a trade remedial measure under WTO*’ (2004) 8 *The Journal of Business Perspective* 43.

limit imports.<sup>37</sup> Alternatively, authors such as Mavroidis *et al* and Raslan maintain that trade remedies are useful instruments for insuring fairness in global trade and preserving the space for adjustment for struggling domestic industries.<sup>38</sup> Raslan notes that the need for the control of imports highlights the importance of anti-dumping laws as they can be employed by developing countries as ‘escape clauses to ease the consequences of liberalization.’<sup>39</sup>

Although the Uruguay Round Agreements hold a great deal of potential for the optimum integration of developing countries into the global trading system there are also challenges.<sup>40</sup> A major challenge has been the adoption of the Uruguay Agreements into national legislation in a manner which is consistent with the rules and guidelines provided in the standard texts. According to Ogunkola and Agah, these agreements are not compulsory. This is because member states are not mandated to adopt them into national legislation. However, in the application of these provisions it is required to implement national legislation in conformity with the agreements dealing with subsidized imports and injury to domestic producers of like products.<sup>41</sup>

In terms of the WTO legal texts, the revised Agreement provides for in-depth clarity and more elaborate rules regarding the method through which it is determined whether a product has been dumped.<sup>42</sup> This includes the criteria to be considered in a determination that dumped imports cause injury to a local industry, the procedures to be followed in initiating and conducting anti-dumping investigations, and the application and duration of anti-dumping measures.<sup>43</sup> In spite of this claim, Stewart and Dwyer are of the view that, owing to the brevity of the GATT/WTO disciplines on dumping, much of the detail of implementing the rights and obligations under Article VI are left to the discretion of the

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<sup>37</sup> CP Bown ‘*The WTO and antidumping in developing countries*’ World Bank Policy Research Working Paper, November 2007.

<sup>38</sup> PC Mavroidis *et al* *The law and economics of contingent protection in the WTO* (2008) 4; RAA Raslan *Anti-dumping: A developing country perspective* (2009) xv.

<sup>39</sup> n 38 above.

<sup>40</sup> Ogunkola & Agah (n 21 above) 249.

<sup>41</sup> As above.

<sup>42</sup> As above.

<sup>43</sup> Legal texts: the WTO agreements [http://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#fAgreement](http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#fAgreement) (accessed 23 November 2013).

contracting parties.<sup>44</sup> This exercise of individual discretion, has led to significant differences in national anti-dumping systems of member countries.

Regardless of these divergent views, Bentley and Silberston were in agreement as to the effect of non-compliance with the GATT/WTO disciplines on Anti-dumping, Subsidies and Countervailing Measures.<sup>45</sup> According to them, failure to comply with the Uruguay proceedings may lead to proceedings before the WTO Dispute Settlement Bodies, and possibly the Appellate Body of the WTO<sup>46</sup>. These bodies decide on whether or not the Anti-Dumping Agreements and Subsidies and Countervailing Measures Agreement have been complied with. An offender to these agreements can be ordered to take corrective measures, or, if necessary, an injured member state can obtain permission to take countermeasures such as increased tariffs. If they obtain this permission, this is ‘in derogation of the principle of bound tariffs and the MFN treatment.’<sup>47</sup>

While these views illustrate sound reasoning, there are further challenges which these authors have failed to address adequately, if at all. Specifically, developing countries, and in particular Nigeria, the challenge has been how to adopt and effectively implement the WTO anti-dumping rules. This adoption must be in accordance with the provisions of the ADA and in a manner consistent with Nigeria’s commitments under the WTO. This challenge is the focus of this study.

## **1.7 Research Methodology**

This paper constitutes desk and library based research. It relies on both published and unpublished materials. Most of the works on trade remedies are internet based and the writer takes advantage of this resource base as well. This research will combine descriptive, analytical and prescriptive approaches. A descriptive approach will be used in the discussions regarding the substantive and procedural guidelines of the WTO Agreements on anti-dumping. This approach is adopted with a view to show the current rules and procedural guidelines on anti-dumping as provided under the various WTO texts and

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<sup>44</sup> TP Stewart & AS Dwyer ‘*Antidumping: Overview of the Agreement*’ in KW Bagwell et al (eds) *Law and Economics of contingent protection in international trade* (2010) 199.

<sup>45</sup> P Bentley & A Silberston *Anti-dumping and countervailing action: Limits imposed by economic and legal theory* (2007) 6.

<sup>46</sup> As above.

<sup>47</sup> As above.

Agreements. The writer highlights the irregularities and inconsistencies contained in the proposed Anti-dumping and Countervailing Bill, 2010 by critically analysing the same against the background of the descriptions made earlier. It is in this regard that the writer uses an analytical approach. Following the above approaches, the writer makes prescriptions drawing from the experiences of the South African trade remedies system. The choice of South Africa's trade system for the prescriptive study is informed by the following considerations:

- (a) South Africa was one of the first countries to promulgate legislation dealing with dumping and serves as a reference to other countries on the continent.<sup>48</sup>
- (b) Although South Africa's trade remedies regime is not without its share of criticisms, South Africa is one of the most prolific users of anti-dumping measures on the continent and has a robust experience in trade remedies actions;<sup>49</sup>
- (c) The country has conducted a significant number of anti-dumping investigations;<sup>50</sup>
- (d) The country is without doubt the most industrialised country on the continent; and
- (e) South Africa has been involved in WTO anti-dumping disputes.<sup>51</sup>

## 1.8 Limitations to the study

A detailed analysis of the WTO ADA can hardly be achieved in a mini-dissertation in view of the time and word limitations. This research does not intend to consider the WTO Subsidy and Countervailing Measures Agreement nor the subsidy provisions in the Bill as these would suffice as a different research topic altogether. This research is also not intended to be a comparative analysis of the Nigerian and South African anti-dumping systems as the former's legislation is still in the making. Interviews from trade and industry departments in selected African countries would have enriched the findings of this research but time and resource constraints posed a significant challenge.

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<sup>48</sup> GF Brink *'A theoretical framework for South African anti-dumping law'* unpublished PhD thesis, University of Pretoria, 2004 4.

<sup>49</sup> GF Brink *Anti-dumping and countervailing investigations in South Africa: A practitioner's guide to the practice and procedures of the board on tariffs and trade* (2004) 2-3.

<sup>50</sup> As above.

<sup>51</sup> Illy (n 32 above) 15-16, 40-41.

## **1.9 Outline of chapters**

### **Chapter 1**

This chapter introduces the research topic. It highlights the problem statement, questions, thesis statement, and justification for the research, literature review and proposed research methodology.

### **Chapter 2**

This chapter will describe the substantive provisions of the WTO Anti-dumping Agreement with a focus on the fundamental standards and requirements.

### **Chapter 3**

The procedural elements of the Anti-dumping Agreement as set down by the WTO will be discussed in this chapter.

### **Chapter 4**

This chapter critically analyses, against the background of chapters 2 and 3, the inconsistencies identifiable in the proposed Bill.

### **Chapter 5**

Although South Africa's anti-dumping system has been criticised for WTO consistency shortcomings,<sup>52</sup> South Africa's anti-dumping procedures have changed significantly to come in line with the requirements of the ADA and is one of the most prolific users of anti-dumping measures on the African continent. It also has a robust experience in the use of anti-dumping measures which, in the writer's view, can provide some direction for Nigeria in her quest for effective WTO consistent national legislation on anti-dumping measures. This will be the focus of the current chapter.

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<sup>52</sup> Brink (n 48 above) 689-690.

## Chapter 6

This chapter provides the conclusion to the discussion, highlighting the flaws and shortcomings illustrated in chapter 4 and outlining recommendations on the substantive and procedural issues as well as the institutional framework proposed by the Bill.

## Chapter 2

### The substantive aspects of Anti-Dumping

#### 2.1 Introduction

Adoption of excessive trade protectionism, maximization of exports and minimization of imports were some of the significant factors responsible for the great depression of the 1930s.<sup>1</sup> The Second World War also brought key changes in the structure of world economic management, following the establishment of the ‘Bretton Woods Institutions’: the World Bank and the International Monetary Fund.<sup>2</sup> These institutions were responsible for world finance, and therefore the need for a third institution to deal with international trade became obvious.<sup>3</sup> This need was met in the establishment of the International Trade Organization (ITO) under the ambit of the United Nations.<sup>4</sup> The rules on employment, commodity agreements, economic development, international investment and restrictive business practices were captured in the draft ITO Charter for negotiations.<sup>5</sup> Over 50 countries took part in the negotiations and in 1946 23 participants commenced negotiations for the reduction and binding of customs tariffs.<sup>6</sup> These negotiations on customs tariffs led to a collection of trade rules and tariff concessions which together became known as the General Agreement on Tariffs and Trade (GATT) 1947.<sup>7</sup>

#### 2.2 GATT and the WTO: a brief history

Between January and February 1947, negotiations were concluded by state representatives leading to what became the GATT.<sup>8</sup> Notably, members of the Preparatory Committee

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<sup>1</sup> United Nations Economic and Social Commission for Asia and the Pacific *‘Introduction to the WTO’* [http://www.unescap.org/tid/projects/accesswto\\_bhul\\_wto.pdf](http://www.unescap.org/tid/projects/accesswto_bhul_wto.pdf) (accessed 28 January 2014).

<sup>2</sup> As above.

<sup>3</sup> As above.

<sup>4</sup> As above.

<sup>5</sup> PC Mavroidis *The General Agreement on Tariffs and Trade - A commentary* (2005) 2-3.

<sup>6</sup> United Nations Economic and Social Commission for Asia and the Pacific (n 1 above).

<sup>7</sup> As above.

<sup>8</sup> Mavroidis (n 5 above).



conducted a round of tariff negotiations between April and October 1947 in the course of the ITO negotiations at the European office of the United Nations, in Geneva.<sup>9</sup> This became the first round of multilateral trade negotiations.<sup>10</sup> Further developments of the GATT's basic legal rules were achieved through a series of multilateral trade negotiations referred to as 'trade rounds.'<sup>11</sup> Trade rounds focused on further tariffs reduction and the eighth was the Uruguay Round of 1986- 1994, which led to the establishment of the WTO on 1 January 1995 with a new set of agreements.<sup>12</sup> The WTO Agreements relating to anti-dumping measures, subsidies and countervailing measures and safeguards are part of the multilateral agreements on trade in goods.<sup>13</sup>

The purpose of GATT and the WTO is to ensure that parties to the Agreement<sup>14</sup> conduct their relations in the field of trade and economic endeavour with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.<sup>15</sup>

The WTO has, as part of its institutional structure,<sup>16</sup> a Ministerial conference composed of representatives of all the Members, which meets at least once every two years and carries out its functions.<sup>17</sup> The General Council of the WTO is composed of representatives of all the Members, which meets as appropriate.<sup>18</sup> The General Council is responsible for

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<sup>9</sup> As above.

<sup>10</sup> As above.

<sup>11</sup> World Trade Organization 'Understanding the WTO' (2011) 16  
[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf) (accessed 28 January 2014).

<sup>12</sup> As above.

<sup>13</sup> As above.

<sup>14</sup> The Agreement Establishing the World Trade Organization [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf) (accessed 31 January 2014).

<sup>15</sup> See the Preamble to the Agreement Establishing the World Trade Organization [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf) (accessed 31 January 2014).

<sup>16</sup> Art IV. 1 Agreement Establishing the World Trade Organization (n 14 above).

<sup>17</sup> Art III Agreement Establishing the World Trade Organization (n 14 above).

<sup>18</sup> Art IV. 1 & 2 Agreement Establishing the World Trade Organization (n 14 above).

establishing rules of procedure and approval of the rules of procedure for the Committees.<sup>19</sup> The General Council has under its supervision three distinct Councils – the Council for Trade in Goods, the Council for Trade in Services and the council for Trade-Related Aspects of Intellectual Property Rights.<sup>20</sup> The Council for Trade in Goods is the relevant Council for the purposes of this paper.

The Council for Trade in Goods (and the other Councils) may, as required, establish subsidiary bodies which shall establish their respective rules of procedure subject only, to the approvals of their principal Councils.<sup>21</sup> In the exercise of this power, the Committee on Anti-Dumping Practices was established by the Council for Trade in Goods. The Committee is composed of representatives from each of the Members and meets regularly at least twice a year.<sup>22</sup> The Committee, as part of its role, affords Members the opportunity for consultations on any matter regarding the operation of the agreement and its objectives, including providing guidance on Member's anti-dumping legislations and actions.<sup>23</sup>

### **2.3 Legal instruments of GATT and the WTO**

The GATT and WTO are heavily documented in their operations and processes. The original agreements that established the GATT together with annexes and schedules are attached to the Final Act of the United Nations Conference on Trade and Employment.<sup>24</sup> The results of the Uruguay Round of multinational trade agreements is also contained in the Final Act consisting of the Final Act itself, the Agreement establishing the WTO and agreements annexed to it, as well as additional GATT declarations, decisions and agreements.<sup>25</sup>

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<sup>19</sup> Art IV. 7 Agreement Establishing the World Trade Organization (n 14 above).

<sup>20</sup> Art IV. 5 Agreement Establishing the World Trade Organization (n 14 above).

<sup>21</sup> Art IV. 6 Agreement Establishing the World Trade Organization (n 14 above).

<sup>22</sup> Part II Art 16.1 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; also commonly called the Anti-Dumping Agreement (ADA)

<http://www.worldtradelaw.net/uragreements/adagreement.pdf> (accessed 31 January 2014).

<sup>23</sup> As above.

<sup>24</sup> Mavroidis (n 5above) 11.

<sup>25</sup> As above.

## 2.4 Some important sources of anti-dumping law and practice

### 2.4.1 The Text of the General Agreement on Tariffs and Trade 1947

The preamble to the General Agreement on Tariffs and Trade which was signed in 1947 states that the purpose of the Agreement is to bring about ‘substantial reduction of tariffs and other trade barriers and the elimination of discriminatory treatment in international commerce, on a reciprocal and mutually advantageous basis.’<sup>26</sup> As has been shown in paragraphs 2.1 and 2.2 above, the preparation of the GATT and the draft Charter for the ITO have an intertwined history. Notably, the United States and its economic policy played significant roles in the ITO draft Charter and the GATT 1947.<sup>27</sup> The U.S economic policy on ‘reciprocal trade agreements’ finds its legal force in the Reciprocal Trade Agreements Act of 1934. The Executive was authorized by Congress to conclude trade agreements under the provisions of the Act. The GATT and its clauses therefore, drew largely from the provisions of the Reciprocal Trade Agreements Act of 1934.<sup>28</sup> It is important to mention that, following Canada’s enactment of the first anti-dumping legislation in 1904 other countries had become ever more interested in dumping and began enacting their own anti-dumping legislations.<sup>29</sup> A comprehensive body of rules on the subject of dumping had therefore become imperative leading to the GATT negotiations of mid-1940s which resulted in the rules contained in Article VI of the GATT 1947, dealing with both anti-dumping and countervailing duties.<sup>30</sup> Article VI of the GATT does not prohibit dumping but rather condemns dumping where it causes or threatens to cause material injury.<sup>31</sup>

Another aspect of the United States economic policy that found reflection in the original text of GATT was the recognition of the need for establishment of global economic institutions to avoid ‘beggar-my-neighbour’ policies which were considered by many leaders as being responsible for World War II and its grave consequences on global trade

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<sup>26</sup> See the Preamble to GATT 1947 [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf) (accessed 31 January 2014).

<sup>27</sup> R Wolfrum et al *WTO – Trade in Goods* (2011) 5-6.

<sup>28</sup> As above.

<sup>29</sup> S Lester et al *World Trade Law: Text, materials and commentary* (2008) 468.

<sup>30</sup> As above.

<sup>31</sup> As above.

and economics.<sup>32</sup> The Atlantic Charter of August 1941 provided for clauses articulating the desire of the United States and Britain to bring about full economic collaboration amongst all nations with the aim of ensuring improved labour standards, social security and overall economic development.<sup>33</sup>

In addition to the foregoing, various congressmen had indicated important factors to be considered in the reciprocal trade agreements such as the non-tariff barriers which they reasoned would ultimately eliminate tariff concession and the need to incorporate them into future trade agreements.<sup>34</sup> The draft text of GATT 1947 was an agreement of tariff negotiations which was supervised by Tariff Negotiations Working Party drawing significantly from the ITO Charter provisions on general commercial policy (Part II of GATT).<sup>35</sup>

#### **2.4.2 The WTO Agreement**

A landmark conclusion of the Uruguay trade round, launched at Punta del Este under GATT 1947 was the establishment of the World Trade Organization upon the legal instrument called the WTO Agreement.<sup>36</sup> The Agreement provides for the common institutional framework for the conduct of trade among its Members.<sup>37</sup> More significantly, the negotiators at the Uruguay round desired a treaty based on a ‘single undertaking’ or ‘single package’.<sup>38</sup> In effect, at the end of the Uruguay round of negotiations, all the negotiators who wish to be Members of the WTO would be bound, without reservations, to accept all the obligations of the Agreement.<sup>39</sup> The GATT 1994, the Agreement on Implementation of Article VI of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures (SCMA) all form part of Annex IA to the WTO Agreement

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<sup>32</sup> R Wolfrum et al (n 27 above) 5-6.

<sup>33</sup> As above.

<sup>34</sup> Wolfrum et al (n 27 above) 10.

<sup>35</sup> Wolfrum et al (n 27 above) 11-12.

<sup>36</sup> Art I Agreement Establishing the World Trade Organization (n 14 above); The WTO came into force on 1 January 1995.

<sup>37</sup> Art II.1 Agreement Establishing the World Trade Organization (n 14 above).

<sup>38</sup> Wolfrum et al (n 27 above) 22-23.

<sup>39</sup> As above.

regarding multilateral trade in goods and are binding on all members.<sup>40</sup> Article VI of the GATT 1994 provides two trade remedies (anti-dumping measures and; countervailing measures, including countervailing duties (CVDs) and regulates WTO Members' defence against dumping and subsidization.<sup>41</sup> The ADA and the SCMA provide detailed substantive and procedural rules as to how dumping or countervailable duties, injury and causality are determined.<sup>42</sup> Anti-dumping and countervailing measures would generally, constitute a breach of WTO Members' substantive obligations, for instance the most-favoured-nation, the national treatment and the GATT tariff commitments but are now regarded as permissible and exceptions under Article VI of the GATT 1994, the ADA and the SCMA.<sup>43</sup>

### 2.4.3 The Anti-Dumping Codes

The 1967 Kennedy Round featured negotiations for the Anti-Dumping Code which was signed by 17 parties and became the first agreement on the implementation of Article VI of GATT 1947.<sup>44</sup> The 1967 Code was also referred to as the 1967 Agreement on Implementation of Article VI of the GATT 1947.<sup>45</sup> The 1967 Code provided parties with the procedural framework for conducting anti-dumping investigations.<sup>46</sup> At the Tokyo Round negotiations in 1979, 25 parties were signatories to the Tokyo Code, counting the European Economic Communities (now the European Union) as representing one party.<sup>47</sup> Also at the Tokyo Round negotiations, the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement, that is the 1979 Subsidies Code was concluded.<sup>48</sup> Consequently, the 1967 Anti-Dumping Code was revised and brought into conformity with the 1979 Subsidies Code. Much later, at the Uruguay Round of negotiations the ADA and the SCMA were established.<sup>49</sup>

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<sup>40</sup> Art II.2 Agreement Establishing the World Trade Organization (n 14 above); Wolfrum et al (n 27 above) 199.

<sup>41</sup> Wolfrum et al (n 27 above) 198.

<sup>42</sup> As above.

<sup>43</sup> As above.

<sup>44</sup> United Nations Conference on Trade and Development 'Training module on the WTO agreement on anti-dumping' (2006) 3 [http://unctad.org/en/docs/ditctncd20046\\_en.pdf](http://unctad.org/en/docs/ditctncd20046_en.pdf) (accessed 3 January 2014).

<sup>45</sup> Wolfrum et al (n 27 above) 198-199.

<sup>46</sup> GF Brink 'A theoretical framework for South African anti-dumping law' unpublished PhD thesis, University of Pretoria, 2004 94.

<sup>47</sup> United Nations Conference on Trade and Development (n 44 above).

<sup>48</sup> Wolfrum et al (n 27 above) 199.

<sup>49</sup> As above.

## 2.4.4 The Anti-Dumping Agreement

Following the Uruguay Round of negotiations, a new agreement on anti-dumping was reached. It is referred to as - the Agreement on Implementation of Article VI of GATT 1994.<sup>50</sup> Article VI of the GATT 1947 was carried forward into GATT 1994.<sup>51</sup> The ADA provides clear details and expands Article VI provision regarding dumping.<sup>52</sup> Both Article VI of the GATT 1994 and the ADA are applied together.<sup>53</sup> The ADA has provided some major changes to the Anti-Dumping Code 1979, including setting out provisions for consultations by all interested parties, application of price undertakings in anti-dumping situations, duration of measures, measures providing for expiration of anti-dumping measures after five years after the date of imposition, except in the event of a determination showing that termination of the imposed measure, will not stop the continuing or reoccurrence of the dumping and injury complained of.<sup>54</sup>

A close look at the ADA reveals that it contains 18 Articles dealing with substantive and procedural aspects of anti-dumping, and providing for various other issues as anti-dumping action on behalf of a third country and dispute settlement among parties.<sup>55</sup> Below is a highlight of the various substantive and procedural issues:

- Article 1 Provides for circumstances governing the application of Article VI of GATT 1994<sup>56</sup>
- Article 2 Provides for the definition of dumping, determination of the margin of dumping, determination of the normal value and the export price; transshipment and definition of like value; fair comparison between the normal and the export price<sup>57</sup>

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<sup>50</sup> Brink (n 46 above) 105.

<sup>51</sup> United Nations Conference on Trade and Development (n 44 above) 4.

<sup>52</sup> World Trade Organization 'Understanding the WTO' (n 11 above) 44.

<sup>53</sup> As above.

<sup>54</sup> Institute of Economic Affairs 'Anti-dumping as a trade remedy: the way forward for Kenya' (2013) 36 trade notes Issue 2 [www.ieakenya.or.ke/.../289-anti-dumpping-as-a-trade-remedy-the-way-froward-for-kenya](http://www.ieakenya.or.ke/.../289-anti-dumpping-as-a-trade-remedy-the-way-froward-for-kenya) (accessed 3 January 2014).

<sup>55</sup> Anti-Dumping Agreement (n 22 above).  
(n 22 above).

<sup>56</sup> Brink (n 46 above) 105.

<sup>57</sup> As above.

Article 3	Provides for determination of injury and causality <sup>58</sup>
Article 4	Provides the definition of domestic industry <sup>59</sup>
Article 5	Provides for the procedure for investigation and subsequent investigation, and rules on negligibility and <i>de minimis</i> dumping margins <sup>60</sup>
Article 6	Provides rules on evidence; confidentiality; oral hearings; sampling and individual margins of dumping; definition of interested parties <sup>61</sup>
Article 7	Provides rules on application of provisional measures
Article 8	Provides rules regarding price undertakings
Article 9	Provides for rules on imposition duties and collection of definitive anti-dumping duties; new shippers review <sup>62</sup>
Article 10	Provides rules on retroactive imposition of anti-dumping duties <sup>63</sup>
Article 11	Duration and review of anti-dumping duties and price undertakings
Article 12	Provides rules on notification of interested parties and public notice
Article 13	Requirement of judicial review in national legislations containing anti-dumping measures
Article 14	Provides rules on anti-dumping action on behalf of a third country
Article 15	Special consideration for developing country members
Article 16	Establishment of a Committee on anti-dumping practices
Article 17	Rules on consultations on anti-dumping and settlement of disputes <sup>64</sup>
Article 18	Final provisions regarding consistency of members' laws with the ADA <sup>65</sup>
Annex I	Procedures for on-the-spot investigations
Annex II	The use of best information available

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<sup>58</sup> Brink (n 46 above) 106.

<sup>59</sup> As above.

<sup>60</sup> As above.

<sup>61</sup> As above.

<sup>62</sup> As above.

<sup>63</sup> As above.

<sup>64</sup> As above.

<sup>65</sup> As above.

## 2.4.5 Model Anti-Dumping Legislation

As observed by Brink, the identification of the need for WTO-consistent legislation led the WTO Rules Division to draft model anti-dumping legislation that could form the basis of a member country's legislation. Although, the Model Anti-Dumping Legislation has no legal status, it remains an important document as it contains several expansions on the Anti-Dumping Agreement that may be relevant in deciding on issues to include in a member country's legislation.<sup>66</sup> He further observes that, 'there are some significant differences between the Anti-Dumping Agreement and the Model Anti-Dumping Legislation, and that where there are differences between the two instruments, the wording of the Anti-Dumping Agreement will always prevail.'<sup>67</sup>

## 2.5 Substantive provisions in anti-dumping: General

In an effort to balance the conflicting interests of an importing country with those of the exporters with regards to imposing anti-dumping measures, the ADA provides clarity as to the definition of applicable concepts and procedures used in the agreement.<sup>68</sup> The relevance of discussing these concepts and their definitions is underscored by the fact that, the national anti-dumping laws of most countries find their basis in Article VI of GATT 1994 and the ADA.<sup>69</sup>

### 2.5.1 Like product

The determination as to whether a product is a 'like product' is one of the most fundamental decisions that must be made early in every investigation.<sup>70</sup> The ADA defines

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<sup>66</sup> Brink (n 46 above) 107.

<sup>67</sup> As above.

<sup>68</sup> WTO E-Learning 'Trade remedies and the WTO' (2012) 92  
[http://etraining.wto.org/admin/files/course\\_287/coursecontent/TR-R2-E-Print.pdf](http://etraining.wto.org/admin/files/course_287/coursecontent/TR-R2-E-Print.pdf) (accessed 4 January 2014).

<sup>69</sup> Brink (n 33 above) 154.

<sup>70</sup> World Trade Organization 'Technical information on anti-dumping'  
[http://wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm](http://wto.org/english/tratop_e/adp_e/adp_info_e.htm) (accessed 5 February 2014).



‘like product’ as ‘a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.’<sup>71</sup> Within the context of the definition of this Agreement ‘the determination involves first examining the imported product or products that are alleged to be dumped, and then establishing what domestically produced product or products are the appropriate ‘like product.’<sup>72</sup> The ADA specifically provides that for a product to be said to have been dumped, it must cause or threaten to cause material injury to a domestic industry producing a ‘like product’ to the product being investigated.<sup>73</sup> The importance of the decision regarding the like product cannot be overemphasized as it represents the basis of determining which companies constitute the domestic industry, and that determination will in turn define the scope of the investigation as well as the determination of injury and causal link.<sup>74</sup> The Panel in United States- Softwood lumber II had noted that Article 2.6 is a definitional article, and as such it is not clear whether it contains ‘in itself obligations on Members, or in any event that it could be the basis for an independent violation.’<sup>75</sup>

## 2.5.2 Domestic industry and industry standing

The ADA defines ‘domestic industry’ as ‘the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.’<sup>76</sup> There are circumstances in which the inclusion of all domestic producers of the like product would be most inappropriate in the determination of the domestic industry.<sup>77</sup> The ADA for instance, permits the exclusion of producers who are related to the importers or exporters being investigated for dumping.<sup>78</sup> Similarly, producers who have been alleged to be responsible

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<sup>71</sup> Art 2.6 Anti-Dumping Agreement (n 22 above).

<sup>72</sup> World Trade Organization ‘Technical information on anti-dumping’ (n 70 above).

<sup>73</sup> Arts 3.1, 3.2, 3.3, 3.6, 3.7(i), 4.1 & 5.2(i) Anti-Dumping Agreement (n 22 above).

<sup>74</sup> World Trade Organization ‘Technical information on anti-dumping’ (n 70 above).

<sup>75</sup> Report of the Panel, United States- Final dumping determination on softwood lumber from Canada (13 April 2004) World Trade Organization WT/DS264/R para 7.146  
[http://www.worldtradelaw.net/reports/wtopanels/us-lumberfinal\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanels/us-lumberfinal(panel).pdf) (25 April 2014).

<sup>76</sup> Art 4.1 Anti-Dumping Agreement (n 22 above).

<sup>77</sup> World Trade Organization ‘Technical information on anti-dumping’ (n 70 above).

<sup>78</sup> Art 4.1(i) Anti-Dumping Agreement (n 22 above).

for the dumped products may also be excluded from definition of domestic industry.<sup>79</sup> The ADA also recognizes an exceptional circumstance in which the territory of a country may be divided into two or more distinct but competitive markets where the producers in each market are considered a separate domestic industry.<sup>80</sup> For a domestic industry to have an investigation initiated by or on its behalf, it must have a certain level of support which determines its ‘industry standing.’<sup>81</sup> The Panel had in Argentina-Poultry provided a clarifying interpretation of the term ‘domestic industry’ in claim 41, where the United States had argued as a third party that Article 4.1 merely contains a definition of ‘domestic industry, and does not impose an obligation on Members. The Panel noted that Article 4.1 uses the term ‘shall’ in relation to the term ‘domestic industry’ thereby imposing an express obligation on Members to interpret the term ‘domestic industry’ in the manner specified.<sup>82</sup>

### **2.5.3 Interested parties**

In terms of the ADA, ‘interested parties’ include ‘an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; the government of the exporter Member; and a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.’<sup>83</sup> The ADA indicates that, this list of ‘interested parties’ (paragraphs I - III) is not exhaustive and therefore, ‘shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.’<sup>84</sup>

### **2.5.4 Related parties**

Parties are ‘related’ within the meaning of the ADA where any of these three circumstances exist: ‘(a) one of them directly or indirectly controls the other; or (b) both of them are

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<sup>79</sup> Art 4.1 Anti-Dumping Agreement (n 22 above).

<sup>80</sup> Art 4.1(ii) Anti-Dumping Agreement (n 22 above); Brink (n 46 above) 158-159.

<sup>81</sup> Lester et al (n 29 above) 469; Art 5.4 Anti-Dumping Agreement (n 22 above).

<sup>82</sup> Report of the Panel, Argentina – definitive anti-dumping duties on poultry from Brazil (22 April 2003) World Trade Organization WT/DS241/R paras 7.331 & 7.338  
[http://www.worldtradelaw.net/reports/wtopanels/argentina-poultry\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanels/argentina-poultry(panel).pdf) (accessed 25 April 2014).

<sup>83</sup> Art 6.11(i)(ii) & (iii) Anti-Dumping Agreement (n 22 above).

<sup>84</sup> Art 6.11(i)(ii) & (iii) Anti-Dumping Agreement (n 22 above).

directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person.<sup>85</sup> Where any of these three circumstances exist, the ADA authorizes an investigating authority to exclude domestic producers from the definition of the domestic industry if they are ‘related’ to the importers or exporters.<sup>86</sup> Vermulst has observed that many authorities in the exercise of the discretionary decision to include or exclude related domestic producers ‘base their decision on analysis as to where the main economic interests of the related domestic producers lie. If, for example, the domestic producer is a subsidiary of a foreign owned exporter under investigation for dumping which produces a few models in the importing country market, it will typically be excluded. If, on the other hand, the domestic producer imports a few models from the exporting country to complement its domestically-produced product gamma, it will normally be included.’<sup>87</sup>

## **2.6 Substantive provisions in anti-dumping: normal value**

Essentially, an anti-dumping investigation involves identifying and differentiating between three important products: the exported product (or product under consideration); the product that is ‘like’ the product under consideration or exported product, which is produced in the home market of the exporter; and the product that is ‘like’ the product under consideration or exported product, which is produced by the local industry of the importing country.<sup>88</sup> For an investigating authority to determine whether dumping is taking place, it is fundamental to first determine the ‘like product’ in the domestic market of the exporter. Once the investigating authority determines the like product in the domestic market of the exporter, the price of that like product, forms the basis of the ‘normal value’ to be applied in the computation or calculation of the dumping.<sup>89</sup>

### **2.6.1 Domestic sales value**

In an investigation for dumping, one of the ways to determine ‘normal value’ is to find the price of the product exported from one country to another as to whether the exported

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<sup>85</sup> Footnote 11 to Art 4.1 note 11 Anti-Dumping Agreement (n 22 above).

<sup>86</sup> E Vermulst *The WTO anti-dumping Agreement: A commentary* (2005) 72.

<sup>87</sup> As above.

<sup>88</sup> WTO E-Learning (n 68 above) 97.

<sup>89</sup> As above.

product was sold at a price ‘less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.’<sup>90</sup> In other words, the comparable price for the like product in the home market of the exporting country is what is referred to as – domestic sales value. Whilst the ADA does not define the concept of ‘ordinary course of trade’, it seems to establish that only domestic prices in the ordinary course of trade are to be used as normal value.<sup>91</sup> By implication investigating authorities may need to ascertain whether or not domestic sales are made in the ordinary course of trade.<sup>92</sup> Vermulst noted two most common reasons why domestic sales are not made in the ordinary course of trade as where – ‘some or all domestic transactions are sold below cost; or domestic sales are made to related parties.’<sup>93</sup> The Panel in Guatemala-Cement II had held that nothing in Articles 2.1 and 2.2 of the ADA ‘prevents an investigating authority from requesting cost information, even if the applicant does not allege sales below cost.’<sup>94</sup> In essence, investigating authorities are at liberty to seek information in this regard.

### **2.6.2 Constructed normal value**

As discussed in paragraph 2.6.2 above, determination of normal value relies first, on the domestic sales of the like product in the exporting country. However, the domestic sales value may not be used where – ‘there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country; because of the particular market situation or the low volume of the sales in the domestic market of the exporting country; and where sales do not permit a proper comparison.’<sup>95</sup> These circumstantial exemptions to the use of domestic sales value to establish normal value is the basis for ‘constructed normal value.’ Constructed normal value is defined in Article 2.2 as the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. Cost of production is also often used to refer to the cost of

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<sup>90</sup> Art VI.1 (a) & (b) General Agreement on Tariffs and Trade (n 26 above); Arts 2.1 & 2.2 Anti-Dumping Agreement (n 22 above).

<sup>91</sup> Vermulst (n 86 above) 20.

<sup>92</sup> As above.

<sup>93</sup> n 86 above, 20.

<sup>94</sup> Report of the Panel, Guatemala – definitive anti-dumping measures on grey Portland cement from Mexico (24 Oct., 2000) World Trade Organization WT/DS156/R [http://www.worldtradelaw.net/reports/wtopanels/guatemala-cement II\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanels/guatemala-cement II(panel).pdf) (accessed 25 April 2014).

<sup>95</sup> Arts 2.1 & 2.2 Anti-Dumping Agreement (n 22 above).

manufacture and would usually include all costs incurred in the factory of production.<sup>96</sup> Direct and indirect selling costs, administrative and general costs incurred ex-factory all combine to make-up what is called - Administrative, selling and general costs (SGA).<sup>97</sup> As Vermulst noted, where a company ‘has a factory and a headquarters, the SGA costs will normally be the costs incurred by the headquarters.’<sup>98</sup> He further pointed out that, ‘the purpose of the constructed normal value is to construct a price of the exported product, as if it would have been sold on the domestic market.’<sup>99</sup> The consequences of this are two-fold. On the one hand, with respect to the cost of production, it is the cost of production of the exported product that should be calculated.<sup>100</sup> Vermulst gives a vivid illustration when he stated that ‘if the country of export uses a duty drawback system, the cost of production of the exported would normally be reported exclusive of import duties because the exported product does not include import duties.’<sup>101</sup> On the other hand, the SGA and profit on the domestic market should be added to the cost of production of the exported product. It is important to mention that, as to what would be the ‘reasonable profit requirement,’ the Panel in EC-Bed linen did not consider the use of a profit margin of 18.65 per cent illegal.<sup>102</sup> A profit margin of 36.3 per cent was also applied in Thailand-H-Beams.<sup>103</sup>

### 2.6.3 Export price to a third country

With reference to our discussions in the introductory paragraph, GATT 1994 makes provision for different approaches to determine normal value. The Article provides as follows:<sup>104</sup>

... for the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another – (a) is less than the

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<sup>96</sup> Vermulst (n 86 above) 33.

<sup>97</sup> As above.

<sup>98</sup> n 86 above, 34.

<sup>99</sup> As above.

<sup>100</sup> As above.

<sup>101</sup> As above.

<sup>102</sup> Report of the Panel, European Communities – anti-dumping duties on imports of cotton-type bed linen from India (30 Oct., 2000) World Trade Organization WT/DS141/R para 6.100  
[http://worldtradelaw.net/reports/wtopanels/ec-bedlinen\(panel\).pdf](http://worldtradelaw.net/reports/wtopanels/ec-bedlinen(panel).pdf) (accessed 26 April 2014).

<sup>103</sup> Report of the Panel, Thailand – anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and h-beams from Poland (2000) World Trade Organization WT/DS122/R para 7.109 & 7.128  
[http://www.worldtradelaw.net/reports/wtopanels/thailand-steel\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanels/thailand-steel(panel).pdf) (accessed 26 April 2014).

<sup>104</sup> Art VI.1 (a) & (b) General Agreement on Tariffs and Trade (n 26 above); Arts 2.1 & 2.2 Anti-Dumping Agreement (n 22 above).

comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or (b) in the absence of such domestic price, is less than either (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

In terms of the above provision, the other alternative method for determining normal value would be to look at the comparable price of the like product when exported to an appropriate third country, provided that price is representative.<sup>105</sup> However, the criteria for determining the ‘appropriate third country’ are not specified by the ADA.<sup>106</sup> With respect to a third country exports alternative, some investigating authorities have been reluctant to use third country exports as the basis for normal value determination on the ground that, if the alleged exports were dumped in their market, chances are such exports were also dumped into the market of the third country.<sup>107</sup> This reasoning is however, not to be regarded as conclusive.

#### **2.6.4 Non-market economy normal value**

The non-market economy is described in a situation where the government of a country ‘has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the state.’<sup>108</sup> In this instance, the home prices may not be a correct reflection of the actual costs, and therefore, would be most inappropriate to compare the export price, calculated in the circumstances, with the selling price in the home market, or a constructed normal value based on costs in the home market of a non-market economy country.<sup>109</sup> Consequently, a different approach is required to determine dumping in the case of non-market economies.<sup>110</sup> In more practical terms, many importing countries have adopted a discretionary approach in the calculation and determination of normal value of products exported from non-market economies.<sup>111</sup> As provided by the ADA, Article 2 is

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<sup>105</sup> World Trade Organization ‘Technical information on anti-dumping’ (n 70 above).

<sup>106</sup> As above.

<sup>107</sup> Vermulst (n 86 above) 33.

<sup>108</sup> As above.

<sup>109</sup> Brink (n 46 above) 179.

<sup>110</sup> As above.

<sup>111</sup> As above.

without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994. The second Supplementary provision recognizes that:

[I]n the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

This provision accounts for the reason why various investigating authorities do not reckon with prices and costs in non-market economies as they regarded unreliable since, in their view, they are not determined by market forces but by the State.<sup>112</sup> In view of this, investigating authorities rely on prices or costs in a market economy country as the basis for the normal value in such cases having to do with non-market economies.<sup>113</sup> Importantly, this approach has been criticized on the grounds that first, very few countries have a completely or substantially complete monopoly of their trade in which all domestic prices are fixed by the State.<sup>114</sup> Second, reliance on the surrogate country concept has the potential to result in high dumping margins as surrogate countries are at different levels of economic development. Producers in the surrogate countries have also cooperated with this approach with a view to ensuring that their competitors in non-market economies have a high anti-dumping duty applied to their products.<sup>115</sup>

### **2.6.5 Non- or partial cooperation by exporters**

The ADA provides that ‘in cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.’<sup>116</sup> The provisions of Annex II of the ADA deals with the application of ‘best information available in terms of paragraph 8 of Article 6 and requires investigating authorities, soon after initiation of investigation to specify in

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<sup>112</sup> Vermulst (n 86 above) 44.

<sup>113</sup> As above; This approach is what is referred to as ‘surrogate or analogue country concept.’

<sup>114</sup> Vermulst (n 86 above) 45.

<sup>115</sup> As above.

<sup>116</sup> Art 6.8 Anti-Dumping Agreement (n 22 above).

detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response.’<sup>117</sup> In requesting for information by authorities, the ADA stipulates that ‘authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party;’<sup>118</sup> and provided that the information is supplied in a timeous fashion.’<sup>119</sup>

One of the issues for determination by the Appellate Body, in Hot-Rolled Steel<sup>120</sup> review was ‘whether the Panel erred in finding, in paragraph 8.1(a) of the Panel Report, that the United States acted inconsistently with Article 6.8 and Annex II of the ADA in its application of ‘facts available’ to Nippon Steel Corporation, NKK Corporation and Kawasaki Steel Corporation.’<sup>121</sup> The Appellate Body held that ‘USDOC acted inconsistently with Article 6.8 of the ADA through its failure to consider whether, in light of all the facts and circumstances, the weight conversion factors submitted by NSC and NKK were submitted within a reasonable period of time.’<sup>122</sup> In reaching this conclusion the Appellate Body had observed that ‘the approach taken by the United States in this case had excluded the very possibility, recognized by Articles 6.1.1 and 6.8 and Annex II of the ADA, that USDOC might be required, by these provisions, to extend the time-limits and accept the information submitted, as requested by NSC and NKK.’<sup>123</sup>

## **2.7 Substantive provisions in anti-dumping: export price**

In terms of the ADA, the price at which the product is exported from one country to another country is referred to as - export price.<sup>124</sup> Put differently, ‘it is the transaction price at which the product is sold by a producer/exporter in the exporting country to an importer

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<sup>117</sup> Annex II para 1 Anti-Dumping Agreement (n 22 above).

<sup>118</sup> Annex II para 2 Anti-Dumping Agreement (n 22 above).

<sup>119</sup> Annex II para 3 Anti-Dumping Agreement (n 22 above).

<sup>120</sup> Appellate Body Report, United States – anti-dumping measures on certain hot-rolled steel products from Japan (24 July 2001) World Trade Organization WT/DS184/AB/R [http://www.wto.org/english/tratop\\_e/dispu\\_e/184abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/184abr_e.pdf) (accessed 15 February 2014).

<sup>121</sup> World Trade Organization WT/DS184/AB/R (n 120 above) 21.

<sup>122</sup> World Trade Organization WT/DS184/AB/R (n 120 above) 35.

<sup>123</sup> As above.

<sup>124</sup> Art 2.1 Anti-Dumping Agreement (n 22 above).



in the importing country.’<sup>125</sup> Usually, the export price is contained in such export documentation, for instance, the letter of credit, bill of lading as well as the commercial invoice.<sup>126</sup>

### **2.7.1 Constructed export price**

Circumstances exist in which there may not be an export price - (a) where the export transaction may be an internal transaction; (b) where the product is exchanged as in the case of a barter arrangement; (c) where, as between the exporter and the importing country, the selling price of the product is unreliable based on the fact that, the transaction is a compensatory arrangement between the exporter and the importing country or a third party.<sup>127</sup> In the third instance, the transaction price may have been manipulated for tax purposes, rebates or refunds or discounts which results in its unreliability. In these instances, the ADA provides that an export price may be constructed.<sup>128</sup>

## **2.8 Substantive provisions in anti-dumping: price comparison**

The ADA requires fair comparison to be made between the export price and the normal value, and that the comparison is made at the same level of trade.<sup>129</sup> The basis of the ‘same level of trade’ comparison is the fact that differences may exist in various levels of trade. For instance, trade between wholesalers, distributors, retailers and final consumers may affect prices. Level of trade differences will make a difference in price where for instance, a producer is selling directly to end-users and where the same producer is selling to a trader or wholesaler. In the same vein, the comparison between the normal value and the export price at ex-factory level and in respect of sales made at as nearly as possible the same time, as required by the ADA, is aimed at ensuring the removal of distorting effects of such factors as – insurance, transport, credit, guarantees, taxation on the comparison of the normal value and the export price.<sup>130</sup>

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<sup>125</sup> United Nations Conference on Trade and Development (n 44 above) 7.

<sup>126</sup> As above.

<sup>127</sup> Art 2.3 Anti-Dumping Agreement (n 22 above).

<sup>128</sup> As above; WTO E-Learning (n 68 above) 105.

<sup>129</sup> Art 2.4 Anti-Dumping Agreement (n 22 above); WTO E-Learning (n 68 above) 110; United Nations Conference on Trade and Development (n 44 above) 13.

<sup>130</sup> As above; WTO E-Learning (n 68 above) 110-111; United Nations Conference on Trade and Development (n 44 above) 13.

### 2.8.1 Comparison between normal value and export price

The ADA provides an interesting detail regarding the comparison between normal value and export price as follows:<sup>131</sup>

Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis...

From the wording of this provision, two basic rules and one exception are contemplated by the ADA with a view to finding the margin of dumping. First, the margin of dumping is established on the basis of a comparison between the weighted average normal value and the weighted average export price; or second, a comparison between the normal value and the export price on a transaction-by-transaction basis.<sup>132</sup>

The exception to the above main rules is that, the weighted average normal value may only be compared to individual export transactions where:

- (a) The authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods or;
- (b) An explanation is provided as to why such differences cannot be taken into account appropriately by the use of either of the main rules discussed above.<sup>133</sup>

Below is an illustration of the main rules followed by the exception.

Table 2.8.2.1<sup>134</sup>

Date	Normal value	Export price
1 January	50	50
8 January	100	100
15 January	150	150
21 January	200	200

<sup>131</sup> Art 2.4.2 Anti-Dumping Agreement (n 22 above).

<sup>132</sup> Brink (n 46 above) 189.

<sup>133</sup> Art 2.4.2 Anti-Dumping Agreement (n 22 above); Brink (n 46 above) 190.

<sup>134</sup> Source: United Nations Conference on Trade and Development (n 44 above) 13.

- Weighted average method -  
The weighted average normal value would be:  $500 \div 4 = 125$   
Compared with - the weighted average export price:  $500 \div 4 = 125$   
Dumping amount equals zero.<sup>135</sup>
- Transaction-to-transaction method -  
This method entails a comparison of the domestic and export sales made at as nearly as possible the same time. With reference to the table above, the transactions on 1 January will be compared to those of 8, 15 January and so on. The dumping amount will like in the first example be zero.<sup>136</sup>
- In exceptional circumstances, a comparison could be made between prices of individual export sales where the investigating authorities find export prices of a significantly different pattern among different purchasers, regions or time periods, and if an explanation is given to indicate why the differences cannot be properly considered by using either of the two main methodologies.<sup>137</sup>

Applying the exceptional circumstances methodology to table 2.8.2.1 will alter the results significantly as shown below.

Table 2.8.2.2<sup>138</sup>

Date	Normal value WA basis	Export price T-by-T	Dumping amount
1 January	125	50	75
8 January	125	100	25
15 January	125	150	-25
21 January	125	200	-75

<sup>135</sup> As above.

<sup>136</sup> As above.

<sup>137</sup> Brink (n 46 above) 190; Art 2.4.2 Anti-Dumping Agreement (n 22 above).

<sup>138</sup> Source: United Nations Conference on Trade and Development (n 44 above) 14.

## 2.8.2 Zeroing

With reference to table 2.8.2.2 above, the first two transactions shows a positive dumping amount of 100 and a negative dumping amount of -100 in the last two transactions. The negative dumping amount is as a result of a higher export price over the normal value.<sup>139</sup> Offsetting the negative dumping amount with the positive dumping amount will show that no dumping exists, and this practice is what is referred to as – zeroing.<sup>140</sup> Applying this methodology to the data in table 2.8.2.2 indicates a dumping amount of 100 and a dumping margin of:  $100 \div 500 \times 100 = 20\%$ .

Before the conclusion of the Uruguay Round, most WTO members used the zeroing methodology. However, as a result of strong resistance by other WTO members to the zeroing formula, the weighted average method became the practice as it was adopted under Article 2.4.2 of the ADA. In the Carbon Steel Sunset Review,<sup>141</sup> where Japan argued that the United States acted inconsistently with Article 2.4 of the ADA, by relying on the dumping margins from the administrative reviews because the margins were calculated using a zeroing methodology. The Appellate Body in EC – Bed Linen, upheld the Panel that the European Communities acted inconsistently with Article 2.4.2 of the ADA by using a ‘zeroing’ methodology in the anti-dumping investigation in that case but in the instant case, the details of the alleged zeroing in the methodology used by the USDOC in the administrative reviews are were considered less clear.<sup>142</sup>

## 2.8.3 Adjustments to the normal value and export price

The ADA allows for adjustments to be made regarding the normal value or the export price for the purpose of taking into account product differences or circumstances of sale, in the importing and exporting markets.<sup>143</sup> It provides that ‘due allowance shall be made in each

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<sup>139</sup> As above.

<sup>140</sup> As above.

<sup>141</sup> Appellate Body Report, United States – sunset review of anti-dumping duties on corrosion-resistant carbon steel flat products from Japan (14 Aug., 2003) World Trade Organization WT/D244/AB/R [www.wto.org/english/tratop\\_e/dispu\\_e/244abr\\_e.doc](http://www.wto.org/english/tratop_e/dispu_e/244abr_e.doc) (accessed 17 February 2014).

<sup>142</sup> Appellate Body Report, European Communities – anti-dumping duties on imports of cotton-type bed linen from India (1 March 2001) World Trade Organization WT/DS141/AB/R para 66 [http://www.worldtradelaw.net/reports/wtoab/ec-bedlinen\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-bedlinen(ab).pdf) (accessed 19 February 2014).

<sup>143</sup> WTO E-Learning (n 68 above) 111; Brink (n 46 above) 190-191.

case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.’<sup>144</sup>

In light of the foregoing, let us ‘suppose that a producer sells urea in its home market at USD 150/ton. The same company exports urea at USD 120/ton to Member A. If we compare these two figures we find that the export price (USD 120/ton) is lower than the normal value (USD 150/ton), yielding an apparent dumping margin of USD 30/ton.

$$150 \text{ (NV)} - 120 \text{ (EP)} = 30$$

However, let's suppose that the domestic buyer has asked the producer to deliver the product to the buyer's warehouse, and that the cost of transporting a ton of urea from the factory to the warehouse is USD 50/ton. This is therefore, the amount that the producer of urea will have to pay to a transport company to bring the urea from the factory to the warehouse. Thus, what the producer/exporter earns for a ton of urea sold in the domestic market is not USD 150/ton, but USD 100/ton.

Let's further suppose that the importer of the good in Member A also has requested that the producer/exporter deliver the urea to the importer's warehouse, and that the cost of transport is USD 20/ton. Again, we deduct the cost of transport and we find that the producer earns USD100 for a ton of urea exported to Member A.

It is clear from this example that, when we adjust the prices on both sides of the dumping calculation to remove cost elements such as transport, in order to arrive at the ‘real’ prices as required by the ADA, the apparent margin of dumping disappears. That is, there is no dumping.

## **2.9 Substantive provisions in anti-dumping: margin of dumping**

The practice of selling a product in another country at a price, less than it is sold in its domestic country, or the cost of production is informally referred to as – Dumping.<sup>145</sup> It

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<sup>144</sup> Art 2.4 Anti-Dumping Agreement (n 22 above).

occurs when producers export a product to a foreign country at a price less than the price charged for the same or ‘like product’ in its domestic market, or in quantities that cannot be justified through regular market competition.<sup>146</sup> The difference between the normal value and the export price is what is referred to as – Dumping margin.<sup>147</sup>

### **2.9.1 Single product types**

A single model or product type may be the subject of an anti-dumping investigation. Where this is the case, the dumping margin calculation is unambiguous and relatively easy to determine. The calculation is made after necessary adjustments and allowances that affect price comparability such as – differences in conditions and terms of sale, quantities, trade levels, taxation, physical characteristics, and any other variables that are shown to affect price comparability have been duly considered.<sup>148</sup>

### **2.9.2 Multiple product types**

Sometimes, an anti-dumping investigation may cover more than one product type or models which are clearly different from each other, and each requiring its own distinct margin of dumping calculation.<sup>149</sup> ‘An example might be fresh, chilled and frozen salmon in all presentations (whole, gutted, head-on, head-off filleted or otherwise cut in pieces, etc.) It could be that the production processes (i.e., cost structure) and pricing of these different presentations or models are sufficiently diverse that each should have its own dumping margin calculation, while ultimately a single, weighted average dumping margin should be calculated for each producer (covering all of the models that it produces). In such a case, it may be that for some models, no dumping (in fact, negative dumping) is apparent, because for that model the weighted average export price exceeds the weighted average normal value. For other models, there may be dumping. The question becomes how to calculate the overall weighted average dumping margin for all of the models combined, and

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<sup>145</sup> Institute of Economic Affairs (n 54 above) 1.

<sup>146</sup> Arts 2.1 & 2.4 Anti-Dumping Agreement (n 22 above); Institute of Economic Affairs (n 54 above) 1.

<sup>147</sup> Brink (n 46 above) 194.

<sup>148</sup> Brink (n 46 above) 194-195.

<sup>149</sup> WTO E-Learning (n 68 above) 114.

in particular, how in the weight-averaging across models to treat the models where no dumping/negative dumping is apparent.

The Appellate Body ultimately has ruled in a series of cases that "zeroing" violates various provisions of the AD Agreement, including the "fair comparison" provisions. Thus, the full value of the negative margins of dumping needs to be included in calculating the overall weighted average margin of dumping.<sup>150</sup>

The basic formula for calculating the margin of dumping in percentage terms is as follows:<sup>151</sup>

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

### **2.9.3 Individual margins of dumping and Sampling**

In the determination of the margin of dumping, the ADA stipulates that the investigating authority must determine each known exporter or producer's product and the margin of dumping on an individual basis.<sup>152</sup> However, where 'the number of exporters, producers, importers or types of products involved are so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.'<sup>153</sup>

### **2.10 Substantive provisions in anti-dumping: material injury**

Within the context of the ADA, the determination of material injury requires – positive evidence and an objective examination of the volume of the dumped imports, the effect of

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<sup>150</sup> WTO E-Learning (n 68 above) 114-115.

<sup>151</sup> As above.

<sup>152</sup> Art 6.10 Anti-Dumping Agreement (n 22 above); WTO E-Learning (n 68 above) 115; Brink (n 46 above) 200-201.

<sup>153</sup> Art 6.10 Anti-Dumping Agreement (n 22 above).

the dumped imports on prices in the home market for like products and their consequent impact on the home market industry.<sup>154</sup> In essence, ‘injury’ in terms of the ADA covers actual material injury to a domestic industry, the threat of material injury to the domestic industry or the material retardation of the establishment of an industry in the importing country.<sup>155</sup> It follows therefore, that an investigating authority in the determination of injury must rely on all relevant reasoning and facts. Furthermore, as to the nature of the obligations created by Article 3 provisions of the ADA, the Appellate Body had held that, the obligations set out are fundamental and absolute. The obligations provide neither exceptions nor qualifications.<sup>156</sup>

The ADA provides for a situation where dumped imports have not yet caused material injury, but may cause such injury in the future unless anti-dumping measures are applied. In this event, dumped imports are said to ‘threaten to cause’ material injury.<sup>157</sup> Although, a threat of material injury appears speculative by nature, Article 3.7 provides four important conditions to be satisfied in the determination of such a threat of material injury. First, the threat in question must not be a mere speculation or allegation but rather be based on facts. Second, there must be a foreseeable and imminent change in circumstances which holds the potential to create actual injurious dumping.<sup>158</sup> Third, four additional and specific factors must be considered in the determination of a threat of material injury - (a) dumped imports in the domestic market must have increased significantly as to indicate the possibility of substantially increased imports; (b) an increase in the capacity of the exporter as to indicate the possibility of substantially increased dumped exports into the market of the importing member, considering the availability of other export markets to accommodate additional exports; (c) whether the price of imports are significant as to suppress or depress domestic prices, and the possibility of increase in the demand for additional imports; (d) inventories of the investigated products.<sup>159</sup> Fourth, taking into account all the factors considered, a conclusion must be reached that further dumped exports are foreseeable and imminent and

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<sup>154</sup> Art 3 Anti-Dumping Agreement (n 22 above); United Nations Conference on Trade and Development (n 44 above) 20.

<sup>155</sup> Art 3 note 9 Anti-Dumping Agreement (n 22 above).

<sup>156</sup> World Trade Organization WT/DS141/AB/R (n 142 above) para 109; Vermulst (n 86 above) 74-75.

<sup>157</sup> Vermulst (n 86 above) 94.

<sup>158</sup> Vermulst (n 86 above) 94-95.

<sup>159</sup> Vermulst (n 86 above) 96.



that a failure to take pro-active steps to protect the market would lead to material injury occurrence.<sup>160</sup>

The Panel in Mexico-HFCS was of the view that, a determination that material injury would occur cannot be based exclusively on the consideration of Article 3.7 factors but rather, must include a consideration of the possible impact of further dumped imports on the domestic market. The Panel held as follows:<sup>161</sup>

While an examination of Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry. The Article 3.7 factors relate specifically to the questions of likelihood of increased imports (based on the rate of increase of imports, the capacity of exporters to increase imports, and the availability of other export markets), the effects of imports on the future prices and the likely future demand for imports, and inventories. They are not in themselves, relevant to a decision concerning what the “consequent impact” of continued dumped imports is likely to be. However, it is precisely this latter question – which must be answered in a threat of material injury analysis. Thus, we conclude that an analysis of the consequent impact of imports is required in a threat of material injury determination.

## **2.11 Substantive provisions in anti-dumping: causal link**

In the determination of injury to the domestic industry, the ADA requires the investigating authority to establish that not only were the imported goods from another country dumped and has caused or is causing injury, but that the authority clearly demonstrates the causal relationship between the injury and the dumped products.<sup>162</sup> The authority is also required by the ADA to ensure that injury caused by ‘other known’ factors are not ascribed to the dumped products. This last condition is what is referred to as the ‘non-attribution’ requirement.<sup>163</sup>

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<sup>160</sup> As above.

<sup>161</sup> Panel Report, Mexico – anti-dumping investigation of high fructose corn syrup (HFCS) from the United States (2000) World Trade Organization WT/DS132/R para 7.126

<http://www.worldtradelaw.net/reports/wtopanels/mexico-hfcs> (panel).pdf (accessed 28 April 2014); Vermulst

<sup>162</sup> Art 3.5 Anti-Dumping Agreement (n 22 above); United Nations Conference on Trade and Development (n 44 above) 123.

<sup>163</sup> Art 3.7 Anti-Dumping Agreement (n 22 above); Vermulst (n 86 above) 91.

Within the context of Article 3.5, the ‘other known’ factors that may be examined in the determination of the causes of injury are – (a) the volume and prices of imports not sold at dumping prices; (b) contraction in demand or changes in the patterns of consumption; (c) trade restrictive practices of and competition between the foreign and domestic producers; (d) developments in technology; and (e) the export performance and productivity of the domestic industry. In EC-Malleable cast iron tube or pipe fittings, the Appellate Body was invited to examine Brazil’s claim that the Panel incorrectly interpreted the requirements of Article 3.5 of the ADA. The Appellate Body held that the requirement to examine other known factors whose injuries need not be attributed to dumped factors will become necessary and applies where the following three conditions are met - (a) the factor is known; (b) the factor must be a one other than the dumped imports; and (c) the factor must be injuring the domestic industry at the same time as the dumped imports.<sup>164</sup>

The Appellate Body further ruled that Article 3.5 ‘does not compel, in every case, an assessment of the collective effects of other causal factors, because such an assessment is not always necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors.’<sup>165</sup> Whilst investigating authorities are under no obligation to initiate an investigation into those ‘other factors’ causing injury, should those ‘other factors’ be raised by interested parties, the authorities have an obligation to examine such claims.<sup>166</sup>

## 2.12 Conclusion

Article VI of the General Agreement on Tariffs and Trade 1994 and the ADA provide the rules and the circumstances under which WTO members may exercise their rights to discipline dumped imports. This chapter has looked at those rules and circumstances, with a view to providing some guidance for its application in Nigeria and other countries seeking to adopt same as part of their trade policy. The following chapter looks at the procedural aspects.

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<sup>164</sup> Appellate Body Report, European Communities – Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil ( 22 July 2003) World Trade Organization WT/DS219/AB/R para 175 [http://www.worldtradelaw.net/reports/wtoab/ec-pipefittings\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-pipefittings(ab).pdf) (accessed 28 April 2014).

<sup>165</sup> World Trade Organization WT/DS219/AB/R (n 164 above) para 191.

<sup>166</sup> Vermulst (n 86 above) 92.

## Chapter 3

### The Procedural aspects of Anti-Dumping

#### 3.1 Introduction

The ADA<sup>1</sup> provides for a number of procedural requirements on anti-dumping which are applicable at different stages of the proceedings. An earlier reference was made to these requirements as contained in the ADA in paragraph 2.4.4 of Chapter 2. The discussions following will present some explanatory details on these guidelines as provided by the ADA. In considering these provisions, it is important to keep in mind that, at minimum, WTO members must comply with these requirements in the conduct of investigations into alleged cases of dumping.<sup>2</sup>

#### 3.2 Procedural provisions in anti-dumping

##### 3.2.1 Initiation and subsequent investigation

The imposition of an anti-dumping measure consistent with the ADA is a process which is investigation dependent. Investigations into an alleged dumping is generally, initiated upon a written application<sup>3</sup> by or on behalf of the domestic industry.<sup>4</sup> In special circumstances, an investigation may be initiated ex officio by the authorities of the importing country. In either case, sufficient evidence of dumping, injury and causal link must be established as the basis of initiation.<sup>5</sup> The ADA also provides a list of information that should be contained in the application.<sup>6</sup>

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<sup>1</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 <http://www.worldtradelaw.net/uragreements/adagreement.pdf> (accessed 31 January 2014); also commonly called the Anti-Dumping Agreement (ADA).

<sup>2</sup> WTO E-Learning 'Trade remedies and the WTO' (2012) 125 [http://etraining.wto.org/admin/files/course\\_287/coursecontent/TR-R2-E-Print.pdf](http://etraining.wto.org/admin/files/course_287/coursecontent/TR-R2-E-Print.pdf) (accessed 4 January 2014).

<sup>3</sup> This application contains the complaint from the domestic industry.

<sup>4</sup> Art 5.1 Anti-Dumping Agreement (n 1 above).

<sup>5</sup> WTO E-Learning (n 2 above) 127.

<sup>6</sup> Art 5.2(i)(ii)(iii)(iv) Anti-Dumping Agreement (n 1 above).

Receiving an application alone does not suffice as a basis for the initiation of an investigation. To determine sufficiency of evidence to justify the initiation of an investigation, the investigating authority is required to: 1. Examine the accuracy and adequacy of the evidence contained in the application and; 2. Determine whether the applicants are sufficiently representative of the domestic industry, in other words, whether the applicants have the ‘standing’ required to bring the case.<sup>7</sup> In Guatemala – Cement I, Mexico had requested the Panel to ‘(b) conclude that the measures adopted by Guatemala, in particular though not exclusively those relating to the initiation of the investigation, are inconsistent with the obligations of that Member country of the WTO under Article VI of GATT 1994 and, at least, Articles 2, 3, 4, 5, 6 and 7 and Annex I of the Anti-Dumping Agreement.’<sup>8</sup> The Panel found that, ‘the fact that the applicant has provided, in the application, all the information that is “reasonably available” to it on the factors set forth in Article 5.2(i) – (iv) is not determinative of whether there is sufficient evidence to justify initiation. Rather, Article 5.3 establishes an obligation that extends beyond a determination that the requirements of Article 5.2 are satisfied.’<sup>9</sup>

Upon initiation, a number of investigative steps follow. This starts with the process of information gathering for the investigation; preliminary determination;<sup>10</sup> further investigation; verification of information and; final determination.<sup>11</sup>

### **3.2.2 Notification and transmission of the application**

With a view to ensuring transparency and procedural fairness in the investigative process, the ADA requires the authorities of the importing Member country to notify the government of the countries named in the application as well as other interested parties,<sup>12</sup>

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<sup>7</sup> WTO E-Learning (n 2 above) 127; Arts 4.1, 5.3 & 5.4 Anti-Dumping Agreement (n 1 above); Ch 2 para 2.5.3 on ‘Domestic industry and industry standing.’

<sup>8</sup> Report of the Panel, Guatemala – anti-dumping investigation regarding Portland cement from Mexico (1998) World Trade Organization WT/DS60/R para 3.2  
[http://www.worldtradelaw.net/reports/wtopanels/guatemala-cement\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanels/guatemala-cement(panel).pdf) (accessed 24 February 2014).

<sup>9</sup> World Trade Organization WT/DS60/R (n 8 above) para 7.49.

<sup>10</sup> Relevant information found to be complete and accurate will be relied upon at this stage and or final stage of determinations.

<sup>11</sup> WTO E-Learning (n 2 above) 126.

<sup>12</sup> See ch 2 para 2.5.4 on ‘Interested parties.’

known to the investigating authorities.<sup>13</sup> In the same vein, all interested parties, including the authorities of the exporting Member must be provided with the full non-confidential text of the written application, upon request.<sup>14</sup>

### 3.2.3 Period of investigation

Investigation time frame is an important concept in the ADA. An anti-dumping investigation must be concluded within 12 months from the date of initiation unless, exceptional circumstances exist, in which case, they must be concluded within 18 months from the date of initiation.<sup>15</sup> With regards to exchange rates fluctuations during the period of investigations, the ADA provides that ‘...in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.’<sup>16</sup> Further on time frames, the ADA provides that ‘the adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.’<sup>17</sup> Brink, submitted that ‘considering the reference that sales at a loss may only be regarded if, among others, such sales took place over an extended period of time, and considering that an extended period of time shall normally be regarded as a year, but in no case less than six months, an investigation period for dumping should also normally cover a period of one year, but in no case fewer than six months.’<sup>18</sup> Exporters or foreign producers responding to questionnaires used in anti-dumping investigation have at least 30 days within which to reply. These time frames are a clear indication that, an investigation will run its normal course leading eventually to a determination by the authorities as to

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<sup>13</sup> Art 5.5 Anti-Dumping Agreement (n 1 above); WTO E-Learning (n 2 above) 126.

<sup>14</sup> Caribbean Export Development Agency ‘An introduction to trade remedies in the multilateral trade system’ (2010) 1:1 <http://www.carib-export.com/login/wp-content/uploads/2010/01/trade%20wins%20trade%20remedies%20final%20june%202010.pdf> (accessed 3 April 2014); Art 6.1.3 Anti-Dumping Agreement (n 1 above).

<sup>15</sup> Art 5.10 Anti-Dumping Agreement (n 1 above); Caribbean Export Development Agency (n 14 above) 11.

<sup>16</sup> Art 2.4.1 Anti-Dumping Agreement (n 1 above).

<sup>17</sup> Footnote 6 to Art 2.2.1.1 Anti-Dumping Agreement (n 1 above).

<sup>18</sup> GF Brink ‘A theoretical framework for South African anti-dumping law’ unpublished PhD thesis, University of Pretoria, 2004 243; Art 2.2.1 Anti-Dumping Agreement (n 1 above).

whether a definitive measure will be imposed by the importing country or not, in view of the outcome of the investigations.<sup>19</sup>

### 3.2.4 Confidentiality

In terms of the ADA, information whose disclosure would be of significant competitive advantage to a competitor, or would have a significant adverse effect upon the person supplying the information or upon the person from that person acquired the information is classified as – confidential.<sup>20</sup> Similarly, information that is provided on a confidential basis shall be treated as such by the authorities. To determine dumping, investigating authorities would most times, require information and data that are highly confidential. Such information may include – product costs, pricing policies, customers list, etc. This category of information is by their nature sensitive, and parties are concerned about the protection of such information and their treatment as confidential. Such information must not be accessible to competitors nor the public at large.<sup>21</sup> The ADA in ensuring that other parties are able to defend their interests requires ‘parties providing confidential to furnish non-confidential summaries thereof.’<sup>22</sup> Authorities requesting confidential information have an obligation to justify its request, and more importantly, prepare and submit a confidential summary of the information submitted to them in confidence. The summary submitted must allow for a reasonable understanding of the substance contained in the information submitted in confidence, and must be available to other parties involved in the investigation.<sup>23</sup> Parties may indicate their inability to submit non-confidential summaries in certain circumstances, provided they are able to give a reason as to their constraint.<sup>24</sup> In *Guatemala-Cement II*, the Panel held as follows:<sup>25</sup>

...Article 6.5.1 generally obliges investigating authorities to require interested parties providing confidential information to furnish non-confidential summaries thereof. However, such confidential summaries need not be furnished when, “in

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<sup>19</sup> Art 6.1.1 Anti-Dumping Agreement (n 1 above); Caribbean Export Development Agency (n 14 above) 11.

<sup>20</sup> Art 6.1 Anti-Dumping Agreement (n 1 above); Brink (n 18 above) 245.

<sup>21</sup> WTO E-Learning (n 2 above) 135.

<sup>22</sup> Art 6.5.1 Anti-Dumping Agreement (n 1 above).

<sup>23</sup> As above; WTO E-Learning (n 2 above) 135; Brink (n 18 above) 246.

<sup>24</sup> E Vermulst *The WTO anti-dumping Agreement: A commentary* (2005) 139.

<sup>25</sup> Report of the Panel, *Guatemala – definitive anti-dumping measures on grey Portland cement from Mexico* (24 Oct., 2000) World Trade Organization WT/DS156/R para 8.213  
[http://www.worldtradelaw.net/reports/wtopanels/guatemala-cement II\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanels/guatemala-cement II(panel).pdf) (accessed 25 April 2014).

exceptional circumstances”, the information “is not susceptible of summary”. In such case, “a statement of the reasons why summarization is not possible must be provided”. Although Article 6.5.1 does not explicitly provide that “the authorities shall require” interested parties to provide a statement of the reasons why summarization is not possible, any meaningful interpretation of Article 6.5.1 must impose such an obligation on the investigating authorities. It is certainly not possible to conclude that the obligation concerning the need to provide a statement of reasons is an obligation imposed exclusively on the interested party submitting the information, and not the investigating authorities. The AD Agreement imposes obligations on WTO Members and their investigating authorities to require parties that indicate that information is not susceptible of summary to provide a statement of the reasons why summarization is not possible.

In this case therefore, the Panel found Guatemala failed to comply with this requirement.

### **3.2.5 On-the-spot verifications**

To enable authorities to verify and obtain further details of information provided by interested parties, the ADA provides that ‘authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless the Member objects to the investigation.’<sup>26</sup> The ADA sets out the procedures to be followed during on the spot investigations.<sup>27</sup> It is important to point out that, the information submitted by interested parties are mostly contained in the questionnaire responses and the investigating authorities could sometimes make subsequent requests for clarifications of those responses or additional information.<sup>28</sup> In view of this form of documentation and the possibility of clerical errors, it is reasonable to check the correctness of the written information by means of ‘on-the-spot’ visits also called ‘verifications’ in the ADA.<sup>29</sup>

In practical terms, verifications may be expensive to conduct and some WTO members have come to rely on local staff for instance, from their embassy in the exporting member country. Some other members rely on external experts to conduct the verifications. The

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<sup>26</sup> Art 6.7 Anti-Dumping Agreement (n 1 above); Brink (n 18 above) 245.

<sup>27</sup> Annex I Anti-Dumping Agreement (n 1 above).

<sup>28</sup> Vermulst (n 24 above) 140; this subsequent request for clarification or further information may also be referred to as ‘deficiency letters.’

<sup>29</sup> Vermulst (n 24 above) 141.

latter option is mostly used by new users of anti-dumping legislation in view of their limited experience.<sup>30</sup> In the case of Guatemala-Cement, Mexico had objected the use of two non-governmental experts by Guatemala on grounds of conflict of interest (both the experts had previously represented the United States cement producers against Mexican cement producers in a United States anti-dumping action). The Panel ruled as follows:<sup>31</sup>

...Although we are of the view that an impartial and objective investigating authority would not include non-governmental experts with a conflict of interest in its verification team, none of the provisions cited by Mexico explicitly prohibit such conduct. Accordingly, we are unable to find that the Ministry violated Article 6.7 and Annex I (2), (3), (7) and (8) of the AD Agreement by including non-governmental experts with a conflict of interest in its verification team.

### **3.2.6 Oral hearings**

The requirement of oral hearing under the ADA is to ensure that parties have full opportunity to defend their interests. Investigating authorities therefore, have an obligation, upon request by an interested party, to provide opportunities for meetings with adverse interests with a view to allowing opposing arguments and rebuttals to be offered.<sup>32</sup> Authorities, in facilitating such meetings, must bear in mind the need to preserve confidential information and the convenience of the parties. Attendance of this meeting or failure to attend shall not prejudice a party's case. In the same vein, interested parties have the right, on justification, to present oral information. Oral information so provided shall be taken into account by the authorities in so far as it is reproduced in writing and made available to other interested parties.<sup>33</sup>

### **3.2.7 Facts available**

The ADA envisages a situation in which one or more interested parties may decide not to cooperate in an investigation. For instance, where an interested party does not supply the required information within a reasonable time, or refuses authorities access to its relevant information or significantly hinders the investigation, the ADA allows for preliminary and

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<sup>30</sup> Vermulst (n 24 above) 143.

<sup>31</sup> World Trade Organization WT/DS156/R (n 25 above) para 8.189.

<sup>32</sup> Art 6.2 Anti-Dumping Agreement (n 1 above).

<sup>33</sup> Arts 6.2 & 6.3 Anti-Dumping Agreement (n 1 above); Brink (n 18 above) 252.



final determinations to be made on the facts available.<sup>34</sup> In essence, the investigating authority is at liberty to ‘fill the gap’ by relying on information from other sources. Reliance on such ‘available facts’ are however, subject to strict rules set out more elaborately in the ADA.<sup>35</sup>

Under the WTO rules, investigating authorities rely on voluntary cooperation of all interested parties and have no authority to use or apply force in the conduct of investigations or to obtain information.<sup>36</sup> Annex II of the ADA provides fairly elaborate details of the rules and obligations guiding the application of the ‘facts available’ or ‘best information available.’ In *Guatemala-Cement II*, the Panel ruled that failure to cooperate does not necessarily constitute significant impediment of an investigation.<sup>37</sup>

... We do not consider that a failure to cooperate necessarily constitutes a significant impediment of an investigation, since in our view the AD Agreement does not require cooperation by interested parties at any cost. Although there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, in our view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner. In light of the circumstances of this case, we find that the Ministry did not act in such a manner.

### **3.2.8 Anti-Dumping measures**

Following an affirmative finding of dumping, injury and causation, an investigating authority may apply anti-dumping measures to the dumped product. These measures may take different forms which would now be discussed in turns.

#### **3.2.8.1 Provisional measures**

Provisional measures as provided by the ADA ‘may take the form of a provisional duty or, preferably, a security – by cash deposit or bond – equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of

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<sup>34</sup> 6.8 Anti-Dumping Agreement (n 1 above).

<sup>35</sup> Annex II Anti-Dumping Agreement (n 1 above); WTO E-Learning (n 2 above) 137; See discussions in ch 2 para 2.6.6 on ‘Non- or partial cooperation by exporters.’

<sup>36</sup> Vermulst (n 24 above) 146.

<sup>37</sup> World Trade Organization WT/DS156/R (n 25 above) para 8.251.

dumping.<sup>38</sup> However, the ADA clearly provides that a provisional measure may only be applied subject to the following conditions: first, that an investigation has been initiated in accordance with the provisions of Article 5. Second, a public notice has been given. Third, a preliminary affirmative determination has been made of dumping and consequent injury to a home market and; fourth, such a measure has been adjudged necessary, by the investigating authorities, to prevent injury being caused during the investigation.<sup>39</sup>

The essence of provisional measures is to ensure payment of anti-dumping duties on products that are imported during an investigation. Provisional measures also serve the purpose of putting importers on notice that, after a certain date, imports may be subject to anti-dumping duties. The imposition of provisional measures prevents importers from increasing sales considerably before the determination, with a view to avoiding anti-dumping duties.<sup>40</sup>

### **3.2.8.2 Definitive measures and notification**

The ADA expressly provides: ‘an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.’<sup>41</sup> In terms of the ADA, anti-dumping measures may take either of two forms: duties or price undertakings.<sup>42</sup> As discussed in paragraph 3.2.7.1 above, a provisional measure or payment could also be imposed before an anti-dumping duty. In other words, the ADA provides for three measures – provisional measures, anti-dumping duties (which are definitive measures) and price undertakings.<sup>43</sup>

Imposition of anti-dumping duties may either be prospective or retrospective.<sup>44</sup> Once the investigating authority has made a final determination either affirmative or negative, it is required to publish a notice to that effect, and directly provide the notice to the members

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<sup>38</sup> Art 7.2 Anti-Dumping Agreement (n 1 above).

<sup>39</sup> Art 7.1 Anti-Dumping Agreement (n 1 above).

<sup>40</sup> S Lester et al *World Trade Law: Text, materials and commentary* (2008) 506.

<sup>41</sup> Art 1 Anti-Dumping Agreement (n 1 above).

<sup>42</sup> Arts 8 & 9 Anti-Dumping Agreement (n 1 above).

<sup>43</sup> Brink (n 18 above) 273.

<sup>44</sup> Art 9.3 Anti-Dumping Agreement (n 1 above); Brink (n 18 above) 276

named and whose products are involved in the investigation.<sup>45</sup> Anti-dumping duties may also remain in place for a period not exceeding five years from its imposition or the most recent review thereof.<sup>46</sup>

### 3.2.8.3 Price undertakings

The ADA provides rules on the offering and acceptance of price undertakings. Authorities may terminate anti-dumping investigations without imposing anti-dumping duties where exporters agree to and offer undertakings to cease exports to the importing country at dumped prices or revise prices to the satisfaction of the authorities that injurious effect of the dumping is removed.<sup>47</sup> Although, price undertakings are often exporters preferred option, some countries as a matter of policy are reluctant to accept price undertakings.<sup>48</sup> Price undertaking has been criticized as capable of resulting ‘in inefficiencies similar to those of tariffs and transfers of consumer surplus.’<sup>49</sup>

It is important to mention that, price undertakings may not be sought or accepted from exporters except the investigating authorities have already made an affirmative preliminary determination of injurious dumping.<sup>50</sup> An offer of price undertakings may be suggested by an investigating authority but it may not force exporters to offer such.<sup>51</sup> Within the context of the ADA, the rationale for price undertakings has been attributed to the fact that, anti-dumping investigations are expensive and burdensome to exporters, the local industry and the investigating authorities. Negotiated settlement has therefore, been exporters preferred option and in view of the time and resource constraints.<sup>52</sup>

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<sup>45</sup> WTO E-Learning (n 2 above) 141.

<sup>46</sup> Art 11.3 Anti-Dumping Agreement (n 1 above).

<sup>47</sup> Art 8.1 Anti-Dumping Agreement (n 1 above); United Nations Conference on Trade and Development ‘Training module on the WTO agreement on anti-dumping’ (2006) 34  
[http://unctad.org/en/docs/ditctncd20046\\_en.pdf](http://unctad.org/en/docs/ditctncd20046_en.pdf) (accessed 3 January 2014).

<sup>48</sup> United Nations Conference on Trade and Development (n 47 above) 34; Art 8.3 Anti-Dumping Agreement (n 1 above).

<sup>49</sup> As above.

<sup>50</sup> Art 8.2 Anti-Dumping Agreement (n 1 above).

<sup>51</sup> Art 8.5 Anti-Dumping Agreement (n 1 above); Brink (n 18 above) 280.

<sup>52</sup> Lester et al (n 40 above) 506.

#### 3.2.8.4 Retroactivity decisions

In terms of the ADA provisional measures and anti-dumping duties operate prospectively.<sup>53</sup> Put differently, they may only be applied to products which enter for consumption in the domestic market of the importing country from the moment the decision is taken that provisional measures (under Article 7.1) or anti-dumping duties (under Article 9.1) be applied.<sup>54</sup> The ADA provides for exceptions to the above general principle in two types of retroactivity: the imposition of anti-dumping duties for the period for which provisional measures were applied, covered by Articles 10.2-10.5 and; the imposition of a definitive anti-dumping duty on products which entered for consumption during the 90 days prior to the application of provisional measures, but not before initiation, covered by Articles 10.6-10.8.<sup>55</sup> Where an investigating authority decides to impose an anti-dumping duty retroactively the ADA requires the authorities ‘to report all relevant information on the matters of fact and law and reasons which have led to the imposition of a definitive anti-dumping duty or the acceptance of a price undertaking.’<sup>56</sup>

#### 3.2.9 Lesser duty rule

The ‘lesser duty rule’ is used to describe the procedural requirement which is to the effect that, ‘anti-dumping duties should be lower than the margin of dumping where such lower anti-dumping duty would be sufficient to remove the injury.’<sup>57</sup> In the same vein, the ADA indicates the desirability that the increase in price negotiated with regards to a price undertaking be less than the margin of dumping if such lesser adjustment would be sufficient to remove the injury to the domestic market.<sup>58</sup>

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<sup>53</sup> See para 3.2.7.2 on ‘definitive measures and notification.’

<sup>54</sup> Vermulst (n 24 above) 182; Art 10.1 Anti-Dumping Agreement (n 1 above).

<sup>55</sup> Art 10.2-10.5 & 10.6 Anti-Dumping Agreement (n 1 above).

<sup>56</sup> Art 12.2.2 Anti-Dumping Agreement (n 1 above); Vermulst (n 24 above) 212.

<sup>57</sup> Art 9.1 Anti-Dumping Agreement (n 1 above); Brink (n 18 above) 273.

<sup>58</sup> Art 8.1 Anti-Dumping Agreement (n 1 above); Brink (n 18 above) 273 & 274.

### 3.3 Reviews

#### 3.3.1 Introduction

The ADA makes provision for different types of reviews. In view of the rules regarding anti-dumping duties,<sup>59</sup> the requirement for periodic reviews became necessary to respond to the concerns raised by the practice of some countries that leave their anti-dumping duties in place indefinitely.<sup>60</sup>

#### 3.3.2 Administrative reviews

The ADA provides for a mandatory review, by the authorities, of the continued imposition of an anti-dumping duty. This review may be initiated by the imposing authority, or where ‘a reasonable time has lapsed’, upon request by any interested party, which presents positive information establishing the need for a review.<sup>61</sup> Essentially, the review is to enable authorities determine whether ‘the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied or both.’<sup>62</sup>

In terms of the ADA, any reviews carried out under Article 11, which includes – administrative reviews, ‘shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.’<sup>63</sup>

#### 3.3.3 Sunset reviews

As provided by the ADA, anti-dumping measures (both duties and price undertakings) must be terminated on a date no later than 5 years from the date of their imposition. As an exception to this general rule, the ADA allows an investigating authority, to keep the duty in force where, following a review investigation initiated prior to expiry of the measure (unofficially but universally called ‘sunset review’) it was established that the expiry of the

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<sup>59</sup> Art 11 Anti-Dumping Agreement (n 1 above).

<sup>60</sup> World Trade Organization ‘Technical information on anti-dumping’  
[http://wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm](http://wto.org/english/tratop_e/adp_e/adp_info_e.htm) (accessed 5 February 2014).

<sup>61</sup> Art 11.2 Anti-Dumping Agreement (n 1 above).

<sup>62</sup> As above.

<sup>63</sup> Art 11.4 Anti-Dumping Agreement (n 1 above); Brink (n 18 above) 288.

measure would be likely to lead to continuation or recurrence of injurious dumping.’<sup>64</sup> As to the number of times a measure may be extended through a sunset review, the ADA makes no provision on this. In the Sunset Review of the Anti-Dumping Duties on Stranded Wire, Ropes and Cables, a final determination was made by the Commission to the effect that ‘the Applicant is likely to suffer material injury in the form of price undercutting, price suppression, decrease in net profit, decline in market share, decline in capacity utilization, and a negative cash flow, in the event of the removal of the anti-dumping and countervailing duties.’<sup>65</sup>

### **3.3.4 New shipper reviews**

In certain circumstances exporters that did not export the product to the importing Member country during the period of investigation that is, ‘new shippers’ have the right to a review to obtain individual margins of dumping. However, these exporters or producers, to exercise this right, must show that they are not related to any of the exporters or producers subject to the anti-dumping duties. New shipper reviews are to be initiated and conducted expeditiously, compared with normal duty assessment and review proceedings. No anti-dumping duties can be levied on imports from such exporters or producers while the review is in progress, although the investigating authorities are entitled to ‘withhold appraisalment or to require a guarantee to ensure payment of duties retroactive to the initiation of the review if dumping is found.’<sup>66</sup>

### **3.3.5 Judicial reviews**

The ADA requires members that have national legislation on anti-dumping to maintain judicial, arbitral or administrative tribunals, or procedures, for the purpose of prompt review, or hearing appeals of, administrative actions regarding final determinations and reviews, and not for preliminary reviews. This provision guarantees the right of an

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<sup>64</sup> Art 11.3 Anti-Dumping Agreement (n 1 above); Caribbean Export Development Agency (n 14 above) 12.

<sup>65</sup> Sunset review of the anti-dumping duties on stranded wire, ropes and cables originating in or imported from the People’s Republic of China, Germany, Korea and the United Kingdom and countervailing duties on stranded wire, ropes and cables originating in or imported from India (2009) Report No. 288 of the International Trade Administration Commission of South Africa para 5.5.14 <http://www.itac.org.za/docs/Report%20No%20288.pdf> (accessed 1 March 2014).

<sup>66</sup> WTO E-Learning (n 2 above) 144; Art 9.5 Anti-Dumping Agreement (n 1 above).

interested party to seek a judicial review where it is not satisfied with the final decision of an investigating authority.<sup>67</sup> Importantly, tribunals or procedures set up for this purpose are required to be independent of the authorities making the determinations.<sup>68</sup>

### 3.3.6 Refund applications

The ADA provides that where the anti-dumping duties are assessed on a prospective basis, the investigating authorities must make provision for the prompt refund of any duty paid in excess of the actual dumping margin, upon request by an importer whose product was subject to the duty. The ADA further provides that the payment of such duty ‘shall normally take place within 12 months and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence has been made...’<sup>69</sup>

### 3.3.7 Third country dumping

An anti-dumping action may be brought by a Member country on behalf of a third country. The ADA clearly provides the applicable rules<sup>70</sup> in this event. According to Vermulst, ‘it is possible that country A producers dumping into country B cause injury to producers in country C, for example, by replacing country C exports to country B. Article 14, which goes back all the way to Article VI.6(b) of the GATT, allows the country C authorities in such situations to request the country B authorities to initiate an anti-dumping investigation with regard to country A and to impose anti-dumping duties on country A exporters if they were to find dumping and resulting injury to the domestic industry of country C.’<sup>71</sup> Anti-dumping actions on behalf of a third country are hardly initiated, possibly because of the requirement for the approval of the Council for Trade in Goods before such anti-dumping action and the likelihood that the importing country authorities may not find it in their interest to initiate the action.<sup>72</sup>

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<sup>67</sup> Art 13 Anti-Dumping Agreement (n 1 above); Brink (n 18 above) 295; United Nations Conference on Trade and Development (n 47 above) 37.

<sup>68</sup> As above; Brink (n 18 above) 296.

<sup>69</sup> Art 9.3.2 Anti-Dumping Agreement (n 1 above); Brink (n 18 above) 295.

<sup>70</sup> Art 14 Anti-Dumping Agreement (n 1 above).

<sup>71</sup> Vermulst (n 24 above) 214.

<sup>72</sup> Vermulst (n 24 above) 215.

### 3.4 Final provisions

Part III Article 18 covers the final provisions of the ADA. It provides as follows:<sup>73</sup>

No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.

The ADA further provides:<sup>74</sup>

Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

In United States-1916 Act, the Appellate Body gave an interpretative ruling as to the effect of Article 18 of the ADA as follows:<sup>75</sup>

Articles 18.1 and 18.4 support the conclusion that a Member may challenge the consistency of legislation as such with the provisions of the Anti-Dumping Agreement and that where a specific action against dumping takes a form other than a form authorized under Article VI of the GATT 1994, as interpreted by the Anti-Dumping Agreement, such action will violate Article 18.1.

### 3.5 Conclusion

This chapter has discussed various procedural and administrative requirements set out in the ADA. Both the substantive and the procedural requirements are mandatory and complementary in their application and remain the agreed standard practice for all Member countries. A Member country seeking to promulgate a national legislation on anti-dumping must ensure that these rules and the procedural guidelines form the basis of their law on the subject. The following chapter subjects the Nigerian Bill to the ‘acid test’ as it critically analyses the Bill, highlighting possible areas of irregularities and inconsistencies with the WTO jurisprudence on anti-dumping.

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<sup>73</sup> Art 18.1 Anti-Dumping Agreement (n 1 above); Brink (n 18 above) 285.

<sup>74</sup> Art 18.4 Anti-Dumping Agreement (n 1 above).

<sup>75</sup> Report of the Appellate Body, United States – Anti-Dumping Act of 1916 (28 Aug., 2000) World Trade Organization WT/DS136/AB/R paras 81-82 [http://www.wto.org/english/tratop\\_e/dispu\\_e/136abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/136abr_e.pdf) (accessed 30 April 2014).



## Chapter 4

### A critical analysis of the Anti-Dumping and Countervailing Bill, 2010

#### 4.1 Introduction

This chapter gives a general overview of Nigeria's legislative history regarding dumping from 1958 to 2010. The chapter also critically analyzes the current legislative effort of Nigeria as it attempts to bring the anti-dumping procedures contained in the subsisting regulation - Customs Duties (Dumped and Subsidized Goods) Act 1958<sup>1</sup> in line with Nigeria's obligations under the WTO framework. The substantive provisions and procedural guidelines in the proposed Bill<sup>2</sup> are measured against the requirements of the ADA.<sup>3</sup>

It is worthy of note that most of the trade-related legislations in Nigeria dates back to the colonial era.<sup>4</sup> The subsisting legislation regulating dumping and subsidized imports is the Customs Duties (Dumped and Subsidized Goods) Act 1958 (the Act). The Act provides for 'the imposition of a special duty on any goods deemed to be dumped by companies or subsidized by any government or authority outside Nigeria. Under the Act, goods are regarded as having been dumped if the export price is lower than the "fair market price."<sup>5</sup> The Act does not provide for procedures or define substantive issues, for instance like product and related parties. Under the Act the President has power over such matters as the determination of dumping and the imposition of duties.<sup>6</sup> The Act has been under review since 1991 and the Anti-Dumping and Countervailing Bill, 2010 is the current legal

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<sup>1</sup> Plac: The complete laws of Nigeria <http://www.placng.org/lawsofnigeria/node/78> (accessed 4 April 2014); also contained in the Laws of the Federation of Nigeria 1990 Vol. V Cap 87.

<sup>2</sup> Anti-dumping and Countervailing Bill 2010 [http://www.nassnig.org/nass2/legislation\\_2010.php?pageNum\\_bill=3&totalRows\\_bill=210](http://www.nassnig.org/nass2/legislation_2010.php?pageNum_bill=3&totalRows_bill=210) (accessed 19 March 2014).

<sup>3</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; also commonly called the 'Anti-Dumping Agreement' (ADA) <http://www.worldtradelaw.net/uragreements/adagreement.pdf> (accessed 31 January 2014).

<sup>4</sup> EO Ogunkola & YF Agah 'Nigeria and the world trading system' in A Oyejide & D Njinkeu (eds) *Africa and the world trading system* (2007) 254.

<sup>5</sup> Nigerian Shippers' Council [http://www.shipperscouncil.com/trade\\_information\\_cont2.htm](http://www.shipperscouncil.com/trade_information_cont2.htm) (accessed 4 April 2014).

<sup>6</sup> Secs 3 & 4 Customs Duties (Dumped and Subsidized Goods) Act 1958.

framework proposed to repeal the Act and bring its provisions in compliance with Nigeria's WTO obligations.<sup>7</sup>

## 4.2 Anti-Dumping and Countervailing Bill, 2010

The proposed Anti-Dumping and Countervailing Bill, 2010 (the Bill) is sponsored by Hon. Abdullahi Umar Farouk. The Bill comprises 75 sections,<sup>8</sup> divided into thirteen parts. Part I is entitled 'Preliminary Provisions' (Sections 1-3) - section 1 introduces the short title of the Bill – Anti-Dumping and Countervailing Bill, 2010. Section 2 provides for the scope and application<sup>9</sup> of the Act. Section 3 contains a general list of substantive and procedural concepts used in the Bill and their definitions. Part II is entitled 'Establishment of the Anti-Dumping and Countervailing Measures' (Sections 4-9) - section 4 establishes the Advisory Committee; section 5 provides for the composition of the Committee; section 6 makes provision for the functions of the Committee; section 7 specifies the tenure and conditions of service of Committee members; section 8 deals with Committee meetings and; section 9 makes provision empowering the Committee to make its own procedures. Part III is entitled 'Anti-Dumping and Countervailing Provisions' (Sections 10-22) - section 10 provides for principles of operation; section 11 provides for determination of normal value; section 12 for determination of dumping; section 13 provides for determination of the 'margin of dumping' where there are no sales of 'like products' in the ordinary course of trade in the domestic market of the exporting country; section 14 deals with sales 'not in the ordinary course of trade'; section 15 provides for the 'calculation of production in the exporting country'; section 16 contains provisions dealing with ascertaining amounts of administrative, selling and general costs; section 17 provides for calculation of export price; section 18 makes provision for comparison of export price and normal value adjustment; section 19 deals with currency conversion; section 20 provides for margin of dumping during the investigating phase; section 21 appears to deal with determination of normal value on the basis of the export price to a third country and; section 22 provides for determination of injurious subsidies. Part IV is entitled 'Determination of Injury' (Sections 23-26) – section 23 provides for examination of volume of dumped or subsidized imports

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<sup>7</sup> Ogunkola & Agah (n 4 above) 249.

<sup>8</sup> Two sections (76 – on 'appeal' & 77 – on 'regulations') are merely listed in the arrangement of section with no provisions afterwards.

<sup>9</sup> The Act will apply to all import and export products traded in the Federal Republic of Nigeria.

and their effect on production and price; section 24 provides further on examination of volume of dumped or subsidized imports; section 25 deals with simultaneous investigation and; section 26 deals with causal link. Part V is entitled **‘Initiation of Investigation’** (sections 27-33) – section 27 contains the rules on application for investigation; section 28 makes provision for initiation of investigation by the Committee; section 29 covers the decision to initiate an investigation; section 30 deals with rejection and termination of investigation; section 31 deals with the period of investigation; section 32 provides for ascertaining the volume of dumped or subsidized imports and; section 33 makes provision for the determination of threat of material injury. Part VI is entitled ‘Provisions relating to evidence’ (sections 34-45) – section 34 deals with notification of interested parties; section 35 provides for the right to present evidence; section 36 deals with provision of information about investigation; section 37 deals with confidentiality; section 38 makes provision for verification of information; section 39 deals with investigation in the exporting country; section 40 deals with the rules on failure to provide information within reasonable time; section 41 provides for information about essential facts under consideration; section 42 deals with the determination of individual margin and sampling; section 43 deals with provision of information by users and representatives; section 44 provides guidance on supply of information in difficult circumstances and; section 45 deals with interpretation of intention with regards to the provisions of the Bill. Part VII is entitled ‘Provisional measures’ (sections 46-48) – section 46 deals with the application of provisional measures; section 47 deals with forms of provisional measures and; section 48 deals with application for provisional measures. Part VIII is entitled ‘Price undertakings’ (section 49-54) – section 49 makes provision for suspension or termination of provisional measures in respect of anti-dumping or countervailing duties; section 50 deals with preliminary affirmative determination to price undertaking; section 51 provides for discretionary obligation of Committee regarding acceptance of undertaking; section 52 provides for termination of investigation upon acceptance of undertaking; section 53 provides for the discretionary obligation of the exporter regarding acceptance of price undertaking and; section 54 deals with periodic information in respect of undertaking. Part IX is entitled ‘Imposition and collection of anti-dumping and countervailing duties’ (sections 55-59) – section 55 provides for the imposition of anti-dumping or countervailing duties on a product; section 56 deals with the collection of anti-dumping or countervailing duties; section 57 makes

provision for the amount of anti-dumping or countervailing duty to be levied; section 58 deals with the notification of interested parties right to present evidence and; section 59 provides for ‘new shipper review’, wrongly summarized in the side marginal note as ‘dumping or countervailing duties on products within country.’ Part X is entitled ‘Retroactivity provisions’ (sections 60-62) – section 60 deals with retroactive application of provisional measures, anti-dumping and countervailing duties; section 61 provides rules on definitive anti-dumping or countervailing duties and; section 62 covers ‘other measures’ to be taken by the Committee. Part XI is entitled ‘Duration and review of anti-dumping or countervailing duties and price undertaking’ (sections 63-67) – section 63 deals with the duration of anti-dumping or countervailing duty; section 64 makes provision for the review of anti-dumping or countervailing duty; section 65 provides for termination of anti-dumping or countervailing duty; section 66 provides for expeditious review in respect of Part VI provisions and; section 67 provides that the provisions of Part XI shall apply on all sides to price undertakings. Part XII is entitled ‘Public notice and explanation of determinations’ (sections 68-73) – section 68 deals with notification of interested parties and public notice; section 69 provides for public notification of preliminary determination and other decisions; section 70 deals with public notification of provisional measures; section 71 provides for public notification of conclusion or suspension of an investigation and; section 72 deals with public notification of an investigation and; section 73 provides for the application of Part XII, on all sides, to initiations, completion of reviews and retroactive application of duties pursuant to Part IX and X. Part XIII is entitled ‘Miscellaneous provisions’ (sections 74-75) – section 74 provides for application on behalf of a third country and; section 75 deals with offences relating to information. An explanatory memorandum is provided at the end of section 75.

### **4.3 The Anti-Dumping and Countervailing Bill, 2010: substantive provisions**

#### **4.3.1 Anti-dumping measures**

Part I, section 3 provides for the definitions and interpretations of various terms and concepts used in the Bill. In more practical terms, ‘definitions’ serve the purpose of

clarifying concepts and attaching a specific meaning to a word or phrase as intended by the draftsman. In other words, they define and confine concepts to a particular meaning.<sup>10</sup>

The Bill seeks, partly, to provide for anti-dumping and countervailing measures in the country's trade transactions<sup>11</sup> but does not define 'anti-dumping measures' nor 'anti-dumping duty' in the list of interpretations. Notably, it attempts a definition of 'countervailing measures'<sup>12</sup> and provides a definition for 'countervailing duty' as 'a special duty to be levied for the purpose of offsetting subsidy granted directly or indirectly on the investigated product.'<sup>13</sup> This omission creates a fundamental gap in the Bill as to what 'measure,' or whether a 'duty' would be imposed under Nigeria's anti-dumping legislation in the event of a determination of dumping. In *China – Broiler Products*, the United States challenged China's definition of 'domestic industry' on grounds of inconsistency with the provisions of the ADA. The U.S also claimed that China's Ministry of Commerce (MOFCOM) public notice of the preliminary and final anti-dumping duty determination were inconsistent with the requirement of Articles 12.2 of the ADA.<sup>14</sup>

The ADA provides for the application of 'anti-dumping measures' and the circumstances of their application.<sup>15</sup> Under the ADA anti-dumping measures can take the form of either anti-dumping duties or price undertakings.<sup>16</sup> The ADA also provides that provisional payments may be applied before anti-dumping duties.<sup>17</sup> In other words, 'anti-dumping measures' refers to provisional measures, anti-dumping duties and price undertakings, and 'all measures taken against dumping' as stated by the Appellate Body in the case of *US - 1916 Act*.<sup>18</sup> The absence of a clear definition, in the Bill, of these fundamental concepts is

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<sup>10</sup> K Clark & M Connolly 'A guide to reading, interpreting and applying statutes' (2006) The Writing Center, George Town University Law Center [www.georgetown.edu/.../legal.../statutoryinterpretation.pdf](http://www.georgetown.edu/.../legal.../statutoryinterpretation.pdf) (accessed 17 March 2014).

<sup>11</sup> See the long-title of the Anti-Dumping and Countervailing Bill, 2010 (n 2 above) 2.

<sup>12</sup> Part I sec 3 Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>13</sup> As above.

<sup>14</sup> Report of the Panel, *China – anti-dumping and countervailing duty measures on broiler products from the United States* (2 Aug., 2013) World Trade Organization Dispute DS427 [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds427\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds427_e.htm) (accessed 17 March 2014).

<sup>15</sup> Part I Art 1 Anti-Dumping Agreement (n 3 above).

<sup>16</sup> Arts 8 & 9 Anti-Dumping Agreement (n 3 above).

<sup>17</sup> Art 7 Anti-Dumping Agreement (n 3 above).

<sup>18</sup> WTO Analytical Index: Anti-dumping Agreement [http://www.wto.org/english/res\\_e/booksp\\_e/analytical\\_index\\_e/anti\\_dumping\\_01\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytical_index_e/anti_dumping_01_e.htm) (accessed 17 March 2014).

not only inconsistent with the spirit of the ADA but creates challenges of implementation from the onset.

### 4.3.2 Dumping

The ADA provides that ‘a product is to be considered dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.’<sup>19</sup> This definition reveals four important concepts: normal value, export price, ordinary course of trade and like product.<sup>20</sup> The Bill defines ‘dumping’ as ‘the situation where the export price of goods imported or intended to be imported into Nigeria is less than the normal value of such goods in the market (country) of origin as determined in accordance with the provisions of this Act.’<sup>21</sup> The Bill appears to have introduced an additional concept not envisaged by the ADA in its definition. In terms of the Bill, ‘export price of goods imported’ as well as those ‘intended to be imported’ will be considered in the determination of ‘dumping.’ This ‘new definition’ creates a challenge as to how to determine the normal value, export price, and ‘likeness’ of a product ‘intended to be imported’ into Nigeria, in the ordinary course of trade. This definition is problematic and at variance with the object and purport of the ADA.

### 4.3.3 Export price

The export price is a fundamental consideration in the determination of dumping. In terms of the ADA, the export price is the price at which the product is exported from one country to another.<sup>22</sup> However, the export price may also be constructed in certain circumstances.<sup>23</sup> Unlike the definition of export price in the ADA, the Bill defines export price as – ‘a price paid or payable for an export destined to the Country.’<sup>24</sup> This definition is problematic in two respects. First, the reference to ‘the Country’ in that definition is most confusing and

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<sup>19</sup> Art 2.1 Anti-Dumping Agreement (n 3 above).

<sup>20</sup> E Vermulst *The WTO anti-dumping Agreement: A commentary* (2005) 9.

<sup>21</sup> Part I sec 3 Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>22</sup> Art 2.1 Anti-Dumping Agreement (n 3 above).

<sup>23</sup> Art 2.3 Anti-Dumping Agreement (n 3 above); see para 2.7.2 on ‘constructed export price.’

<sup>24</sup> Part I sec 3 Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

leaves one to conjecture as to which country is the destination of the exported product. Second, the definition is limiting to the extent that, it does not apply to products sold for export, but only those actually exported.<sup>25</sup> For instance, an invoiced export price is normally either Free on Board (fob) or Carriage Insurance and Freight (cif) price. The price actually paid for the goods sold (export price) should be net of all taxes, discounts and rebates granted and related to the sale of the goods in consideration.<sup>26</sup> Although the Bill, seem to provide details as to considerations to be made in the calculation of export price,<sup>27</sup> these cannot be regarded as ‘a cure’ for the defect. The need to create an effective anti-dumping framework consistent with the provisions of the ADA calls for an amendment of the current definition of ‘export price’ as contained in the proposed Bill.

#### 4.3.4 Interested parties

In an anti-dumping proceeding, the foreign exporters, their importers and the domestic producers of the product being investigated are three key interested parties. They all are directly affected by the investigation as the outcome would significantly influence future investments.<sup>28</sup> The Bill defines ‘interested parties’ to include – ‘(b) the government of the origin of the investigated product; (c) a producer of the like product in the territory or a trade or business association with a majority of the members who produce the like product in the territory.’<sup>29</sup> This definition needlessly imports circumstances not contemplated by the ADA. Whilst the paragraph (a) of the definition in the Bill seem to align word for word with the ADA, the preceding paragraphs (b) and (c) cited above fall short of the clear provisions of the ADA in this regard. Rather than adopting the simplicity of the term ‘exporting Member’ as used in the ADA, the Bill uses the expression ‘the government of the origin of the investigated product.’ Not only is this expression subject to more than one interpretation because the origin of the investigated product may be different from the exporting member, it does not explicitly recognize the exporting country government as

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<sup>25</sup> This information was gained from a personal interview with Dr. Gustav Brink, International Trade Law Consultant and Associate Director at XA International Trade Advisors, Centurion, South Africa (20 January 2014).

<sup>26</sup> GF Brink *‘Anti-dumping and countervailing investigations in South Africa: A practitioner’s guide to the practice and procedures of the board on tariffs and trade’* (2004) 63.

<sup>27</sup> Part III sec 17 Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>28</sup> Vermulst (n 20 above) 165.

<sup>29</sup> Part I sec 3 Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

intended by the ADA thereby establishing a basis for difficulty in interpretation and implementation. In the paragraph following, the word ‘territory’ referred to is unspecified and there is no certainty as to the meaning of the word ‘territory’ as used in the paragraph. These definitions as set out in the Bill, creates circumstances and standards that are clearly not in line with the spirit of the ADA.<sup>30</sup>

#### **4.3.5 Related parties**

The ADA provides a comprehensive interpretation of the term ‘related parties.’<sup>31</sup> Within the context of the ADA, determination of the ‘domestic industry’ is significantly connected with the definition of ‘related parties.’ In an anti-dumping proceeding, not all parties are interested parties and a proper definition of the term guarantees the exclusion of ‘unrelated parties’ as intended by the ADA. As observed by Brink, the definition of the concept of ‘related parties’ may impact the determination of normal value and export price.<sup>32</sup> Interestingly, the Bill provides an interpretation of ‘domestic industry’<sup>33</sup> but fails to define the term - ‘related parties.’ These definitional gaps fall short of consistency with the WTO standards as set out in the ADA and would pose a challenge to effective implementation of the anti-dumping rules.

#### **4.3.6 Normal value**

The writer has shed some light on the concept of ‘normal value’ and the different ways of normal value determination earlier in this work.<sup>34</sup> In determining whether dumping is taking place, it is fundamental for an investigating authority to first, determine the ‘like product’ in the domestic market of the exporter. Once the investigating authority determines the like product in the domestic market of the exporter, the price of that like product, forms the basis of the ‘normal value’ to be applied in the calculation of the dumping margin. However, the domestic sales value may not be used where – ‘there are no

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<sup>30</sup> Art 6.11(i) (ii) & (iii) Anti-Dumping Agreement (n 3 above); See ch 2 para 2.5.4 on ‘Interested parties.’

<sup>31</sup>Footnote 11 to Art 4.1 note 11 Anti-Dumping Agreement (n 3 above); See ch 2 para 2.5.5 on ‘related parties.’

<sup>32</sup> GF Brink ‘*A theoretical framework for South African anti-dumping law*’ unpublished PhD thesis, University of Pretoria, 2004 761.

<sup>33</sup> Part I sec 3 Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>34</sup> See ch 2 para 2.6 on ‘normal value.’



sales of the like product in the ordinary course of trade in the domestic market of the exporting country; because of the particular market situation or the low volume of the sales in the domestic market of the exporting country; and where sales do not permit a proper comparison.<sup>35</sup> The concept of ‘normal value’ is defined in the Bill as ‘the price comparable to the export price, in the ordinary course of trade, for the investigated product when destined for consumption in the investigated country.’<sup>36</sup> This definition clearly and erroneously disregards the reference made in the ADA definition to ‘the like product’ and ‘the exporting country.’<sup>37</sup> It may be seen that the Bill, provides further details as to the determination of ‘normal value’ and severally made references to ‘country of export.’<sup>38</sup> Upon a closer look, the Bill in the determination of ‘normal value’ fails to provide for ‘non-market economies.’<sup>39</sup> The paragraph (a) - (c) provides exceptions to the application of section 11 where the investigated products – ‘are not produced in the country of export; are merely trans-shipped through the country of export from the country of origin or; have no comparable price for such products in the country of export.’ The Bill is silent as to what would be the rule in these exceptional circumstances. This oversight creates a fundamental deficiency in the proposed national anti-dumping legislation considering the fact that China is one of Nigeria’s major trading partners and has been treated by other trading partners, in some circumstances, as a non-market economy.<sup>40</sup> The reliance of the drafters of the Bill on ambiguous words and terms where the ADA is clear and precise has not achieved the intended objective of aligning Nigeria’s anti-dumping rules with its WTO obligations.

#### **4.4 The Anti-Dumping and Countervailing Bill, 2010: procedural provisions**

##### **4.4.1 Initiation and investigation**

Chapter 3 discussed the concept and procedural guidelines of ‘initiation’ under the WTO ADA.<sup>41</sup> With reference to the panel ruling in Thailand-H-Beams, the ADA provides clearly defined obligations that must be met before the initiation of an investigation. Consequently,

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<sup>35</sup> Arts 2.1 & 2.2 Anti-Dumping Agreement (n 3 above).

<sup>36</sup> Part I sec 3 Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>37</sup> Art 2.1 Anti-Dumping Agreement (n 3 above).

<sup>38</sup> Art 11 Anti-Dumping Agreement (n 3 above).

<sup>39</sup> See ch 2 para 2.6.5 on ‘non-market economy normal value.’

<sup>40</sup> K Oporum ‘Nigeria is third largest trade partner of China: Chinese envoy’ AllAfrica 10 July 2013. <http://allafrica.com/stories/201307100758.html> (accessed 22 March 2014); Vermulst (n 20 above) 45; Brink (n 26 above) 180-181.

<sup>41</sup> See ch 3 para 3.2.1 on ‘initiation and subsequent investigation.’

a WTO member seeking a remedy against a violation of an Article 5 obligation has a duty to specify which paragraph of Article 5 is violated and at the very least identify the specific sub-paragraphs of that Article that is being alleged to have been violated.<sup>42</sup> Upon receiving an application, the investigating authority, has to take the further step of determining the sufficiency of evidence to justify the initiation of an investigation. The investigating authority is required to – first, examine the accuracy and adequacy of the evidence contained in the application and; second, determine whether the applicants are sufficiently representative of the domestic industry, in other words, whether the applicants have the ‘standing’ required to bring the case.<sup>43</sup> The proposed Bill sets out the procedure for initiation of investigation<sup>44</sup> in providing as follows - ‘upon receipt of application by or on behalf of an industry, the Minister assisted by the department responsible for trade shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify initiation of investigation.’<sup>45</sup> It further provides – ‘where the Minister is satisfied that, sufficient evidence exist in favour of an investigation, he shall convene the Committee for that purpose.’ In view of the provisions cited above, the proposed Bill imposes two obligations for the initiation of an investigation: examination of the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify initiation of investigation and; the discretionary decision of the Minister as to sufficiency of evidence in favour of an investigation. The latter requirement of the Bill appears to have substituted the ADA ‘standing’ requirement for the Minister’s discretionary decision.

#### **4.4.2 Committee meeting**

Furthermore, the Bill provides for ‘initiation of investigation by the Committee.’<sup>46</sup> The Bill also provides for the ‘meeting of the Committee’<sup>47</sup> in response to the ‘special circumstances’ contemplated by section 28. However, the Bill fails and or neglects to

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<sup>42</sup> Panel Report, Thailand – anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and h-beams from Poland (2000) World Trade Organization WT/DS122/R para 7.23 [http://www.worldtradelaw.net/reports/wtopanels/thailand-steel\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanels/thailand-steel(panel).pdf) (accessed 23 March 2014); Vermulst (n 20 above) 102.

<sup>43</sup> Arts 4.1, 5.3 & 5.4 Anti-Dumping Agreement (n 3 above).

<sup>44</sup>Part V sec 27(3) Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>45</sup> As above.

<sup>46</sup> Part V sec 28 Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>47</sup> Part II sec 8(2) Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

provide for ‘normal procedures’<sup>48</sup> that is, the ordinary applications requiring more frequent meetings which section 8 cannot be said to have provided for. The procedures proposed by the Bill for the initiation of investigation seems suspicious, lacking in transparency, constitutes a potential threat to implementation of the law on anti-dumping and not in compliance with the ADA requirements.

#### **4.4.3 Retroactive imposition of anti-dumping duty**

Chapter 3 discusses in more detail ‘retroactivity decisions’ earlier in this work.<sup>49</sup> The Bill makes provision for the imposition and collection of anti-dumping duties.<sup>50</sup> It also specifically provides for the imposition of anti-dumping duties on a ‘retrospective’ basis.<sup>51</sup> However, the Bill does not contain provisions specifying the reasons or circumstances under which an anti-dumping duty would be applied retrospectively. In terms of the ADA, anti-dumping duties may be imposed retroactively to a date 90 days prior to the imposition of provisional measures, under the following critical circumstances: 1. ‘there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and; 2. The injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.’<sup>52</sup> The panel in Mexico-HFCS held that, Article 10.6 provides the exceptional circumstances under which a Member may impose anti-dumping duties retroactively.<sup>53</sup> This lacuna in the proposed legislation creates uncertainty as to the procedural guideline in the event of imposing anti-

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<sup>48</sup> The writer uses the term ‘normal procedures’ to describe those circumstances that are not within the scope of the Committee’s ‘special circumstances’ provided in sec 28 of the Anti-Dumping and Countervailing Bill, 2010.

<sup>49</sup> See ch 3 par 3.2.8.4 on ‘retroactivity decisions.’

<sup>50</sup> Part IX sec 57(2) Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>51</sup> Part IX sec 52(2) Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>52</sup> Art 10.6(i)(ii) Anti-Dumping Agreement (n 3 above).

<sup>53</sup> Panel Report, Mexico – anti-dumping investigation of high fructose corn syrup (HFCS) from the United States (2000) World Trade Organization WT/DS132/R para 7.53

<http://www.worldtradelaw.net/reports/wtopanels/mexico-hfcs> (panel).pdf (accessed 26 March 2014).

dumping duties retroactively and is inconsistent with the ADA as has been shown by the writer in the foregoing discussions.

#### **4.4.4 Refund applications**

The ADA provides elaborate guidelines regarding ‘refund applications.’<sup>54</sup> The Bill provides: ‘where the amount of the anti-dumping or countervailing duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request to the government of any duty paid in excess of the margin of dumping or subsidization.’<sup>55</sup> It further provides: ‘a refund under subsection (4) shall be made within twelve months, and in any case not exceeding eighteen months after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping or countervailing duty and such refund shall be made within ninety days from the day the decision was made.’<sup>56</sup> Notably, the Bill neither indicates to whom the application for refund must be made nor who must refund it. This is in direct contravention of the ADA requirements that provision ‘...shall be made for a prompt refund, upon a request, of any duty paid in excess of the margin of dumping. The refund authorized should normally be made within 90 days of the above-noted decision.’<sup>57</sup>

#### **4.4.5 ‘Offences relating to information’**

The last section of the Bill deals with ‘offences relating to information.’<sup>58</sup> In terms of the section of the Bill, where a person wilfully gives false or misleading information to the Committee or discloses a confidential information provided in the course of an investigation without the permission of the Committee and without ‘lawful excuse’<sup>59</sup> refuses to provide the Committee with an information requested, contravenes the Act and commits an offence punishable upon conviction by a fine not exceeding two million naira<sup>60</sup> (N2 000 000) or imprisonment for a term not exceeding six months or to both. Although, the ADA continues to function as a framework agreement and leaving substantial

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<sup>54</sup> See ch 3 para 3.3.6 on ‘refund applications.’

<sup>55</sup> Part IX sec 57(4) Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>56</sup> Part IX sec 57(5) Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>57</sup> Art 9.3.2 Anti-Dumping Agreement (n 3 above).

<sup>58</sup> Part XIII sec 75 Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>59</sup> The term ‘lawful excuse’ or what would amount to an ‘unlawful excuse’ is not defined in the Bill.

<sup>60</sup> The ‘naira’ is Nigeria’s currency.

discretion to Member countries in the application of the rules, it does not in its entirety, either by way of express provision or inference, provide for ‘penalising’ or ‘criminalising’ an exporter for non or incomplete co-operation or refusal to provide information.<sup>61</sup> The ADA envisages a situation in which one or more interested parties may decide not to cooperate in an investigation. In the event that an interested party does not supply the required information within a reasonable time, or refuses authorities access to its relevant information or significantly hinders the investigation, the ADA allows for preliminary and final determinations to be made on the facts available. This provision of the Bill which seeks to penalise and criminalise an exporter for none or incomplete co-operation is outrageous and at variance with the spirit, object and purport of the WTO ADA.

#### **4.4.6 Advisory committee**

It is important that any system set up for the purpose of balancing the interests of local industries against those of their foreign counterparts be seen to be fair, objective and transparent in its composition and operations. The Bill seeks to establish an Advisory Committee<sup>62</sup> (Committee) to carry out certain functions contemplated in the Bill.<sup>63</sup> The Committee consist of: (a) the Chairman; (b) one member representing the Federal Ministry of Commerce; (c) one member representing the Federal Ministry of Finance; (d) a representative of the Attorney-General of the Federation; (e) one member representing the Nigeria Chambers of Commerce, Industry and Agriculture; (f) one member representing the Federal Ministry of Industry; (g) one member representing the Federal Inland Revenue Service; (h) one member representing the Standard organization of Nigeria; (i) one member representing the National Planning Commission; and (j) one member representing the National Agency for Food Administration and Control (NAFDAC).<sup>64</sup> Section 6 provides a list of functions of the Committee as follows: (a) advising the Minister generally, on the proper implementation of the provisions of the Act; (b) advising on urgent measures necessary for the protection of domestic industries from injury caused by dumping or subsidy; (c) ascertain whether the investigated product, through the effect of dumping or subsidization, cause or threatens material injury to industry or producer; (d) advise the

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<sup>61</sup> See ch 3 para 3.2.7 on ‘facts available.’

<sup>62</sup> Part II secs 4 & 5 Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>63</sup> Part II sec 6 Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>64</sup> Part II sec 5(a - i) Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

Minister on policy issues related to this Act; (e) perform any other duties related to this Act assigned to it by the Minister; (f) recommend to the Minister the imposition of anti-dumping or countervailing measures appropriate action; and (g) to conduct investigation on such matters as the Minister may determine.<sup>65</sup>

The inclusion of a representative from the Nigeria Chambers of Commerce, Industry and Agriculture (the Chambers) appears to indicate that the Committee may be expected to be biased in favour of the local industry in the conduct of anti-dumping investigations, its advisory function to the Minister, its recommendations to the Minister as to the appropriate measures to be imposed, and this may well be the a major reason why a separate department or institution should be saddled with the responsibility for anti-dumping investigations to the exclusion of the Chambers. In point of fact, the Chambers represents the interests of local companies and businesses in Nigeria with the primary objective of ‘promoting, supporting or opposing legislative or other measures affecting trade, industry, commerce and agriculture as well as representing the opinion of the business community on the above matters in particular, and the economy as a whole.’<sup>66</sup>

#### **4.4.7 Conclusion**

Although Nigeria’s Anti-Dumping and Countervailing Bill 2010 may generally be regarded as a positive legislative intervention, the writer has shown in this chapter that many of its substantive and procedural provisions do not conform to the spirit, object and purport of the WTO Antidumping Agreement. The urgency of redrafting the Bill, taking cognisance of the writer’s observations, and provision of an Act that reflects the substantive and procedural issues of the ADA cannot be overemphasised. The next chapter turns the searchlight on the South African anti-dumping system with a view to highlighting experiences that are hoped will contribute to the development of the Nigerian anti-dumping system.

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<sup>65</sup> Part II sec 6(a – g) Anti-Dumping and Countervailing Bill, 2010 (n 2 above).

<sup>66</sup> About the Chamber <http://www.lagoschamber.com/profile-of-the-lcci/> (accessed 7 April 2014).

## Chapter 5

### Lessons from South Africa's Anti-dumping experience

#### 5.1 Introduction

This chapter provides a brief commentary on the history of South African anti-dumping system and investigates some of the different issues that have influenced the development of the South African anti-dumping system. Although the South African system continues to 'fill-in the gaps' in terms of WTO compliance,<sup>1</sup> the writer considers these experiences as providing a road map, at least at the initial stages, for African countries and in particular Nigeria, to learn from in her quest for a WTO consistent national legislation on anti-dumping.

#### 5.2 Legislative and institutional changes: a brief history

South Africa has been applying anti-dumping measures as far back as 1914 and has since become one of the first countries to promulgate legislation on anti-dumping.<sup>2</sup> The Board of Trade and Industries (the Board) was responsible for anti-dumping investigations from its inception in 1921 and later became known as the Board on Tariffs and Trade.<sup>3</sup> In practice, the Department of Customs was responsible for the conduct of dumping investigations although the Board had the official responsibility for investigating injury and causality and made recommendations for the imposition of duties.<sup>4</sup> The Board Act underwent further amendments with a view to 'enable a gradual transition toward consistency with the provisions of the Anti-Dumping Agreement of 1994. This entailed including the definitions of dumping, normal value, export price and fair comparison consistent with the Anti-Dumping Agreement.'<sup>5</sup> The Board has been replaced by the International Trade Administration Commission (ITAC) in 2003 and the Anti-Dumping Regulations (ADR)

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<sup>1</sup> GF Brink 'A theoretical framework for South African anti-dumping law' unpublished PhD thesis, University of Pretoria, 2004 689-690.

<sup>2</sup> GF Brink Anti-dumping and countervailing investigations in South Africa: A practitioner's guide to the practice and procedures of the board on tariffs and trade (2004) 2-3.

<sup>3</sup> G Brink 'Anti-Dumping in South Africa' (2012) A working paper by Tralac D12WP07/2012 <http://www.tralac.org/files/2012/07/D12WP072012> (accessed 10 November 2014).

<sup>4</sup> As above.

<sup>5</sup> Brink (n 3 above) 2.

promulgated in November 2003.<sup>6</sup> Since 1995 when the WTO was established South Africa has initiated more than 200 anti-dumping investigations for which anti-dumping duties were applied to most of them.<sup>7</sup>

Following the Customs Amendment Act and Board Amendment Act both of 1992, a separate unit, the Directorate for Dumping Investigations was established signaling a new dispensation in South Africa's anti-dumping regime. Whilst the primary legislation on anti-dumping is the International Trade Administration Act, 71 of 2002<sup>8</sup> (ITA Act) which saddled ITAC with the responsibility for anti-dumping investigations, provided definitions of dumping, normal value, export price and treatment of confidential information; all other substantive and procedural guidelines are provided for in the Anti-Dumping Regulations 2003<sup>9</sup> (ADR).<sup>10</sup> It is important to note that, these legislative changes particularly dealing with tariff measures, dumping and subsidization followed a realization by the South African government that it would have to decrease duties and open its borders for free trade.<sup>11</sup> This realization also led to 'a sharp increase in South Africa's application of trade remedies, in particular anti-dumping measures.'<sup>12</sup>

### 5.2.1 Anti-Dumping Regulations 2003

As indicated in paragraph 5.2 above, the ITA Act is the primary legislation on anti-dumping in South Africa. It provides for the reconstitution of the Board as a Commission,<sup>13</sup> inclusion of anti-dumping action within the scope of the Commission's work, defines dumping, normal value and export price.<sup>14</sup> In terms of the ITA Act 'the Minister may make regulations – (a) regarding the proceedings and functions of the Commission, after

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<sup>6</sup> As above.

<sup>7</sup> JB Cronje 'Anti-dumping investigation on chicken imports from the EU' (6 Nov., 2013) Trade Law Centre (Tralac) <http://www.tralac.org/2013/11/06/anti-dumping-investigation-on-chicken-imports-from-the-eu/> (accessed 10 November 2014).

<sup>8</sup> International Trade Administration Act, 71 of 2002 <http://www.itac.org.za> (accessed 12 April 2014).

<sup>9</sup> The International Trade Administration Commission: Anti-Dumping Regulations 2003 [http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Anti\\_Dumping\\_Regulations.pdf](http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Anti_Dumping_Regulations.pdf) (accessed 12 April 2014).

<sup>10</sup> Brink (n 3 above) 5.

<sup>11</sup> N Joubert 'Managing the challenges of WTO participation: The reform of South Africa's anti-dumping regime' case study 38 [http://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm) (accessed 12 April 2014).

<sup>12</sup> As above.

<sup>13</sup> Sec 7 International Trade Administration Act (n 8 above).

<sup>14</sup> Secs 16, 1(2), 32(2)(b), 32(2)(a) & 32(5).



consulting the Commission; (b) to give effect to the objects of this Act; and (c) on any matter that may or must be prescribed in terms of this Act.’<sup>15</sup> The ADR was made pursuant to the provisions of the ITA Act and serves as a guide to ITAC in its conduct of anti-dumping investigations. The ADR also plays a complementary role to the ITA Act in providing additional information to substantive and procedural issues relating to anti-dumping.<sup>16</sup> The ITA Act contains 64 sections and 3 schedules. The ADR comprise 68 sections, divided into five parts.<sup>17</sup> The ADR provides additional information on such issues as - confidential information, representation by third parties, oral hearings and adverse party meetings.<sup>18</sup> It also provides for substantive issues - normal value, determination of the margin of dumping, material injury, threat of material injury, causality, material retardation of the establishment of an industry, the lesser duty rule etc. It is worth mentioning that, prior to the publication of the ADR, ITAC relied on the ADA, the anti-dumping regimes of the EU, the United States, the New Zealand and Australia as a model in drafting the ADR.<sup>19</sup> The ADR also received the contributions of Canadian, United States and New Zealand lawyers, as well as local legal practitioners and academics.<sup>20</sup>

## 5.2.2 Promotion of Access to Information Act 2000

In terms of section 32(1) of the Constitution of the Republic of South Africa, everyone has the right of access to records and information either held by the state or any other person and that becomes relevant for the exercise or protection of any rights. In order to give effect to this right, the Promotion of Access to Information Act 2 of 2000 (PAIA) was enacted pursuant to section 32(2) of the Constitution. It is important to highlight the objects of the PAIA which are stated as follows:<sup>21</sup>

- (a) to give effect to the constitutional right of access to any information held by the State;

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<sup>15</sup> Sec 59 (a – c) International Trade Administration Act (n 8 above).

<sup>16</sup> G Brink ‘Proposed amendments to the anti-dumping regulations: are the amendments in order?’ (Nov., 2006) A tralac working paper No. 21/2006 [http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/200661128\\_Brink\\_%20ADR\\_amendments.pdf](http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/200661128_Brink_%20ADR_amendments.pdf) (accessed 12 April 2014).

<sup>17</sup> Anti-Dumping Regulations (n 9 above).

<sup>18</sup> Secs 2 - 6 Anti-Dumping Regulations (n 9 above).

<sup>19</sup> Joubert (n 11 above).

<sup>20</sup> As above.

<sup>21</sup> See generally secs 9(a) – (e) Promotion of Access to Information Act 2 of 2000 [http://www.dfa.gov.za/department/accessinfo\\_act.pdf](http://www.dfa.gov.za/department/accessinfo_act.pdf) (accessed 12 May 2014).

- (b) to give effect to that right subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance;
- (c) to establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible; and
- (d) generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone to understand their rights... in relation to public and private bodies... effectively scrutinize, and participate in, decision-making by public bodies that affects their rights.

More importantly, the PAIA has provided a mechanism for the South African people and systems to move ‘from a culture of secrecy and bureaucracy to a culture of transparency and accountability.’<sup>22</sup>

### 5.3 Training and learning from other jurisdictions

As at 1914, South Africa became the fourth country after Canada, Australia and New Zealand to enact legislation on anti-dumping.<sup>23</sup> Interestingly, South Africa continues to develop its anti-dumping system by embarking on purposeful visits to other jurisdictions with the aim of building and strengthening technical capacity and knowledge thereby bringing its anti-dumping substance and procedures progressively in conformity with the requirements of the WTO. Brink noted that:

[S]everal staff members have attended courses or workshops in Belgium, Korea, Switzerland and the U.S to improve the level of skills in the Directorate. The Rules Division of the WTO, the U.S Department of Commerce, a U.S trade lawyer, a Belgian trade lawyer and a Dutch trade lawyer have conducted training courses in South Africa, while a leading Belgian law firm extended a standing invitation to provide training to the Directorate’s staff. Two other Belgian law firms also conducted training sessions in Pretoria.<sup>24</sup>

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<sup>22</sup> <http://www.sahrc.org.za/home/21/files/Reports/PAIA%20GUIDE%20english.pdf> (accessed 12 May 2014).

<sup>23</sup> Brink (n 3 above) 2.

<sup>24</sup> Brink (n 1 above) 692-693.

## 5.4 National Economic Forum (NEF)

The NEF of South Africa is a tripartite body consisting of representatives from business, government and labour.<sup>25</sup> NEF had in 1994 undertaken a review of South Africa's anti-dumping system with a view to modify the then subsisting regime bringing it into conformity with the requirements of the ADA.<sup>26</sup> NEF had emphasized the need to adopt national legislation on anti-dumping and countervailing measures as well as establishment of an anti-dumping authority.<sup>27</sup> Again in 1996, the Board under a further study invited comments and inputs from the general public although the results of the study were not published.<sup>28</sup> The NEF collaboration justifies Joubert's observation as follows:<sup>29</sup>

[C]ountries should always keep in mind that it is the private sector that trades, not governments. A common problem faced by all countries is a lack of proper consultation between government and stakeholders to ensure that their concerns are addressed when government determines trade policies. It is important that a government establish opportunities for public-private dialogue in order to involve all spheres of society in its decision - making processes, as policy making cannot take place in a vacuum.

## 5.5 Reviews: the Commission and the Judiciary

By virtue of the ADR the Commission<sup>30</sup> may conduct reviews of anti-dumping duties.<sup>31</sup> The Commission may conduct four types of reviews under the ADR: interim reviews; new shipper reviews; sunset reviews and; circumvention reviews. Most importantly, the ADR also provides for judicial reviews of the decisions of the Commission. Judicial reviews allow interested parties to challenge, before a court of competent jurisdiction, in appropriate circumstances, preliminary decisions or the Commission's procedures prior to the finalization of an investigation. This however, does not limit a court of law's jurisdiction to review final decisions of the Commission.<sup>32</sup> An application may be made, by the party affected by the Commission's decision, to the High Court for a review of the

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<sup>25</sup> Joubert (n 11 above).

<sup>26</sup> Brink (n 1 above) 693.

<sup>27</sup> Joubert (n 11 above).

<sup>28</sup> Brink (n 1 above) 693.

<sup>29</sup> Joubert (n 11 above).

<sup>30</sup> Formerly called 'the Board' see para 5.2.1

<sup>31</sup> Secs 40 – 63 Anti-Dumping Regulations (n 9 above).

<sup>32</sup> Secs 44 48, 53, 60, 64(a-c) & 46 Anti-Dumping Regulations (n 9 above).

determination, recommendation or decision in question.<sup>33</sup> The High Court is also empowered, in the exercise of its review jurisdiction, ‘to make an order for the payment of costs against any party, or against any person who represented a party in the proceedings, according to the requirements of the law and fairness.’<sup>34</sup> Whilst the decision of the Commission may be reviewed by the High Court, an appeal against the decision of the High Court in respect of matters within its jurisdiction under section 46 lies to the Supreme Court of Appeal, or the Constitutional Court with leave to appeal, subject to the respective leave of the Courts.<sup>35</sup> The Magistrate Courts also play a significant role in the anti-dumping judicial system of South Africa as they have jurisdiction to impose any penalty provided for under the ITA Act.<sup>36</sup>

In the recent case of *ITAC v SCAW*,<sup>37</sup> both the High Court and the Constitutional Court of South Africa were invited to give legal interpretation of the duration and procedure for reviewing anti-dumping duties. In this case, the Minister of Trade and Industry (Minister) had in 2002, imposed anti-dumping duties on stranded wire, rope and cable of iron or steel products which originated from foreign producers. This decision was based on the recommendation made by the Board on Tariffs and Trade (now ITAC). SCAW, the respondent, is the manufacturer of steel products in South Africa. In 2007, before the expiration of the five year period of the duties imposed, SCAW brought an application to ITAC for the initiation of a ‘sunset review’ with the aim to keep the duties in place.

In 2008, ITAC recommended to the Minister that anti-dumping duties imposed on Bridon UK’s products be terminated. SCAW, unsatisfied with the recommendation, brought an action before the High Court seeking and was granted the following reliefs: 1. an order stopping ITAC from transmitting its recommendation to the Minister for consideration, pending the final determination of SCAW’s application for the review of the recommendation. 2. an order preventing the Minister and the Minister of Finance from performing their respective obligations in respect of the recommendation.

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<sup>33</sup> Sec 46 International Trade Administration Act (n 8 above).

<sup>34</sup> Sec 46(3) International Trade Administration Act (n 8 above).

<sup>35</sup> Sec 47(1) International Trade Administration Act (n 8 above).

<sup>36</sup> Sec 56 International Trade Administration Act (n 8 above).

<sup>37</sup> *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2010 ZACC 6.

ITAC appealed the decision of the High Court at the Constitutional Court. The Constitutional Court held unanimously as follows:<sup>38</sup>

[T]hat the interim interdict was final in effect and that it caused irreparable harm. The interests of justice therefore dictated that the interim interdict be appealable... that leave to appeal against the interim interdict should be granted as it implicated questions of separation of powers and South Africa's international trade obligations, issues which are not the subject of SCAW's pending review application in the High Court... that decisions regarding the setting or lifting of anti-dumping duties are patently within the domain of the executive, and that the interdict prevented the Ministers involved from performing their legislative functions. It was inappropriate for the High Court to grant the interdict, because it improperly breached the doctrine of separation of powers.

This case clearly demonstrates the vibrant understanding and active participation of the courts and the domestic industry in South Africa in domestic and international trade-related issues.

## **5.6 Studies and publications**

Research and publications also played a significant role in South Africa's anti-dumping system. According to Brink, the periods 1992 through 2004 witnessed a significant number of studies and publications on South Africa's anti-dumping system. These included research studies carried out by university students, two specific textbooks dealing on different countries' anti-dumping systems and each having a chapter on the South African anti-dumping regime, a textbook specifically dealing dedicated to discussions on the South African system, newspaper articles, internal training documents put together by the Directorate. He further observed that, several legal opinions were advanced to the Board, upon its request, from the State Attorney with regards to questions bearing on the legal status of international law in South African public law, application of provisional measures, confidentiality and other related issues. Brink notes that, these legal opinions may have been sought by the Board upon its realization that its procedures were not fully in line with local and international obligations and thereby making concerted efforts to bring them into conformity.<sup>39</sup>

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<sup>38</sup> Per Moseneke DCJ in *ITAC v SCAW* (n 37 above) 3.

<sup>39</sup> Brink (n 1 above) 733-736.

## 5.7 Engaging the WTO technical assistance and capacity building initiatives

The WTO offers a number of trade-related technical assistance to its Members, particularly developing and least-developed participants. These initiatives are in response to the Doha Ministerial which declared as follows:<sup>40</sup>

We confirm that technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system, and we welcome and endorse the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration. We instruct the Secretariat, in coordination with other relevant agencies, to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty reduction. The delivery of the WTO technical assistance shall be designed to assist developed and developing countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system.

The Rules Division of the WTO performs a strategic role in ensuring effective functioning and facilitation of ‘new and on-going negotiations and consultations, monitoring and actively assisting in the implementation of WTO agreements in the areas of anti-dumping, subsidies and countervailing measures, safeguards, trade-related investment measures...’<sup>41</sup>

The Rules Division provides support to – the Negotiating Group on Rules, the Committee on Trade-related Investment Measures, the Permanent Group of the Subsidies Agreement, the Committee on Anti-Dumping Practices, etc.<sup>42</sup>

More importantly, the South African anti-dumping system has benefitted significantly from the technical assistance of the Rules Division of the WTO in bringing its procedures and practices in line with the ADA.<sup>43</sup>

## 5.8 The Trade Law Centre (TRALAC)

As part of efforts to building trade-related capacity for in east and southern African, Tralac was established in 2002 to enhance trade law and policy capacity in the region. The organization consists of a team of trade law experts and economists, with functional

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<sup>40</sup> Doha WTO Ministerial adopted 14 Nov., 2001: Ministerial Declaration para 38 [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm#cooperation](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#cooperation) (accessed 1 May 2014).

<sup>41</sup> [http://www.wto.org/english/thewto\\_e/secret\\_e/div\\_e.htm#rules](http://www.wto.org/english/thewto_e/secret_e/div_e.htm#rules) (accessed 1 May 2014).

<sup>42</sup> As above.

<sup>43</sup> See para 5.3 on ‘Training and learning from other jurisdictions.’

professional staff and a network of associates to complement its capacity-building projects. To expand the reach and impact of Tralac's work, it collaborates with a number of global and regional organizations. Whilst the organization operates on the principles of good governance, its Board effectively provides oversight functions.<sup>44</sup>

## **5.9 Conclusion**

This chapter has shown that there were a number of important landmarks that contributed, at varying degrees, to the current development of the South African anti-dumping system. From the legislative and institutional changes to training and making concerted efforts to learning from other jurisdictions to engaging stakeholders at the National Economic Forum to reviews by the Commission and the Judiciary and to continuous studies, research and publications South Africa has shown that developing countries and in particular Nigeria, can learn from these experiences and adopt and implement a national legislation on anti-dumping that conforms with the WTO ADA.

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<sup>44</sup> Trade Law Centre <http://www.tralac.org/about-us/> (accessed 5 May 2014).

## Chapter 6

### Conclusion and Recommendations

#### 6.1 Summary of findings

This research started from the hypothesis that whilst Nigeria's Anti-Dumping and Countervailing Bill, 2010 may generally be regarded as a positive legislative intervention, to a large extent, the proposed regulatory regime falls short of consistency with the spirit, object and purport of the WTO Anti-Dumping Agreement. The aim of the study was to highlight areas of irregularities and inconsistencies of the Bill with the existing WTO jurisprudence with a view to proposing substantive and procedural provisions that should be redrafted to bring it in line with Nigeria's international obligations in terms of Article VI of GATT 1994 and the Anti-Dumping Agreement.

In order to substantiate the above reservations, this research used as its basis some discussions on the substantive and procedural guidelines of the WTO Agreements on anti-dumping. With the aid of selected WTO Reports and Appellate Body Reports, this research provided significant discussions on concepts and terms such as: like product, domestic industry and industry standing, interested parties, normal value, domestic sales value, constructed normal value, export price to a third country, non-market economy normal value, non or partial cooperation by exporters, export price, constructed export price, price comparison, zeroing, adjustments to normal value and export price, margin of dumping, single and multiple product types, sampling, material injury, causal link, initiation, notification and transmission of application, period of investigation, confidentiality, on-the-spot verifications, oral hearings, facts available, anti-dumping measures, retroactivity decisions, lesser duty rule, reviews, refund applications and third country dumping.

This research proceeded to un-pack the irregularities and inconsistencies contained in the proposed Anti-Dumping and Countervailing Bill, 2010.



## **6.2 Conclusion**

It highlighted definitional gaps, misconstructions and incoherencies on such issues as - anti-dumping measures, dumping, export price, interested parties, related parties, normal value, initiation and investigation, committee standing, retroactivity, refund applications, offences relating to information and the advisory committee. This study also showed a number of important landmarks that contributed to the development of South Africa's anti-dumping system and how other African countries in particular Nigeria, can learn from these experiences to adopt and implement a national legislation on anti-dumping that conforms to the WTO Anti-Dumping Agreement.

In view of the identified flaws in the Anti-Dumping and Countervailing Bill 2010, the writer makes the following recommendations on the substantive and procedural issues as well as the institutional framework proposed by the Bill.

## **6.3 Recommendations**

### **6.3.1 Capacity building**

Drawing from the experiences of South Africa, capacity building depends on a number of factors – training and learning from other jurisdictions, studies and publications and taking advantage of WTO technical and capacity building initiatives. Central here, is cooperation and partnership between Nigeria and South Africa's Trade Law Centre (TRALAC) which is a capacity-building organization geared towards developing trade-related capacity in the eastern and southern regions. Interestingly, TRALAC has a number of trade law experts and works with governments and non-state actors as well.

Nigerian students with interest in global trade and investment should be encouraged to undergo studies like the one presented by the Centre for Human Rights, South Africa on International Trade and Investment Law in Africa and be fully funded by the Nigerian government. Their subsequent training and internships at the WTO in Geneva and other trade law centres across the globe should be facilitated by the federal government through its Ministry of Trade and Industry.

The inconsistencies in the Nigerian Bill regarding the substantive, procedural and institutional irregularities are traceable to the non-engagement and consultation with experts in the field of trade remedies implementation in its preparation.

### **6.3.2 Coordination between the government and private sector**

There can hardly be any progressive implementation of a national legislation on anti-dumping without purposeful consultation between government and the private sector (domestic producers and importers). A review similar to the one undertaken in 1994 by NEF in South Africa is urgently recommended for Nigeria. This is to ensure proper consultation between government and stakeholders to ensure that their concerns are addressed in adopting the new trade policy.

### **6.3.3 Infrastructural development - Power project**

The role of technology infrastructure in the economic and industrial development of a country cannot be overemphasized. Dumping affects product competitiveness but a lack of technology infrastructure and in particular, power supply compounds this challenge. To complement the effort of legislation on dumping, infrastructural development is crucial for industrial growth and sustainable technological development. Nigeria currently generates 3, 000 MW as against over 10, 000 MW required to drive significant economic and industrial growth.<sup>1</sup> Nigeria has in rich abundance various energy sources such as – coal, natural gas, solar energy and crude oil. Liberalizing the power sector is crucial to restoring the competitiveness of the manufacturing and industrial sectors in Nigeria.

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<sup>1</sup> EE Okafor *Development crisis of power supply and implications for industrial sector in Nigeria* (2008) <http://www.krepublishers.com/02> (accessed 15 May 2014).

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