UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

THE PROCEDURAL ASPECTS OF SOUTH AFRICA'S ANTI-DUMPING LEGISLATION AND ITS COMPATIBILITY WITH THE WORLD TRADE ORGANISATION ANTI-DUMPING AGREEMENT

Mini dissertation submitted in partial fulfilment of the requirements of the Degree LL.M (International Trade and Investment Law in Africa)

Faculty of Law, Centre for Human Rights

University of Pretoria

By:

Malebo Ngobeni

(S/n21824836)

Supervisor: Dr Olufemi Oluyeju

08 October 2021

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 fulfilment of the requirements for the award of the LLM Degree in International Trade and Investment Law in Africa.

Malebo Ngobeni

08 October 2021

ACKNOWLEDGEMENT

The completion of this mini thesis would not have been possible without the grace, strength and the love of God, glory be to God and the Almighty Jesus Christ. I dedicate this research to my late Father, Mr Samuel Ngobeni, wish you were alive to witness my achievements, may your soul continue to rest in peace. Thanks to my mom, Catherine Ngobeni, for your love, support and for motivating me to pursue another degree after LLB, most importantly, for keeping me in your prayers. To my sister, Thabang Prudence Ngobeni, thank you for your love and support. Thank you to my TILA Class of 2021 friends for your encouragement and support throughout the programme. To my research supervisor, Dr Olufemi Oluyeju, thank you for your guidance and for proofreading this work. Nonetheless, there is no research without the researcher, I would like to thank myself for my perseverance and pushing it through against all odds.

List of Acronyms

ADA	Anti-Dumping Agreement
ADR	Anti-Dumping Regulations
CADP	Committee on Anti-dumping Practices
CET	Common External Tariff
EU	European Union
GATT	General Agreement on Tariffs and Trade
ITA	International Trade Act
ITAC	International Trade Administration Commission
TRALAC	Trade Law Centre
PAIA	Promotion of Access to Information Act
SACU	Southern African Custom Union
USA	United States of America
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)

The Agreement Establishing the World Trade Organization 1995

The General Agreement on Tariffs and Trade 1994

Statutes, regulation, and case law report

Constitution of the Republic of South Africa, 1994

Customs Tariffs Act 26 of 1914

Board of Trade and Industries Act 19 of 1944

Customs and Excess Act 91 OF 1964

Board on Tariffs and Trade Act 107 OF 1986

Board of Trade and Industries Amendment Act 60 of 1992)

Board of Tariffs and Trade Amendment Act 39 of 1995

International Trade Administration Act 71 of 2002

The International Trade Administration Commission: Anti-Dumping Regulations 2003

Promotion of Access to information Act 2 of 2000

Table of Contents

ABSTRACT

Trade remedies are actions taken by states to safeguard their domestic industries. The anti-dumping agreement is a documented consensus between WTO member states that provides anti-dumping rules and procedures for investigations of dumping cases. South Africa is one of the signatories to the WTO which makes the country bound by the agreement even if it not been promulgated into it national laws. The country has been the major user of the anti-dumping laws since 1914 and has amended its anti-dumping legislation overtime. However, its anti-dumping procedural aspects have been challenged in WTO trade dispute consultations by few states. The complainants argued that South Africa incorrectly applied its laws and that some provisions in its anti-dumping provisions were incompatible with the World Trade Organisation guidelines. To date, anti-dumping procedure in South Africa is regulated by the International Trade and Administration Act 71 of 2002 which is said to be read in conjunction with the Anti-dumping regulations of 2003.

Chapter 1

Overview of the research

1. Introduction

Dumping in commercial terms and refers to a situation whereby a product is exported at a price lesser than its domestic price.[1] This amounts to price discrimination and unfair trade competition. As a result, states establish anti-dumping policies and laws in order to protect their domestic industries against imports causing injury. This protection is referred to as trade remedies.[2] The World Trade Organization (WTO) Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) of 1947, known as the 'Anti-dumping Agreement (AD Agreement), regulate anti-dumping measures and procedures under the multilateral trading system.[3] The GATT is a multilateral agreement between its member states which was signed on 30th October 1947 and came into force on the 1st January 1948.[4] Its main aim is to promote fair trade competition by eliminating international trade barriers such as tariffs, quotas and subsidies while at the same time boasting economies of developing countries and liberalising trade.[5]

The AD Agreement sets out guidelines and procedures that must be followed by WTO State parties when dealing with anti-dumping investigations.[6] South Africa is one of the State parties to the AD Agreement and therefore bound by it. Both the AD Agreement and the GATT 1994 are binding on South Africa under international law but do not form part of South African domestic law as they have not been enacted as part of South Africa's municipal laws.[7] Although not compulsory, Article VI of the GATT permits states to establish anti-dumping measures to protect their domestic industries.[8] The first South African anti-dumping legislation was implemented in 1914 making South Africa the first WTO member to enact Anti-dumping laws after Canada, Australia and New Zealand, and the first country in Africa to enact Antidumping

[1]C Vinti '"Dumping" and the Competition Act of South Africa' (2019) 52 *De Jure Law Journal* at 207.
[2]G Brink 'On "Dumping" and the Competition Act of South Africa: No "double remedy"' (2021) 54 *De Jure Law Journal* at 3.
[3] Brink (n 2 above) 2.
[4] From the GATT to the WTO: "A Brief Overview" available at *https://guides.ll.georgetown.edu/c.php?g=363556&p=4108235* (accessed 25 May 2021).
[5]From the GATT to the WTO: "A Brief Overview" available at *https://guides.ll.georgetown.edu/c.php?g=363556&p=4108235* (accessed 25 May 2021).
[6]S Khanderia 'The determination of injury in South African anti-dumping investigations: recent approaches' (2016) 49*The Comparative and International Law Journal of Southern Africa*at285.
[7]The Constitution of the Republic of south Africa, 1996, Sec 233.
[8] Article VI: 5 of the GATT

laws.[9] Before 1995, South Africa had already investigated 883 dumping cases.[10] Various anti-dumping legislations were enacted and reformed over the years to protect local industries in South Africa from dumping.

Presently, the legislation governing anti-dumping in South Africa is the International Trade and Administration Act (ITAA) read together with the Anti-Dumping Regulations (ADR) of 2003. The ITAA sets out the guidelines on the administration of Anti-dumping measures, while the ADR provides detailed guidelines and procedures of the initiation of dumping investigation and implementation of anti-dumping measures. The ITAA established the International Trade and Administration Commission (ITAC) to deal with Anti-dumping complaints and investigations, and thereafter give a recommendation to the Minister of Trade and Competition. Prior the ITAC, anti-dumping complaints and investigations were conducted by the Board of Trade and Industry, which was established by the Board of Trade and Industries Act (Act 19 of 1944) and repealed by the ITAA.[11]

1.1.Research problem

South Africa has been a major user of anti-dumping measures for over 100 years. However, many writers have challenged South Africa's Anti-dumping laws, specifically with regards to their procedural compatibility with the AD Agreement and their overall effectiveness. Many dumping investigations have been conducted in South Africa over the past despite these anti-dumping laws being in place. As a result, the laws have been amended over the years for South Africa's anti-dumping legislation to be compatible with the WTO Anti-Dumping Agreement. In South Africa, the ITAA established the International Trade and Administration Commission (ITAC) to deal with procedural aspects of dumping cases and investigations. The ITAC has heard over 1000 dumping investigations.[12]

It is however concerning as to whether South Africa is compatible with the AD Agreement in terms of its substantial laws to determine dumping, application of the law, and procedural aspects such as the initiation stage, establishing the existence of material injury, determination

[9] G Brink 'Hundred years of anti-dumping in South Africa' available at *https://repository.up.ac.za/bitstream/handle/2263/56637/Brink_One_2015.pdf?sequence=1&isAllowed=y* (accessed on the 04 September 2021).
[10] Brink (n 9 above).
[11] An overview of ITAC available at *http://www.itac.org.za/pages/about-itac/an-overview-of* (accessed 25 May 2021).
[12] Brink (n 9 above).

of causal relationship up until the imposition of the anti-dumping duties. This problem was raised in 2012 in the case of *South Africa-Brazil Frozen Chicken* WTO trade dispute where South Africa accused Brazil of dumping chickens in South Africa and alleged that it was affecting South Africa's chicken poultry.[13] Brazil took the matter to the WTO for consultation where it raised the question of whether South Africa's imposition of anti-dumping duties is consistent with its the AD Agreement and the GATT.[14] Brazil argued that South Africa's determination of injury, proving of causal link, evidence produced, and the investigation process is inconsistent with South Africa's obligation under Article VI of the GATT, Agreement on Implementation of the Anti-dumping Agreement (AD Agreement). This case demonstrates the fact that South Africa's anti-dumping legislations and procedure for dumping investigations are concerning and consists of irregularities in certain aspects of the implication of the dumping investigation procedures, which result in inconsistencies with the Anti-Dumping Agreement and causes serious implications in practice.[15]

1.2.Research aims and objectives

This research seeks to establish whether South Africa's anti-dumping legislations are compatible with the WTO Anti-dumping agreement, specifically in the substantial and procedural aspects from the initiation stage up until the imposition of final anti-dumping duty and the review stage. It will show provisions whether the South African anti-dumping legislations are similar to the AD Agreement, and points out instances where the South African anti-dumping legislations are incompatible with the AD Agreement, and most importantly, it will point out practical cases where South Africa's anti-dumping procedural law was challenged.

To arrive at the research findings, this research will first discuss the history of anti-dumping laws in international context and thereafter discuss the history of Anti-dumping laws in South African context. Furthermore, this research will establish the meaning and determination of dumping under the AD Agreement and establish the meaning and determination of dumping

[13] WTO Panel Report *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil* 73 WT/DS439/1 (25 June 2012) (*South Africa – Poultry*).
[14]WTO Panel Report *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil* 73 WT/DS439/1 (25 June 2012) (*South Africa – Poultry*).
[15] WTO Panel Report *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil* 73 WT/DS439/1 (25 June 2012) (*South Africa – Poultry*).

under the South African anti-dumping legislation and compare the two to point out similarities and inconsistencies. Moreover, the research will get to the core of the topic whereby South African anti-dumping procedural law will be compared to the AD Agreement to point out where South Africa's anti-dumping law is irregular in terms of anti-dumping procedures and where it is on par with the AD Agreement. Nonetheless, the last part of this research will highlight findings and give recommendations to South Africa in aspects where it appears to be irregular.

1.3.Research question(s)

This research paper seeks to answer the main question of whether South Africa's anti-dumping legislations are consistent with the AD Agreement in respect of anti-dumping procedural aspects, from the initiation stage until the imposition of final anti-dumping duties stage and reviews.

In answering the main research question, the following sub-questions will also be answered-

i. When and where did anti-dumping law begin?
ii. What determines dumping under AD Agreement?
iii. What determines dumping under South African Anti-Dumping Legislation?
iv. What are the procedural requirements for dumping investigations under the AD Agreement and the South African legislation and which aspect is South Africa's procedural aspect compatible with the AD Agreement?

1.4.Thesis statement

This study seeks to critically analyse and point out that while South Africa's anti-dumping substantial laws and procedures appear to be irreconcilable with AD Agreement in practice, they are not wholly incompatible and are compliant with the objectives of the AD Agreement. It seeks to point out that South Africa's anti-dumping procedural laws are similar to the AD Agreement in certain aspects, and where there are irregularities, it does not render them wholly inconsistent with the AD Agreement as they are largely compliant with the AD Agreement.

1.5.Significance of research

This research will provide South Africa with recommendations that can be used to resolve the on-going dumping cases in South Africa. The issue of dumping in South Africa is a recurrent concern. Although its anti-dumping legislation has been in existence for over a decade, there are still dumping cases reported and investigated almost every year. It is worrisome that dumping is still a problem in South Africa despite the long existence of anti-dumping laws. Very few authors have written about this problem and the existing literature appears to be reliant on old sources and legislation which has been repealed. As a result, this paper will contribute to recent South African jurisprudence on South Africa's anti-dumping topic.

1.6.Research methodology

This paper relies solely on desktop-study review and library resources. Reference has been made from both primary and secondary sources such as treaties, articles, cases, legislation, books, journals, published and unpublished theses as well as internet websites, to arrive at a conclusion of whether South African anti-dumping legislation is consistent with the procedures set out in the AD Agreement. This paper follows both descriptive and prescriptive approaches to describe procedural aspects of the WTO Anti-dumping guidelines and prescribe how the guidelines ought to be used in terms of the AD Agreement, from judicial precedents and practical experiences in South Africa. An analytical approach will be used to analyse whether South Africa's anti-dumping investigation procedure is compatible with the WTO anti-dumping guidelines. A qualitative research approach is adopted throughout the paper which consists of already existing data.

2. Chapter overview

This research seeks to establish whether South Africa's anti-dumping procedural law aspects are compatible with the World Trade Organization procedures. It gives a clear assessment of how and where the South Africa's anti-dumping procedural law corresponds with the World Trade Organisation procedure, where and how it is incompatible and the recommendations thereof. This is analysed as follows:

Chapter 1

Introduces the research topic. It consists of the research problem, research question, research methodology, justification of study and literature review.

Chapter 2

This chapter provides a history of the establishment and development of anti-dumping law from the international perspective and South African perspective.

Chapter 3

This chapter seeks to analyse the definition of dumping under the Anti-dumping Agreement.

Chapter 4

This Chapter seeks to critically analyse the definition of dumping in the context of South African anti-dumping legal frameworks.

Chapter 5

In this chapter, a critically analysis of anti-dumping procedures under both the South African anti-dumping legislations and the World Trade Organization Anti-dumping Agreement is done. It makes a comparison between the South African anti-dumping procedural provisions and the WTO Anti-Dumping Agreement provisions, to establish whether the South African Anti-dumping procedures are consistent with the AD Agreement.

Chapter 6

Briefly discusses the consequences of dumping and anti-dumping measures as well as proffer findings and recommendations as to how South Africa can improve.

Chapter 2

History of Anti-dumping Law

2.1. Introduction

The implementation of trade protection measures began in the nineteenth century, when the United States of America implemented its first anti-dumping law due to the growth of monopoly in the market industry and unfair competition.[16] In the twentieth century, Germany faced a rise in dumping from its domestic firms.[17] Cartels were allowed to operate in Germany and the government of Germany encouraged them to take over in foreign markets and use predatory dumping[18] This led to the implementation of anti-dumping laws by affected countries to protect its markets.[19] Canada followed this principle of trade protection through its implementation of the first Canadian Anti-dumping law in 1904 due to dumped steel from United States.[20] New Zealand implemented its first Anti-dumping law in 1905, thereafter in 1906 Australia implemented its first anti-dumping law, followed by South Africa in 1914.[21] As a result, South Africa became the first country in Africa to implement anti-dumping law.[22] Post-World War II, countries such as Australia, Brazil, Canada, USA, China, France, India, Belgium, Netherlands, New Zealand, Czechoslovakia, United Kingdom and South Africa, met to negotiate the establishment of the General Agreement on Tariffs and Trade, the GATT.[23] Several countries across the world continued to hold conferences in order to reach a general agreement on the implementation of anti-dumping law.[24]

---

[16] Govindarajan M **"**History of anti-dumping laws" available at *https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=6244* (accessed 28 September 2021).
[17] (Tao (n20 above) 32.
[18] Tao (n20 above) 32.
[19] Tao (n20 above) 32.
[20] Tao (n20 above) 32.
[21] Tao (n20 above) 32
[22] Brink (n9 above).
[23] Govindarajan M **"**History of anti-dumping laws" available at *https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=6244* (accessed 28 September 2021).
[24] Govindarajan M **"**History of anti-dumping laws" available at *https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=6244* (accessed 28 September 2021).

2.2.The establishment of the GATT

During 1946 to 1947, countries reached a general agreement for the implementation of antidumping law, based on the American working charter known as the 'Suggested Charter for an International Trade Organization of the United Nation.'[25] The countries were concerned with the anti-dumping provisions in the Charter as it opened up for possible abuse of anti-dumping laws.[26] As a result, the focus for the GATT was on the definition of price discrimination;[27] on the limitation of anti-dumping duty to the margin of dumping;[28] and on proving 'material injury' caused by the allegedly dumped product.[29] Several countries continued to hold conferences after the general consensus for a need to establish anti-dumping law, which led to the establishment of anti-dumping codes during 1967 and 1979.[30]

2.2.1. The Dillon Round 1960

In 1958, the 'Under-Secretary of the State for Economic Affairs', Douglas C. Dillon, suggested that there was a need for a new round to negotiate the establishment of multilateral tariff. The round was named after his name, the Dillon Round, which took place between 1960 to May 1962.[31] The purpose of the Dillon round was to reduce trade discrimination of the European Economic Community (EEC) and to decrease barriers to international trade. Most importantly, the new round was necessary for the enforcement of the primary role of the GATT and multilateral system[32] However, the Department of Agriculture objected to the negotiations.[33] At that time, the United State faced a decrease in the balance of payment and trade surplus. As a result, Washington supported the need for a new Round to hep United States to improve its trade surplus and balance of payments.[34] The CET accepted the suggestion by Washington to

[25] JJ Barceló III "A History of GATT Unfair Trade Remedy Law--Confusion of Purposes" (1991) *Cornell Law Faculty Publications* available at https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1299&context=facpub (accessed 28 September 2021).
[26] Barceló III (n45 above) 316.
[27] Barceló III (n45 above) 317.
[28] Barceló III (n45 above) 317.
[29] Barceló III (n45 above) 317.
[30] Barceló III (n45 above) 317.
[31] L Coppolaro Trade and Politics across the Atlantic: the European Economic Community (EEC) and the United States of America in the GATT Negotiations of the Kennedy Round (1962-1967) (2006) 23 *Cambridge University Press* 35
[32] Coppolaro (n51 above) 34.
[33] Coppolaro (n51 above) 34.
[34] Coppolaro (n51 above) 34.

establish a new Round. However, the CET saw that the new Round would not do any justice to reduce tariff duties. Around November 1958, countries such as Paris, Germany and Benelux countries started to support the formation of the multilateral negotiations.[35] Around the 1st of September 1960 the Dillon Round was officially opened and countries began to negotiate the multilateral system, until the 7th of March 1962.[36]

2.2.2. The Kennedy Round 1967

During 1963 to 1967, the antidumping laws were put on the negotiation table for negotiations of prospective non-tariff barriers to trade.[37] Few concerns were raised with regards to the antidumping laws on the negation table, which includes: (1) the Canadian law lacked the test for calculation of injury;[38] (2) the test for material injury, industry and causation lacked delph which would lead to potential abuse of anti-dumping laws;[39] the procedural delays in administration, uncertainties and arbitrariness would lead to potential abuse of anti-dumping laws.[40] The Canadian law problem was settled in the Kennedy Round by Canada's commitment to follow the Anti-dumping Code and to add the injury test in its domestic anti-dumping law.[41]The second and third problem were resolved through the guarantee of proper notice and procedural fairness, and through the insertion of rules and standard for determination of dumping, material injury and causation.[42] In 1967 the Code was finalised and implemented in Europe only.[43]

2.2.3. The Tokyo Round 1979

In 1974 to 1979 the negotiators agreed to establish a new Anti-dumping Code to amend few provisions in the 1967 Anti-dumping Code.[44] Among the few provisions which required amendments in the 1967 Code includes the amendment of the provision for determining

[35] Coppolaro (n51 above) 35.
[36] Coppolaro (n51 above) 39.
[37] Barceló III (n45 above) 317.
[38] Barceló III (n45 above) 317.
[39] Barceló III (n45 above) 317.
[40] Barceló III (n45 above) 317.
[41] Barceló III (n45 above) 317.
[42] Barceló III (n45 above) 317.
[43] Barceló III (n45 above) 317.
[44] Barceló III (n45 above) 318.

causality, known 'principal cause' formula, to 'causing' test.[45]Another amendment which was made is the antitrust provision in the 1967 Code which mandated anti-dumping officials to investigate the existence of 'restrictive business practices' in the domestic industry.[46] The 1979 Code changed this provision to include an outline of injury indicators namely the decrease in output, sales, market share, profits, and more, to safeguard the domestic industry.[47]The 1979 Code was implemented and used by countries such as United States, Canada, Australia and the Europe.[48]

2.2.4. The Uruguay Round of Multilateral Trade Negotiations 1994

The year 1994 marks the most successful year of the World Trade history and GATT negotiations. During 1986 to 1994, the countries met to negotiate the establishment of Article 6 of the GATT, Agreement on Implementation of the Anti-dumping Agreement.[49]Many countries had still not implemented the 1979 Code into their domestic anti-dumping law as they were in disagreement with some provisions in the 1979 Code. However, after the implementation of the GATT Article 6, countries such as the United States implemented the Anti-dumping Agreement into its domestic anti-dumping law, known as the Uruguay Round Anti-dumping Agreement Act of 1994.[50] On the same year the WTO Agreement was concluded which consisted of six Understandings and Multi-integral Agreements.[51] However, the GATT 1994 and the GATT 1947 are 'legally distinct' which means that the GATT 1994 operates separately from the GATT 1947. As a result, when a country revokes its alliance from the GATT 1947 to join the WTO, it did not have any effect to other contracting parties that was not yet a member of the WTO.[52]

The most important scope of the Uruguay Round includes the 'Agreement Establishing the World Trade Organisation.'[53] The WTO replaced the intuitional function of the GATT 1947. A single institutional structure was introduced by the WTO Agreement and made up of: (1) 'GATT 1994,'[54] (2) 'a series of Understandings that amend GATT 1947,'[55] and (3)

[45] Barceló III (n45 above) 318.
[46] Barceló III (n45 above) 318.
[47] Barceló III (n45 above) 318.
[48] Barceló III (n45 above) 318.
[49] Tao (n20 above) 39.
[50] Tao (n20 above) 39.
[51] Tao (n20 above) 46.
[52] Tao (n20 above) 47.
[53] Tao (n20 above) 47
[54] Tao (n20 above) 47.
[55] Tao (n20 above) 47.

'multilateral trade agreements.'[56] The WTO Agreement contains six annexes, which are: Annex 1A, B, and C, Annex 2, Annex 3, and Annex 4. Annex 1A to 3 are binding to all WTO members, while Annex 4 agreements are independent agreements and only binding on members that accepted them.[57] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) is contained in Annex 1A, known as the Multilateral Agreement on Trade in Goods, General Agreement on Tariffs and Trade 1994.[58]

2.3.Evolution of South Africa's anti-dumping legislation

South Africa's anti-dumping law has been in existence since 1914.[59] As noted earlier on, South Africa is a member of the WTO and has signed the AD Agreement, making the country obligated to follow the international trade guidelines.[60] Although not promulgated into South Africa's national law, the Constitution of the Republic of South Africa clearly states that when interpreting legislation, the court must consider international law.[61] The first South African anti-dumping legislation was implemented in 1914 making South Africa the first WTO member to enact Anti-dumping laws after Canada, Australia and New Zealand, and the first African country to enact Anti-dumping laws.[62] Before 1995, South Africa had already investigated 883 dumping cases.[63] Various anti-dumping legislations were enacted and reformed over the years to protect local industries in South Africa from dumping. Article VI of the GATT permits states to establish anti-dumping measures to protect their domestic industries.[64]

[56] Tao (n20 above) 47.
[57] Overview of the WTO agreements available at *https://www.meti.go.jp/english/report/downloadfiles/2011WTO/2-0Overview.pdf* (accessed 29 August 2021).
[58] Overview of the WTO agreements available at *https://www.meti.go.jp/english/report/downloadfiles/2011WTO/2-0Overview.pdf* (accessed 29 August 2021).
[59] G Brink 'One hundred years of anti-dumping in South Africa' (2015) 49 *Journal of World Trade* at 1.
[60] ITAC: 'Trade Remedies' available at *http://www.itac.org.za/pages/services/trade-remedies* (accessed 29 August 2021).
[61] The Constitution of the Republic of south Africa, 1996, Section 233.
[62] Brink (n 9 above) 1.
[63] Brink (n 9 above) 1.
[64] Article VI: 5 of the General Agreement on Tariffs and Trade.

2.3.1. Customs Tariffs Act (Act 26 of 1914)

The Customs Tariffs Act, herein after referred to as Act 26 of 1914, was enacted in 1914. It became the first law in South Africa to regulate dumping and countervailing duties. Prior to this Act, there was no legislation governing dumping law in South Africa.[65] Act 26 of 1914 authorised the Governor-General to impose duties on import goods instances where selling price of the similar goods in the exporting country was lesser than the price of the domestic market in the import country.[66] The country alleged to have been dumped was given six weeks' notice before the imposition of the measure.[67] It further provides for Schedules and outlines how Tariffs of Custom Duties are charged on goods and according to Class of the goods as outlined in the Schedules. The 'First Schedule' provides for special tariffs on first class goods such as: Corn and grain, Eggs, Fruits, Beer, Fish, Potatoes, Pickles and many more.[68] The 1914 Act was operational for a period of about 8 years before it became repealed by the Board of Trade and Industries Act of 1944.[69]

2.3.2. Board of Trade and Industries Act (Act 19 of 1944)

The Board of Trade Industries Act was established and approved on the 3rd of April 1944.[70] It succeeded the Customs Tariffs Act in 1923. It established the Board of Trade and Industries to liaise with the Minister and give advice to the Government with regard to all matters relating to 'the development of the economic resources of the Union and its trade and industries.'[71] Section 9 of the Act provides for Powers and Functions of the Board.[72] Act 19 of 1944 repealed all the previous Acts governing trade.

[65] Tao (n20 above) 51.
[66] Tabane (n34 above) 6.
[67] C De Lange 'An Overview of the History of Dumping in South Africa over the past one hundred years' (2014) *tax talk* 44-46.
[68] Customs Tariffs Act 26 of 1914, First Schedule.
[69] ITAC: Trade Remedies available at *http://www.itac.org.za/pages/services/trade-remedies* (accessed 29 August 2021).
[70] Board of Trade and Industries Act 19 of 1944, Preamble.
[71] Board of Trade and Industries Act 19 of 1944, Section 9.
[72] Act 19 of 1944 (n20 above) Sec 9.

2.3.3. Customs and Excess Act (Act 91 OF 1964)

The Customs and Excess Act came into effect in January 1965. Its main objective is to 'to provide for the levying of customs and excise duties, the prohibition and control of the importation or manufacture of certain goods and for matters incidental thereto.'[73] It granted the secretary the powers and duties of administration Act and interpretation of the Schedules.[74] The Secretary was also responsible to instruct the Collector to collect duties.[75] Chapter 6 of the Customs and Excess Act provides for the regulation of Anti-dumping duties.[76] It introduces five anti-dumping duties that are subject to levies, which were: "ordinary anti-dumping duty", "bounty anti-dumping duty", freight anti-dumping duty", "exchange anti-dumping duty", and "sales anti-dumping duty."[77] The Customs and Excess Act was later amended in 1967.[78]

2.3.4. Board on Tariffs and Trade Act (Act 107 OF 1986)

The Board on tariffs and trade Act of 1986 (the 1986 Act) established the Board on Tariffs and Trade in 1986, to draft more strict policies that will ensure protection against dumping and to promote export through the development of 'structural adjustment programmes.'[79] The Board on Tariffs was responsible for Tariffs and Trade, and as a result a policy was drafted known as the 'Board's Guide to the Policy and Procedure with Regard to Action Against Unfair International Trade Practices: Dumping and Subsidised Export', to provide guidance to the Board on the issue of Dumping and subsidies relating to Exports.[80] Section 4 of the 1986 Act provides for functions of the Board which includes: 'to promote competition within the Southern African Custom Union (SACU); regulate import and exports; and to facilitating trade including entering into trade agreements and promoting trade relations.'[81] It repealed the Board of Trade and Industries Act, and it was later amended for several times up until it was succeeded by the Board of Tariffs and Trade Amendment Act 39 of 1995 (Act 39 of 1995). The first

[73] Customs and excess Act 91 of 1964, Preamble.
[74] Act 91 of 1964, Chapter II.
[75] Act 91 of 1964, Section 2.
[76] Act 91 of 1964, Chapter VI.
[77] Act 91 of 1964, Section 57.
[78] Customs and Excise Amendment Act of 1967.
[79] ITAC: 'An overview of ITAC' available at http://www.itac.org.za/pages/about-itac/an-overview-of (Accessed 29 August 2021).
[80] ITAC: 'An overview of ITAC' available at http://www.itac.org.za/pages/about-itac/an-overview-of (Accessed 29 August 2021).
[81] Board on Tariffs and Trade Act 107 of 1986, Section 4.

amendment was done in 1947, then another in 1969 and the other in 1974 before Act 39 of 1995 came in force.[82]

2.3.5. Board of Trade and Industries Amendment Act (Act 60 of 1992)

On the 6th of May 1992, the Government published a Gazette to amend the Board of Trade and Industries act 19 of 1944. The purpose of the amendment was to:

> Define or more closely define certain expressions; to alter the name of the Board; to further regulate the objects and functions of the Board; and to provide for the promulgation of certain regulations; and to provide for matters connected therewith.[83]

Section 1 (a) of Act 60 of 1992 amended the name of the Board from being called the 'Board for Trade and Industries' to being called the 'Board on Tariffs and Trade, as established in terms of Section 2 of Act 60 of 1992.'[84] Section 1(b) clearly defined the meaning of 'common customs area of the Southern African Customs Union.'[85] Section 4 of Act 107 of 1986 was amended to grant authority to the Board in that the Board can make decision and investigate dumping, engage in development of the industries and provide subsidies for exports without consulting the Minister, provided the SACU agrees to the decision.[86] However, the Board still required the Minister's authority with regard to investigations concerning other matters which affect the SACU and the Republic.[87]

2.3.6. Board of Tariffs and Trade Amendment Act (act 39 of 1995)

The Board of Tariffs and Trade Act was amended in 1995. The amendment to the Act includes the extension of definitions to include the definition 'dumping' which was defined as:

> The introduction of goods into the commerce of the Republic or the common customs area of the Southern African Customs Union at an export price which is less than the normal value of the goods.[88]

[82] Act 107 of 1986 (n31 above) Schedule.
[83] Board of Trade and Industries Amendment Act 60 of 1992, Preamble.
[84] Act 60 of 1992, Sec 1(a).
[85] Act 60 of 1992, Sec 1 (b).
[86] Act 60 of 1992, Sec 4 (a) (i) & (ii).
[87] Act 60 of 1992, Sec 4 (a) (iii).
[88] Board of Tariffs and Trade Amendment Act 39 of 1995, Sec 1.

Section 1 (a) and (b) further includes the extension of the definition of 'export price', and 'Normal value.'[89] Furthermore, Act 39 of 1995 extended its jurisdiction to include goods which are imported to the 'Republic or the Southern African Customs Union' and to all territories in the Republic of South Africa which are: 'the former Republics of Transkei, Bophuthatswana, Venda-and Ciskei'.[90]

2.3.7. International Trade Administration Act 71 of 2002 (ITAA)and the Anti-Dumping Regulations

Currently, anti-dumping in South Africa is regulated by the International Trade and Administration Act read together with Anti-dumping regulations. The ITAA was assented on the 22nd of January 2003.[91] The ITAA established the International Trade and Administration Commission to investigate dumping cases and to impose anti-dumping measures.[92] The ITAC has jurisdiction over all areas in the Republic. It acts as an independent body and is subject to the Constitution and as per the directions of the Minister of Trade and Industry or any Trade Policy Statement.[93] Anti-dumping duties, measures, custom duties, and countervailing measures are provided for in terms of Section 16 of the ITAA.[94]

2.4. Conclusion

This chapter discussed the development of anti-dumping law. It discussed when anti-dumping law was established, what led to its establishment, and how South Africa subsequently adopted Anti-dumping laws and what the to the amendments of its legislations over the years. From the above discussions, it is apparent that Anti-dumping law was first established in the United States before the use of anti-dumping law spread across the world. GATT negotiations took place from 1947 up until it was finalised in 1994. The Uruguay Round became the most successful round in the history of the World Trade Law and established the GATT 1994 which established the Agreement of the Implementation of Article VI of the GATT (Anti-dumping

[89] Act 60 of 1992, Sec 1 (a) & (b).
[90] Act 39 of 1995, Sec 1.
[91] International Trade and Administration Act 71 of 2002, Preamble.
[92] International Trade and Administration Act 71 of 2002, Section 16.
[93] Act 71 of 2002, Sec 2 (a).
[94] Act 71 of 2002, Sec 16.

Agreement).[95] South Africa is the first country in Africa to implement Anti-dumping law since 1914. Although not promulgated into South Africa's national laws, the country is bound by the anti-dumping agreement due to the provision of Section 233 of the Constitution of the Republic of South Africa. Currently, anti-dumping law and procedure in South Africa is regulated by the International Trade and Administration Act 71 of 2002 (ITAA), read together with its Anti-dumping Regulations of 2003 which gives detailed guidelines where there are inconsistencies in the ITAA.[96]

[95] Coppolaro (n51 above) 35.
[96] De Lange (n87 above) 46.

Chapter 3

Definition of dumping in terms of the Anti-Dumping Agreement

3.1 Introduction

WTO does not regulate dumping in itself; it only provides guidelines and regulates anti-dumping measures for States to implement in order to prevent dumping. Article VI of the 1994 General Agreement on Tariffs and Trade (GATT) and the Anti-dumping Agreement (AD Agreement) grants authority to States that their domestic industries are injured or threatened by the occurrence of dumping, to impose anti-dumping duties (ADDs) with the aim of protecting their domestic industries.[97] This action is referred to as 'national economic self-defence.'[98] The two provisions must be read together.[99] The main aim of multilateral trade system is to provide for trade liberalization and this includes provision of trade remedies to ensure fair trade competition. Thus, anti-dumping laws and measures are necessary to provide recourse to States that have been affected by dumping or under threat.[100] WTO members are not obligated to enact anti-dumping laws into their domestic laws as it is not compulsory in the WTO disciplines. However, many States have adopted the use of trade remedies as part of their national policies.[101] Article 1 of the AD Agreement states that when a member choose to use anti-dumping measures, it must be consistent with the WTO anti-dumping principles.[102]

3.2 Determination of dumping under WTO disciplines

The definition of dumping is provided for in Article VI of the GATT and the AD Agreement. However, the most prominently used definition of dumping is the one provided in Article VI:1 of the GATT,[103] which provides that:

[97] PC Osgode 'Assessment of the WTO-Consistency of the Procedural Aspects of South African Anti-Dumping Law and Practice, An' (2003) 22 *Penn State International Law Review* 21.
[98] Osgode (n 117 above) 21.
[99] CJ Human & J Miranda *et el* (ed) *A Handbook on Anti-Dumping Investigations* Cambridge University Press (2003) 119.
[100] IG Andrew 'Implementing effective trade remedy mechanisms: A critical analysis of Nigeria's Anti-Dumping and Countervailing Bill' unpublished LLM mini-thesis, University of Pretoria (2014) 11.
[101] Andrew (n120 above) 12.
[102] Article 1 of the Anti-dumping Agreement'.
[103] Khanderia (n30 above) 349.

> The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.[104]

Thus, it is evident from the above definition that before any aggrieved party can impose anti-dumping measures to safeguard their market from dumping, there are five conditions that must to be proved, which are: 1) there must be occurrence of dumping;[105] 2) the dumping must have occurred in the 'commerce of another country';[106] 3) the selling price of the dumped product must be less that its 'Normal value';[107]4) there must be a threat or 'material injury'[108] on the domestic industry of the aggrieved party; 5) causal link between the dumping and the harm caused.[109]

3.2.1 **Normal value**

The normal value of a product generally means the selling price of a 'like product' which is sold in the 'ordinary course of trade' for its consumption in the importing country.[110] The term 'Ordinary cause of trade' is not defined in the AD Agreement. However, the dictionary meaning of 'ordinary cause of trade' defined ordinary cause of trade as the situation and practices whereby the conditions of trade was considered to be standard practice in the trade under consideration for goods of the same class or type for a reasonable time before exportation.[111] Article 2.1 of the AD Agreement provides methods to determine the normal value of a product.[112] It states that:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the

[104] Article VI:1 of the General Agreement on Tariffs and Trade.
[105] Article 2:1 of the Anti-dumping Agreement.
[106] Article VI:1 of the GATT.
[107] Article VI:1 of the GATT.
[108] Article 3:1 of the Anti-dumping Agreement
[109] Article 3:5 of the Aanti-dumping Agreement
[110] World Trade Organization 'Technical information on anti-dumping' *https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm* (accessed 22 August 2021).
[111] KD Raju 'World Trade Organisation Agreement of Anti-dumping: A GATT/WTO Indian jurisprudence' (2008) *Kluwer Law International* 36.
[112] Article 2.1 of the Anti-dumping Agreement.

comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[113]

As a result, the most critical aspect for determining the occurrence of dumping is to establish the 'normal value' of the product which is allegedly dumped. [114] Most importantly, to succeed in this examination of determining the normal value, the product in question must be a 'like product'.[115]This means that an aggrieved party cannot simply establish the normal value of any product and conclude that the particular product has being dumped before establishing that the product in dispute is a 'like product'. Furthermore, the export price has to be established and thereafter a fair comparison of the export price and the normal value must be made to determine the margin of dumping.[116] Methods to determine normal value includes the following:

3.2.1.1. Sales values in the domestic market

The first method to calculate normal value of a like product is to make a comparison of the selling price of the like product in the export country and the domestic price of the like product in the importing country.[117] If there are no sales in the domestic market of the exporting country or there is low volume of sales, Article 2.2 of the AD Agreement makes reference to other methods which can be used to determine the normal value.[118] AD Agreement provides a test to determine whether the domestic market of the exporting country produces low volume sales. The test asks whether there is viable basis to determine the normal value. It provides that if five percent of the domestic sales of the export country are more than the domestic sales of the importing country, with reference to like products, then this shall not be considered as 'low domestic sales volume', meaning that there is sufficient basis to determine the normal value based on sales value calculation.[119] If the it appears that the sales in the export country are less than five percent of the sales in the importing country, then there is 'low sales volume' and the aggrieved party must make use of other methods to calculate the normal value.[120]

[113] Article 2.1 of the Anti-dumping Agreement
[114] Article 2:2 of the Anti-dumping Agreement
[115] Article 2:6 of the Anti-dumping Agreement.
[116] Khanderia (n30 above) 350.
[117] Article VI:1 (a) of the GATT.
[118] Article 2.2 of the Ad Agreement.
[119] Human (n 119 above) 110.
[120] Osgode (n117 above) 21.

3.2.1.2. Constructed normal value

Constructed normal value is an alternative method to determine the normal value. Article 2.2 of the AD Agreement defined constructed normal value as 'sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs.'[121] Cost of product is generally made up of all cost which the manufacturer incurred during production process and includes expenses such as: raw materials, cost of labour, factory overheads, and manufacturing supplies.[122] Selling cost, Administrative Costs and General costs (SGA) are all direct and indirect expenses which are not added in the cost of production such as: rent and utility costs.[123] The importance of the constructed normal value is to establish the domestic export price of the like product as if the product was sold in the domestic market.[124].

3.2.1.3. Comparable price in third country

The second alternative method to calculate the normal value is to 'look at the comparable price of the like product when exported to an appropriate third country, provided that price is representative.'[125] It is not clear from the AD Agreement as to what constitutes third country price.[126] The problem about this method of calculating normal value is that if the alleged like product has been dumped in the aggrieved State party, there are possibilities that the product might have been dumped in the third country.[127]

3.2.1.4. Export country market price

This method is only applicable in instances where items are not imported straightforwardly from the nation of make but are traded form the middle nation. In such circumstances, the AD Agreement allows for the calculation of the normal value to be determined based on 'sales in

[121] Article 2.2.1 of the Anti-dumping Agreement.
[122] World Trade Organization 'Technical information on anti-dumping' https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 22 August 2021).
[123] Andrew (n 120 above) 36.
[124] Andrew (n 120 above) 36.
[125] World Trade Organization 'Technical information on anti-dumping' https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 22 August 2021).
[126] Andrew (n 120 above) 37.
[127] World Trade Organization 'Technical information on anti-dumping' https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 22 August 2021).

the market of the exporting country'.[128]However, the AD Agreement further raises a problem with regards to this method in that, where the product is not manufactured in the export country or it was transported from the exporting country, this might lead to improper or untrue comparisons as there is essentially no comparable price. Therefore, in such circumstances the price of the product in the country of origin can be used to calculate the normal value.[129]

3.2.2. Non-market economies

In circumstances where the Government in a certain country has complete control over trade and fixed prices, the AD Agreement recognizes that it might not be a challenge to determine price comparability.[130] As a result, it recognizes that it would not be appropriate to use a strict price comparison.[131] However, the AD Agreement does not provide clear guidelines as to which method can be used to determine the price comparability in such instances. Although, WTO members have come up with their own guidelines to calculate dumping margin.[132]

3.2.3. Export Price

Export price generally means a price whereby the product is sold at the exporting country to the importing country. Similar to determination of normal value, there are instances where there may be no export price such as:

(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 since, the transaction is a compensatory arrangement between the exporter and the importing country or a third party.[133]

[128] Article 2.5 of the Anti-dumping Agreement.
[129] World Trade Organization „Technical information on anti-dumping" https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 22 August 2021).
[130] Article 2.7 of the AD Agreement.
[131] Article 2.7 of the AD Agreement.
[132] K Bagwell & GA Bermann *et el Law and economics of contingent protection in international trade* (2010) 202.
[133] Andrew (n120 above) 40.

In such case, the AD Agreement proposes an alternative method for determining the export price, which is the 'constructed export price'.[134] Constructed export price is calculated based on the price whereby the imported products are first resold to the independent buyer.[135]

3.2.4. Fair comparison of normal value and export price

The AD Agreement necessitates that a fair comparison between the export price and the normal value must be done. It provides that when making a fair comparison, the comparison should be between prices of sales resulting from the 'ex-factory level' and sales made at almost the same time. The reason for the fair comparison is to account for differences of the products.[136] Article 2.4 of the AD Agreement outlines guidelines to make a fair comparison. It requires that there 'due allowance' must be made for:

(1) differences in conditions and terms of sale;

(2) differences in taxation;

(3) differences in the levels of trade;

(4) differences in quantities;

(5) differences in the physical characteristics: and

(6) any other differences which are also demonstrated to affect price comparability.[137]

In instances where the constructed export price is to be used to make a fair comparison of the normal value, adjustment should be made for the costs which includes duties and taxes that arose between the transportation of the product to the importing country and the resale of the product to the independent purchaser, and the profit which is supposed to be made.[138] Where the price comparability has been affected due to the use of constructed export prices, Article 2.4 of the AD Agreement necessitates that normal value must be established at the level of trade that amounts to the level of trade of constructed export prices, if not on par then other 'due allowence' must be made as specified.[139] Article 2.4.1 provides guidelines for instances

[134] Article 2.3 of the Anti-dumping Agreement.
[135] World Trade Organization 'Technical information on anti-dumping' https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 22 August 2021).
[136] Bagwell (n152 above) 203.
[137] Bagwell (n152 above) 203.
[138] World Trade Organization "Technical information on anti-dumping" https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 22 August 2021).
[139] Article 2.4 of the AD Agreement.

where conversation of currencies is required when making a comparison of the normal value and the export price.[140]

3.2.5. Dumping margins

The difference between the normal value and the export price is referred to as the dumping margin.[141] Article 2.4.2 provides for three different methods to calculate dumping margin: (1) Weighted-average normal values; (2) Weighted-average export values; and (3) Weighted-average normal value to prices of individual export transactions.[142] The general rule is that the first and second option must be first exhausted before using the third method.[143]

3.3. Determination of Material Injury under WTO disciplines

In terms of Article VI:1 definition of dumping, in conjunction with the AD Agreement, there should be evidence of 'material injury' or 'threat' before the aggrieved party could impose Antidumping duties.[144] Specifically, Article 3.1 of the AD Agreement outlines rules for determinisation of 'injury'.[145] It requires that an objective determination must be made which shall consider:

> a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products; and
>
> (b) the consequent impact of these imports on domestic producers of such products.[146]

3.3.1. Meaning of like products

The definition of likeness of a product has been a long going issue in WTO dispute cases. The term 'like product' is defined in terms of Article 2.6 of the AD Agreement which provides that 'like product' is:

[140] Article 2.4.1 of the AD Agreement.
[141] Article VI: 2 of the General Agreement on Tariffs and Trade.
[142] Bagwell (n152 above) 204.
[143] Article 2.4.2 of the Anti-dumping Agreement.
[144] Article VI:1 of the GATT.
[145] Article 3.1 of the Anti-dumping Agreement.
[146] Article 3.1 of the Anti-dumping Agreement.

> 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.[147]

It is evident from the meaning of anti-dumping guidelines provided in the AD Agreement that a 'like product' is a critical factor when determining whether a product is being dumped. It is in fact the first factor to be considered in AD investigations.[148] Thus, an enquiry has to be made to establish the similarities between the product that is allegedly dumped and the product that is produced in the domestic industry of the importing country. However, it is not clear from the AD Agreement as to what constitutes likeness of a product. Thus, the determination of 'like product' has to be done on a case-by-case basis.[149]

Over the years, Courts have established guidelines to determine 'like product'. In the most popular cases of *Japan Taxes on Alcoholic Beverages*, noted that different guidelines have been used by previous panels to establish what constitutes likeness of a product. The panel highlighted popular criteria used by the previous panels, which are: 'product's properties', 'nature, quality and its end-users', 'consumers tastes and habits', which change from country to country, and the 'product's classification in tariff nomenclatures'.[150] The meaning of 'like products' is important to arrive at a basis of what constitutes 'domestic market', and to arrive at an answer of whether the alleged price discrimination caused 'injury' or 'threat' in the particular domestic market.[151]

3.3.2. Meaning of domestic industry

Domestic Industry is defined as 'the domestic producers 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'[152] The AD Agreement notes that not all producers of like

[147] Article 2:6 of the Anti-dumping Agreement.
[148] Article 2.6 of the Anti-dumping Agreement.
[149] *Japan –Taxes on Alcoholic Beverages*, Report of the Panel, *WT/DS8/R, WT/DS10/R and WTDS11/R*, paragraph 6.21
[150] *Japan –Taxes on Alcoholic Beverages*, Report of the Panel, *WT/DS8/R, WT/DS10/R and WTDS11/R*, paragraph 6.21
[151] *Japan –Taxes on Alcoholic Beverages*, Report of the Panel, *WT/DS8/R, WT/DS10/R and WTDS11/R*, paragraph 6.21
[152] Article 4.1 of the Anti-dumping Agreement

products are 'domestic industry' producers. As a result, when determining which producers of like products fall under the merits of 'domestic industry' producers, Members are allowed to exclude producers connected to the exporters or importers of the supposedly dumped product.[153] A producer is considered to be connected to the exporter or importer of the purportedly dumped product if a there exists level of control relationship between them which causes significant change to the domestic producer.[154] The AD Agreement further acknowledges that under exceptional circumstances, the territory of a country may be separated into two markets or competitive markets whereby the manufacturer inside each of the distinct markets may be considered an individual market.[155]

3.3.3. Determination of injury

The AD Agreement refers to three types of injury that must exist before the aggrieved party can impose dumping measure. The first type of injury is the material injury to the domestic industry; the second type of injury is that the said price discrimination should cause threat to the domestic industry; and lastly, that the price discrimination causes material delay of the establishment of a domestic industry.[156]

3.3.3.1.Material injury

The term 'material' injury is not defined in terms of the AD Agreement. The AD Agreement merely provides that determination of material injury requires a positive evidence and objective examination of: (1) the capacity of the goods which are allegedly dumped and the effects thereof in the domestic market; (2) and the consequence that the alleged dumped products brought to the domestic market producers of like products.[157] Article 3 outlines economic factors to be considered when making the objective examination. However, the AD Agreement does not provide clear direction as to the use of those factors or how they should be evaluated, or how to determine the casual link.[158] The factors to be considered includes the following:

[153] Article 4.1 (i) of the Anto-dumping Agreement.
[154] World Trade Organization "Technical information on anti-dumping" https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 22 August 2021).
[155] Article 4.1 (ii) of the Anti-dumping Agreement.
[156] World Trade Organization "Technical information on anti-dumping" https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 22 August 2021).
[157] Article 3.4 of the Anti-dumping Agreement.
[158] World Trade Organization "Technical information on anti-dumping" https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 22 August 2021).

i. Volume effects

In terms of the volume, Article 3.2 of the AD Agreement provides that investigating authorities must examine whether there has been a significant increase in dumped imports, either in absolute terms of in relation to output or consumption.[159]

ii. Price effects

In terms of the effect of dumped imports on prices, investigating authorities must look into whether there has been a significant price undercutting on the allegedly dumped imports or whether the effect of such imports causes a reduction in prices to a significant degree or prevent price increases that would have occurred, to a significant degree.[160]

iii. Assessment of volume and price effects of dumped imports

The AD Agreement recognizes that none of the factors listed in Article 3.1 gives a definite guidance.[161] The AD Agreement does not outline how the investigating authorities should examine the volume and price effects of the allegedly dumped imports. It only states that the investigating authorities must consider those factors to evaluate the volume and price of the dumped imports. As a result, the investigating authorities have to come up with a logical method to apply the consideration of those factors. Furthermore, the relevancy of each factor is determined on case-by-case basis by the investigating authorities.[162]

iv. Inspection of the effect of dumped imports on domestic industry

The investigating authorities must consider and evaluate all the appropriate economic factors that affect the state of the domestic industry, when assessing the extent to which the allegedly dumped imports affect the domestic industry. Some of the economic factors to consider includes but no limited to: 'real or future reduction in sales, profits, production, market share, return on investments, utilization of capacity, real or future effects on cash flow, inventories,

[159] Article 3.2 of the Anti-dumping Agreement.
[160] Raju (n131 above) 40.
[161] Article 3.2 of the Anti-dumping Agreement.
[162] Article 3.3 of the Anti-dumping Agreement.

employment, wages, development, capability to raise capital or investments, and the degree of the margin of dumping.'[163]

v. Cumulative analysis

Cumulative analysis must do with the assessment of dumped imports from two of more countries on a joint premise to evaluate whether the dumped imports cause injury to the domestic industry. If the margin of dumping from each country is not negligible, and if the volume of imports from each country is not negligible, the authorities must determine that a cumulative assessment is appropriate given the conditions of competition between the imports and the domestic like product. Agreement defines negligible import volumes as well as de minimis dumping margins.[164]

3.3.3.2. Threat of material injury

The AD Agreement requires that in situations where there are allegations of dumping but no material injury to the domestic industry exists, there should at least be a threat to cause material injury in the domestic industry.[165] It provides that the determination of threat of injury should be based on consideration of factors which includes: significant rate of increase of dumped imports which should the possibility of large increase in imports;[166] an increase in the capacity of exporters showing a possibility of substantially increase dumped exports in the domestic market;[167]if the allegedly dumped imports are entering the domestic market at prices that will likely cause a significant decrease or supress effect on the domestic prices and will result in increased changed in demand for the allegedly dumped imports;[168] and inventories of the allegedly dumped import.[169] The factors are necessary to provides assistance to the investigating authorities to arrives at a conclusion that further allegedly dumped import will result in threat to the material injury if protective action is not taken.

[163] Article 3.4 of the Anti-dumping Agreement.
[164] World Trade Organization "Technical information on anti-dumping" *https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm* (accessed 22 August 2021).
[165] World Trade Organization "Technical information on anti-dumping" *https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm* (accessed 22 August 2021).
[166] Article 3.7 (i) of the Anti-dumping Agreement.
[167] Article 3.7 (ii) of the Anti-dumping Agreement.
[168] Article 3.7 (iii) of the Anti-dumping Agreement.
[169] Article 3.7 (iv) of the Anti-dumping Agreement.

3.3.4. Evidencing the existence of a causal relationship

The AD Agreement recognizes that there should be a causal link between the allegedly dumped product and injury caused to the domestic industry.[170] All applicable evidence must be used to proof the existence of a causal relationship between the dumped product and the injury to the domestic market. The relevancy of the evidence to be used when proving a causal link is not clear and the AD Agreement does not provide guidance thereof.[171] Article 3.5 notes that certain factors such as the fluctuations in the demand patents and technological changes can be used to evaluate as appropriate evidence to prove the existence of a causal link.[172] As a result, it is left up to the investigating authorities to establish analytical factors that can be used to demonstrate the occurrence of a causal relationship between the allegedly dumped import and the injury to the domestic industry.[173]

3.4. Conclusion

This chapter presented an analysis of what constitutes dumping in terms of the WTO AD Agreement. It gave a detailed description of how to determine dumping in terms of the AD Agreement, how to determine normal value of a product, what constitutes material injury, what are like products and proving a causal relationship. In brief, AD Agreement provides a guideline to Member states on the implementation of Anti-dumping safety measures and procedures. To prove that dumping has occurred, the alleging party must firstly prove that the product in question is a 'like product'. This is important to enable investigation authorities to make a proper investigation based on facts and evidence. Thereafter, the alleging State need to determine the normal value of the product in question. In instances where there is no Normal Value or the product is not manufactured in the export country, the normal value can be contracted based on sales or third country sales. Furthermore, the alleging country must establish the export price to determine the exact selling price of the like product in the manufacturing State. Once the normal value and the export price have been determined, and

[170] Article 3.5 of the Anti-dumping Agreement.
[171] Raju (n131 above) 40.
[172] Article 3.5 of the Anti-dumping Agreement
[173] Article 3.6 of the Anti-dumping Agreement.

once it has been established that the product in question is a ‘like product’, a fair comparison must be made between normal value and the export price to determine the margin of dumping. The margin of dumping determines the extent of dumping of the product in question. Once all these have been proven, it will be prudent to conclude that the product is being allegedly dumped. It is further necessary to note that the above only constitutes determinants for dumping, and do not constitute final finding of dumping.

Chapter 4

Definition of dumping in terms of South Africa's Anti-dumping legal frameworks

4.1. Introduction

Prior 1914, there was no legislation in South Africa to regulate dumping.[174] It only became recognised in 1914 when the first anti-dumping law, Customs Tariffs Act 26 of 1914, came into force.[175] Even after the implementation of the Customs Tariffs Act, South Africa still experienced high volume of dumping cases. As a result, the State deemed it fit to amend the legislation from time to time until the current legislation.[176] Currently, Anti-dumping law in South Africa is regulated by the International Trade and Administration Act of 2002, thereafter the ITAA, read together with the Antidumping Regulations of 2003 (ADR).[177] The purpose and objective of the ITAA is to establish an International Trade and Administration Commission (ITAC); to set out the duties, functions and procedures of the commission; to establish a clear mandate for Southern African Custom Union (SACU) and to amend the SACU agreement to include the regulation of imports and exports.[178]

4.2 Dumping in terms of South African Anti-dumping legal frameworks

Section 1 (1) of the ITAA defines 'dumping' as: 'the introduction of goods into the commerce of the Republic or the Common Customs Area at an export price contemplated in section 32(2)(a) that is less than the normal value as defined in section 33(2) of those goods.'[179] As discussed in the previous chapter, the definition of dumping under the AD Agreement raises five important areas that must be present for a product to be considered as dumped product. These are: (1) normal value, (2) export price, (3) material injury or threat, (4) causal relationship, and (5) like products.[180] The ITAA definition of dumping lacks the concept of

[174] Brink (n9 above) 1.
[175] Tabane (n34 above) 2.
[176] Tabane (n34 above) 11.
[177] G Brink 'The 10 major problems with the55 Anti-Dumping Instrument in South Africa' (2005) 39 *Journal of World Trade* 147.
[178] Act 71 of 2002, Sec 1(1).
[179] Act 71 of 2002, Sec 1(1).
[180] World Trade Organization "Technical information on anti-dumping" https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 22 August 2021).

'like products' as well as 'ordinary course of trade'. The ITAA is said to be read in conjunction with the Anti-dumping Regulations (ADR) which was published in November 2003, to bring effect to certain aspects not catered for in the ITAA.[181] The Anti-dumping regulations does not define the term 'dumping', it only provides definition of 'like products' and how to establish whether dumping has occurred. This creates confusion and delays in practice for the investigating authorities in instances where they must determine the existence of dumping. For purposes of determining dumping under the South African legislation, one must first ask whether the Southern African Customs Union (SACU) common customs area is the territory of South Africa.[182] There are two methods that can be followed to answer this question. The first method to be used is to establish the meaning of the phrase 'introduced into the commerce of another country.' If it means all independent territories of GATT contracting parties, then the South African Anti-regulations is irreconcilable with the AD Agreement as it only refers to 'SACU common trade region'.[183] The second method aims to establish the meaning of the phrase 'common trade area'. Common trade area means 'an area in which a country has the right or preference to carry out commercial activities.'[184] Common trade area falls under the merits of 'commerce of trade of another country' which supports the enforcement of anti-dumping measures by a contracting party to act against unfair trade practice.[185] As a result, the latter method is compatible with the AD Agreement as SACU is a common trade area falling under the definition of 'commerce of trade of another country'.[186]

4.2.1 Determination of Normal Value under South African Anti-dumping legal frameworks

Section 32 (2)(b) of the ITAA provides three methods to determine Normal Value of a product, which includes:

(i) the comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin;[187] or

[181] *International Trade and Administration Commission* vs *International Trade Administrations and others* CCT 59/09; [2010] ZACC 6
[182] OS Sibanda 'South African Anti-dumping law and practice: A judicial and comparative analysis of procedural and substantive issues' (2011) *Foreign Trade Review* 267.
Available at *https://journals.sagepub.com/doi/abs/10.1177/0015732519894150* (accessed 11 September 2021).
[183] Sibanda (n202 above) 267.
[184] Sibanda (n202 above) 267.
[185] Sibanda (n202 above) 268.
[186] Sibanda (n202 above) 268.
[187] International Trade and Administration Act 71 of 2003 Sec 32(2)(b)(i).

(ii) in the absence of the comparable price, the constructed cost of production of the goods in the country of origin when destined for domestic consumption, plus a reasonable addition for selling, general and administrative costs and for profit;[188] or

(iii) the highest comparable price of the like product when exported to an appropriate third or surrogate country if that price is representative[189]

The South African definition is not substantially compatible with Article 2.2 of the AD Agreement.[190] Article 2.2 of the AD Agreement specifically states that when there are no sales of like products in the ordinary course of trade due to the circumstances of the market, or due to the low volume of sales in the exporting country, it would not be appropriate to do a proper comparison of the sales in respect of like products. In such instance, the margin of dumping must be calculated based on the difference of the comparable price of like product when it is transported to the third country, only if the price of the allegedly dumped product represents the actual domestic sales volume of the exporting country. If the price is not representative, then the margin of dumping shall be determined 'with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profit.'[191]

However, to remedy the incompatibility, Section 8 of the ADR comes to the rescue. It covers aspects such as how to determine the cost of production, administrative, selling price, general and packing costs; how to determine normal value in situations where there are no domestic sales of like products in the exporting country or when is not possible to do a proper price comparison due to low domestic sales of like products in the exporter's domestic market;[192] how to determine normal value when domestic sales of the sporting country are below 20 per cent for an extended period in substantial quantities; how to determine normal value for domestic sales when there are related parties; and how to determine normal value in instances where the domestic price of the allegedly dumped product is not reliable.[193] However, the ADR appears to be in conflict with the ITAA in that it only refers to the 'third country' and not 'appropriate third or surrogate country' as specified in Section 32 (2)(b)(iii) of the ITAA.[194]

[188] Act 71 of 2003 Sec 32(2)(b)(ii)(aa).
[189] Act 71 of 2003 Sec 32(2)(b)(ii)(bb).
[190] Sibanda (n202 above) 268.
[191] Article 2.2 of the AD Agreement.
[192] Anti-dumping Regulations Sec 8.2 (a)(i), (ii) & (iii).
[193] Anti-dumping Regulations Sec 8.2(b)&(c).
[194] Sibanda (n202 above) 271.

This creates discrepancies and contradiction in terms of South African Anti-dumping law which makes it difficult to apply the law in actual dumping cases.

4.2.2 Determination of domestic industry export price

In terms of the ITAA, Export price is considered to mean the actual price paid or payable for the goods sold for trade, which includes the net of all taxes, actual discounts and rebates allowed and specifically related to the sales.[195] Domestic export price is an ideal method to determine normal value.[196] Similar to Article 2.3 of the AD Agreement, the ITAA makes reference to alternative methods that can be used to determine export price in cases where there is no actual export price or there has been price re-arrangements in respect of exports between the exporter and importer, or in cases where the export price cannot be used due to other additional reasons which affects the actual export price.[197] In such circumstances, the export price must be constructed based on the selling price of the product excluding all other costs as well as excluding the importer's profit, between the exporting country and the point where the good is being resold.[198] In circumstances where the good is not resold, the export price can be calculated on alternative suitable basis. The AD Agreement does not provide any guidance of how to determine reasonableness.[199] Although, in such cases, the ITAC is not permitted to consider operational price made between 'related parties' as such sales were not made in the 'ordinary course of trade', without making a proper consideration of whether the transaction was between an independent buyer or not.[200]

4.2.3 Fair comparison

The ITAA obligates the ITAC to make reasonable adjustments for differences in the terms of sale and the conditions thereof, differences in taxation and additional differences that may hamper the price comparison when determining the margin of dumping.[201] The ADR provides additional details regarding how to make a fair comparison of the price. It provides that: 'Adjustments shall be made in each case, on its merit, for differences which affect price comparability at the time of setting prices, including, but not limited to- (a) conditions and

[195] Act 71 of 2002 Sec 32(2)(a).
[196] Sibanda (n148 above) 272.
[197] G Brink 'Anti-dumping in South Africa' Stellenbosch, Tralac working paper, 2012, at 15.
[198] Brink (n217 above) 15.
[199] Tao (n20 above)
[200] Brink (n217 above) 15.
[201] Brink (n217 above) 19.

terms of trade;[202] (b) taxation;[203] (c) levels of trade;[204] (d) physical characteristics;[205] and (e) quantities.'[206] The ITAA states that the comparison between the normal value and the export price must be done on 'weighted average to weighted average' basis.[207] In this regard, South Africa's Anti-dumping legal framework is consistent with the WTO AD Agreement as evidenced in Articles 2.4- 2.5 of the AD Agreement.[208] The exporter also questionnaire is necessary to gather information for proper comparison.[209] Further, several factors exist that may hamper the price comparability, as a result, it is essential to analyse each case on a case-by-case basis.[210]

4.2.4 Material injury

The term 'injury' is not specifically defined in terms the AD Agreement.[211] It merely obligates the investigating authorities to establish whether the alleged dumped product has caused material injury or threat to the domestic industry prices.[212] Similarly, the ITAA and the ADR does not define the term 'injury'. It only provides that material injury shall be deemed to mean the 'actual injury a threat of material injury or the material retardation of the establishment of an industry.'[213] The ADR requires the Commission to consider whether there has been significant decrease or increase of the SACU industry's prices.[214]The Commission is also mandated to consider whether there is significant changes in the performance of the SACU industry looking at factors as noted in the AD Agreement.[215]In this regard, the ADR is similar to the AD Agreement. However, there is a slight deviation in the ADR in terms of the wording which is not compatible with the AD Agreement. The ADR only mandates the Commission to consider the factors for determination of injury, whereas the AD Agreement obligates the investigating authorities to make an evaluation of all listed factors.[216]

---

[202] Section 11.1(a) of the Anti-dumping Regulations.
[203] Section 11.1(b) of the Anti-dumping Regulations.
[204]Section 11.1(c) of the Anti-dumping Regulations.
[205] Section 11.1(d) of the Anti-dumping Regulations.
[206] Brink (n217 above) 20.
[207] Section 11.5 of the Ant-dumping Regulations.
[208] Sibanda (n202 above) 305.
[209] Sibanda (n202 above) 305.
[210] Sibanda (n202 above) 306.
[211] World Trade Organization "Technical information on anti-dumping" https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 22 August 2021).
[212] Khanderia (n above) 252.
[213] Section 1(b)(vii) of the Anti-dumping Regulations.
[214] Section 13.1 of the Anti-Dumping Regulations.
[215] Section 13.2 of the Anti-dumping Regulations.
[216] Khanderia (n6 above) 260.

Furthermore, the AD Agreement obligates the investigating authorities to make an 'evaluation of injury caused to the domestic industry in terms of the 'actual and potential decline in sales.'[217] On the contrary, the ADR merely gives the Commission the discretion to consider injury caused to the domestic industry sales volume.[218]This means that the ITAC is not obligated to make an evolution of the potential decline or increase of the domestic industry sales volume but 'may' consider the effect of the injury on the sales volume of the domestic industry like product.[219] As a result, the South Africa's Anti-dumping legal framework is inconsistent with the WTO AD Agreement in determination of material injury. This was disputed in the WTO consultation matter of *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil (South Africa – Poultry),* Brazil requested consultations with South Africa to make an investigation regarding the issue of preliminary determination of injury and the imposition of preliminary anti-dumping duties on Brazil's frozen chicken, specifically for fowls of the species *Gallus Domesticus,* the whole bird and boneless cuts.[220] Brazil argued that South Africa did not make a fair comparison between the export price and the normal value of the poultry products.[221] Brazil contended that South Africa failed to:

(i) make reported and verified deductions to the normal values so as to bring them to the same level as the export price;
(ii) make reported and verified due allowances for differences that affect price comparability;
(iii) exclude, from the establishment of the normal value, sales of a type of boneless chicken cuts that was apparently not considered to be a like product; and
(iv) exclude, from the establishment of the export price, sales of products outside the scope of the product under investigation.[222]

Moreover, Brazil contended that South Africa failed to specify the information they relied on to make the fair comparison.[223]

[217] Khanderia (n6 above) 260.
[218] Khanderia (n6 above) 260.
[219] Khanderia (n6 above) 260.
[220] WTO Panel Report *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil* 73 WT/DS439/1 (25 June 2012) (*South Africa – Poultry*).
[221] WTO Panel Report *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil* 73 WT/DS439/1 (25 June 2012) (*South Africa – Poultry*).
[222] WTO Panel Report *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil* 73 WT/DS439/1 (25 June 2012) (*South Africa – Poultry*).
[223] WTO Panel Report *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil* 73 WT/DS439/1 (25 June 2012) (*South Africa – Poultry*).

4.2.5 Causal relationship

There is no mention of causal relationship in the ITAA.[224] However, Section 16 of the ADR states that the Commission must consider all relevant factors in order to establish the existence of a causal link between the dumping and the material injury.[225] The AD Agreement specifically states the investigating authorities must make an 'examination of all relevant evidence' to determine the existence of a causal relationship between the dumped product and the material injury.[226] In terms of the ADR however, the Commission is mandated to only 'consider' the factors and says nothing in terms of examining the evidence. As a result, there is a problem in terms of the word of the ADR as it does not mandate the Commission to evaluate the factors based on evidence. It does not state what the Commission should rely on when making the consideration of the factors. The AD Agreement further requires the investigating authorities to consider the following factors:

> The volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.[227]

On the other hand, the factors which the Commission is required to consider in terms of the ADR includes, but not limited to: changes in the volume of the dumped good;[228] price undercutting of the dumped good in the SACU industry;[229] market share of the dumped product;[230] the extent of the margin of dumping;[231] and the of the like good which is not dumped that is available in the market.[232] Although the ADR recommended factors are similar to the AD Agreement, the ADR is not acting within the ambit of Article 3.5 of the Anti-dumping Agreement due to failure to mandate the Commission to make an examination on the basis of positive evidence that there is a causal link between the dumped product and the material injury.

[224] Brink (n217 above) 24.
[225] Section 16.1 of the Anti-dumping Regulations.
[226] Article 3.5 of the Anti-dumping Agreement.
[227] Article 3.5 of the Anti-dumping Agreement.
[228] Section 16.1 (a) of the Anti-dumping Regulations.
[229] Section 16.1 (b) of the Anti-dumping Regulations.
[230] Section 16.1 (c) of the Anti-dumping Regulations.
[231] Section 16.1 (d) of the Anti-dumping Regulations.
[232] Section 16.1 (e) of the Anti-dumping Regulations.

In the WTO Dispute settlement consultation request by Pakistan: *South Africa – provisional anti-dumping duties on Portland cement from Pakistan*, Pakistan requested consultation with South Africa for anti-dumping imposed on Portland cement imported from Pakistan. Pakistan argues that the anti-dumping measures imposed were inconsistent with Articles 3.1, 3.4 and 3.5 of the Anti-dumping Agreement because South Africa did nothing to objectively examine the temporary relationship between the alleged dumping and the presuming worsening of the domestic market condition, especially by neglect of considering the effects of decartelization on the basis of positive evidence, that the dumped imports were in fact causing injury to domestic cement producers.[233]

4.3. Conclusion

More like the previous chapter, this chapter analysed what constitutes dumping in terms of South African Anti-dumping legislation. It discussed how Normal value is determined in terms of South Africa's anti-dumping legislation, how to determine domestic industry export price, how to make a fair comparison, what determines material injury, and finding a causal relationship in terms of South Africa's anti-dumping legislation.

From the above discussions, it appears that South African anti-dumping legislation is slightly inconsistent with the AD Agreement in aspects of determining a causal link between dumping and resulting injury. Unlike the AD Agreement, the South African anti-dumping legislation does not make it mandatory for the Commission to examine or consider factors that causes injury to the domestic industry volume of sales based on positive evidence. Furthermore, the South Africa anti-dumping legislation fails to provide specific provisions or requirements for determining or establishing a causal link between the alleged dumping and the material injury complained of. This is inconsistent with the provisions of the AD Agreement which expressly requires that the party alleging dumping must establish a causal link between the alleged act of dumping and the material injury purportedly suffered.

Nonetheless, other than the above relatively few inconsistencies, it is clear that the provisions of the South African Anti-dumping legislation are largely consistent with the provisions of the AD Agreement on the definition and determinants of dumping. The next Chapter seeks to

[233]WT/DS500/1 G/L/1139 G/ADP/D112/1: *South Africa — Provisional Anti-Dumping Duties on Portland Cement from Pakistan* available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/500-1.pdf&Open=True (accessed 25 September 2021).

compare the provisions of the South African anti-dumping legislation in respect of the procedural aspects of making a finding of dumping with the provisions of the AD Agreement, to assess the extent of consistency and compatibility between the South Africa anti-dumping legislation provisions and the provisions of the AD Agreement.

Chapter 5

A comparison of South Africa's Anti-dumping procedural aspects with the Anti-dumping agreement.

5.1. Introduction

The International Trade and Administration Commission (ITAC) is responsible for dumping investigation in South Africa, from the initiation stage up until the final imposition of anti-dumping duties stage.[234] South Africa is a WTO member and therefore bound by the AD Agreement.[235] Although not enacted into South Africa national law, the constitution of the Republic of South Africa specifically states that International Law must be taken into account when interpreting the law.[236]This means that South Africa is obliged to carry out its obligations under the WTO and its Anti-dumping legal framework should therefore be in line with the AD Agreement. South Africa's Anti-dumping procedures are set out in International Trade and Administration Act (ITAA) and the Anti-dumping Regulations (ADR). The ADR provides additional information and guidelines for dumping investigations.

The three main stages for anti-dumping investigation under the AD Agreement includes: (1) the initiation stage; (2) investigations and evaluation of evidence; and (3) imposition of anti-dumping duties. Part C of the ADR outlines South Africa's anti-dumping investigation procedure. South Africa's anti-dumping procedure includes: (1) submission of a properly documented application to the SACU industry; (2) publication of a notice to the Government Gazette to initiate the investigation process; (3) the exporters concerned send through their responses and verification of the information provided; (4) the Commission do the preliminary determinations to determine if there is solid evidence for the investigations; (5) the Commission do the final determinations and send the findings to the Minister of Trade and Industry for recommendations; (6) the final decision is implemented by publishing the petition in the Government Gazette.[237] Promotion of Access to Information Act 2000 is also relevant in this topic as it shall be evident later on in the chapter.

[234] G Brink 'A nutshell guide to anti-dumping action' (2008) 71 *Tydskrif vir hedendaagse Romeins-Hollandse reg* 285.
[235] The Constitution of the Republic of South Africa, Section 231.
[236] The Constitution of the Republic of South Africa, Section 233.
[237] ITAC: 'Trade Remedies available at *http://www.itac.org.za/pages/services/trade-remedies* (accessed 20 September 2021).

5.2.Initiation stage

In terms of Article 5.2 of the AD Agreement, an official submission of a writing complaint by the aggrieved party to the authority of the allegedly dumping member, is the first step to dumping investigations.[238] The written complaint letter must contain certain issues and it must also include evidence of material injury and the causal link between the injury and the allegedly dumped import.[239] A written complaint alone without evidence shall not be considered sufficient for the purpose of dumping investigations.[240] Article 5.2(i) – (v) of the AD Agreement provides guidelines of information that must be contained in the written complaint letter which includes: (a) the identity of the applicant and the description of the volume and value of the like product by the applicant; [241](b) description of the allegedly dumped import and the name of their export country or country of origin of the product in question;[242] (c) the information regarding the selling price of the product for consumption in the domestic market;[243] and (d) the evaluation of the volume of the product in question and the impact of the dumped import on the domestic industry.[244]

Prior to the commencement of the investigation, the investigation authorities are obliged to do a critical assessment of the evidence provided by the applicant to determine its adequacy and sufficiency to conduct an investigation.[245] If after the assessment of the evidence it appears that the evidence provided is not sufficient to conduct an investigation or not adequate, meaning if it is not supported by the domestic producers whose output constitutes at least 50 per cent of the total production of the like product in question, then the investigation authorities are prohibited from commencing with the investigations.[246] The investigation authorities are also not allowed to publicise any information pertaining to the initiation of the application and comment of the investigation before evaluating the evidence.[247] Investigation authorities are permitted to conduct an investigation without any application submitted, if they have sufficient

[238] Article 5.2 of the Anti-dumping agreement
[239] Sibanda (n202 above) 219.
[240] Article 5.2 of the Anti-dumping Agreement.
[241] Article 5.2(i) of the Anti-dumping Agreement.
[242] Article 5.2(ii) of the Anti-dumping Agreement.
[243] Article 5.2(iii) of the Anti-dumping Agreement.
[244] Article 5.2(iv) of the Anti-dumping Agreement.
[245] Article 5.3 of the Anti-dumping Agreement.
[246] Article 5.4 & 5.8 of the Anti-dumping Agreement.
[247] Article 5.5 of the Anti-dumping Agreement.

evidence of dumping, injury and the causal link between the dumped product and the injury caused thereof.[248] The evidence of dumping and injury will be analysed both at the same time to establish whether or not to conduct an investigation, and to impose provisional measures once the investigation is conducted. [249] The prescription period of the investigation is one year and not more than 18 months after the initiation.[250]

5.2.1. Properly documented complaint

South Africa's anti-dumping legislature is similar to the AD Agreement in respect of the pre-initiation stage.[251] Section 21.1 of the ADR provides that the dumping investigations shall be initiated through a written application submitted to the ITAC by, or on behalf of the Southern African Customs Union (SACU), accompanied by the prescribed Commission's request questionnaire.[252] Similar to the AD Agreement, Section 3.3 of the ADR permits the investigation authorities to conduct an investigation without having received any application from any interested party, if there is sufficient evidence to prove the occurrence of dumping, injury and a causal link between the injury and the product in question.[253] Furthermore, Sections 23.1 to 23.2 of the ADR provides that the application must contain information relating to the price of the like product sold in the export country or country of origin.[254] The evidence must include quotes for domestic sales of the like product in question, price lists and invoices, international publications or any other necessary prove that contains the selling price of the like product.[255] In circumstances where the applicant could not find the domestic selling price of the like product in question, then a reasonable details of the effort undertaken to obtain such domestic selling price must be submitted to the Commission. In such instances, the Commission will allow any information regarding the normal value of the like product.[256]

5.2.2. Notifications and responses

[248] Article 5.6 of the Anti-dumping Agreement.
[249] Article 5.7 of the Anti-dumping Agreement.
[250] Article 5.10 of the Anti-dumping Agreement.
[251] Sibanda (n202 above) 220.
[252] Section 21.1 of the Anti-dumping Regulations.
[253] Section 3.3 of the Anti-dumping Regulations.
[254] Section 23.1 of the Anti-dumping Regulations.
[255] Section 23.2 of the Anti-dumping Regulations.
[256] Section 23.4 of the Anti-dumping Regulations.

Section 27.1 of the ADR requires that the investigation be publicized in the Government Gazette to notify the party concerned of the initiation of dumping investigations.[257] The publicized notice must contain: (a) identity of the applicant;[258] (b) detailed description of the product under investigation;[259](c) the allegedly dumping country or countries being investigated;[260] (d) the reason for the presumed dumping;[261] (e) a brief details of the factors of which the alleged injury is derived from;[262](f) the address where the representations of the interested party should be sent;[263] and (g) the prescription period for the responses from interested parties.[264] After publication of the initiation for investigation, the parties concerned are given 30 days to submit their responses to the Commission.[265] The responding parties are required to use the Commission's questionnaire when responding to the notification which must be submitted to the Commission.[266] In instances where no concerned party responds, and after evaluation of all evidence and consideration of all factors, the Commission may immediately request imposition of provisional payment.[267]

The South Africa's anti-dumping legislature is WTO-consistent in this regard as it aligns with the required information for the initiation of dumping as prescribed in Article 5 of the AD Agreement. It follows the same procedure for initiating an investigation and follows the similar requirement for a detailed description of the allegedly dumped product, its selling price, the basis of injury and the causal link thereof, which is essential to determine whether there is sufficient evidence to conduct an investigation or not.[268] Furthermore, the ITAC is required to do the 'merit assessment' to determine whether there is enough information to establish injury to the SACU industry by the dumped products.[269] Similar to the AD Agreement, the Commission is obliged to notify the representatives of the parties concerned of the application received. Nevertheless, the ADR prohibits the Commission from publicising the application

[257] Section 28.1 of the Anti-dumping Regulations.
[258] Section 28.1(a) of the Anti-dumping Regulations.
[259] Section 28.1(b) of the Anti-dumping Regulations.
[260] Section 28.1(c) of the Anti-dumping Regulations.
[261] Section 28.1(d) of the Anti-dumping Regulations.
[262] Section 28.2(e) of the Anti-dumping Regulations.
[263] Section 28.1(f) of the Anti-dumping Regulations.
[264] Section 28.1(g) of the Anti-dumping Regulations.
[265] Section 29.3 of the Anti-dumping Regulations.
[266] Section 29.1 of the Anti-dumping Regulations.
[267] Section 32.1 of the Anti-dumping Regulations.
[268] Sibanda (202 above)220.
[269] Sibanda (202 above)220.

before the commencement of the investigations.[270] This is necessary in terms of the AD Agreement.[271]

5.3 Investigations and evaluation of evidence

The AD Agreement requires all interested parties to be given sufficient notice to respond and give a written response of the information pertaining to evidence that they deem relevant for the anti-dumping investigations in question.[272] The exporters or the foreign producers of the product in question shall be given 30 days unless otherwise proven for an extension.[273] Evidence provided in writing by the party concerned shall be made available to the other party, dependent on the protection of confidential information requirement.[274] Once the initiation for anti-dumping investigation has commenced, the authorities are required to give a full statement of the written complaint submitted and make it available to another party involved, upon request.[275] Moreover, all the interested parties have the opportunity to defend their interests throughout the investigation, by meeting each other and allowing each party to present their opposite views and allow the other party to rebut such opposition. However, attending a meeting is not obligatory and there is no penalty for failure to attend such meetings.[276] Oral evidence is also accepted, and the authorities are required to put it in writing and make it available to another party concerned.[277]

5.3.1 Confidentiality

In terms of the ADR, read in conjunction with the Section 36 of the Promotion of Access to Information Act, 2000 (PAIA), interested parties are given the privilege to prove confidentiality of information they do not want to be publicised due to the nature of such information. The party claiming such confidentiality is required to provide summaries with the omitted confidential information, the reason for the confidentiality and must give a reasonable understanding in details of the substance of the information submitted in confidence.[278]Article

[270] Section 27.2 of the Anti-dumping Regulations.
[271] Sibanda (202 above)221.
[272] Article 6.1 of the Anti-dumping Agreement.
[273] Article 6.1.1 of the Anti-dumping Agreement.
[274] Article 6.1.2 of the Anti-dumping Agreement.
[275] Article 6.13 of the Anti-dumping Agreement.
[276] Article 6.2 of the Anti-dumping Agreement.
[277] Article 6.3 of the Anti-dumping Agreement.
[278] Section 2.1 of the Anti-dumping Regulations.

2.3 of the ADR provides a list of details that are considered confidential in terms of Section 36 of the PAIA, which include the following:

a) management accounts;
b) financial accounts of a private company;
c) actual and individual sales prices;
d) actual costs, including cost of production and importation cost;
actual sales volumes; individual sales prices;
e) information, the release of which could have serious consequences for the person that provided such information; and
f) information that would be of significant competitive advantage to a competitor.[279]

Information not accompanied by proof of confidentiality will be considered non-confidential.[280] Section 36 of the PAIA provides that:

(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains-

(a) trade secrets of a third party;

(b) financial, commercial, scientific, or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or

(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected- (i) to put that third party at a disadvantage in contractual or other negotiations; or (ii) to prejudice that third party in commercial competition.[281]

(2) A record may not be refused in terms of subsection (1) insofar as it consists of information-

(a) already publicly available;

(b) about a third party who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned; or

[279] Section 2.3 of the Anti-dumping Regulations.
[280] Section 2.4 of the Anti-dumping Regulations.
[281] Promotion of Access to Information Act 2 of 2000, Sec 36(1).

> (c) about the results of any product or environmental testing or other investigation supplied by a third party or the result of any such testing or investigation carried out by or on behalf of a third party and its disclosure would reveal a serious public safety or environmental risk.[282]

Section 36 (2)(c) of the PAIA is substituted by Section 32 of Judicial Matters Amendment Act 42 of 2001 which provides that:

> A record may not be refused in terms of subsection (1) insofar as it consists of information- about the results of any product or environmental testing or any other investigation supplied by a third party or the result of any such testing carried out by or on behalf of a third party and its disclosure would reveal a serious public safety or environmental risk.[283]

In terms of the AD Agreement, investigating authorities must consider the need of protecting confidential information of the adverse party when it comes to the meeting and providing evidence stage. The AD Agreement further provides that confidential information shall be treated with confidence and should not be disclosed to the other party without permission of the party requesting confidentiality.[284] Nonetheless, the AD Agreement mandates the investigation authorities to request for non-confidential summaries from the party claiming confidentiality.[285] Based on the abovementioned provision, it is evident that the ADR is compliant with the AD Agreement as the ADR and the PAIA preserves the confidentiality of the parties concerned in certain contents where it might be prejudicial to the other if the confidential information was to be published.[286] The ADR further caters for non-confidential summaries in Section 2.1 of the ADR.[287]

5.3.2 Representation

Representations are permitted in terms of the ADR. It provides an interested party that would like to be represented by any party outside may do so through submission of a letter with the

[282] Act 2 of 2000, Sec 36 (2).
[283] Judicial Matters Amendment Act 42 of 2001, Sec 32.
[284] Article 6.5 of the Anti-dumping Agreement.
[285] Article 6.5.1 of the Anti-dumping Agreement.
[286] Section 2.3 of the Anti-dumping Regulations.
[287] Section 2.1 of the Anti-dumping Regulations.

details and duration of appointed representatives.[288] Thereafter, all communications between the applicant and the interested party concerned are done through the appointed representatives.[289] Termination of representatives is done through a submission of a letter to the Commission which indicates the wish to terminate the representatives.[290] The AD Agreement does not specify whether representations are permitted in the initiation stage. It only refers to representations in the dispute settlement stage.[291] As a result, the ADR is not consistent with the AD Agreement in this instance. However, even though the ADR is inconsistent with the AD Agreement in this aspect, it constitutes a positive inconsistency because the provisions of the ADR represent an improvement on that of the AD Agreement in this regard.

5.3.3 Oral hearings

The ADR permits any interested party to request an oral hearing during the preliminary or final investigation stage, provided they give reasons for not relying on written submissions. The Commission may decline the request for an oral hearing if it is of a view that such oral hearing it might cause unnecessary delay in the finalisation of the investigation.[292] The Commission will not consider oral hearing for more than 60 days, and no oral hearing may be heard more than 90 days, after the publication of the preliminary findings by the Commission.[293] Oral hearings are subject to be reduced to writing and publicised, taking into account the confidential information.[294]The ADR is similar to the AD Agreement in terms of oral procedure as it specifically provides that 'oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties.'[295]

On a practical point, the *South African Fasteners Manufacturers Association (SAFMA), on behalf of its members CBC Fasteners (Pty) Ltd and Transvaal Pressed Nuts Bolts and Rivets (Pty) Ltd*, lodged an application to the ITAC to make an investigation into alleged dumping of

[288] Section 4.1 of the Anti-dumping Regulations.
[289] Section 4.3 of the Anti-dumping Regulations.
[290] Section 4.2 of the Anti-dumping Regulations.
[291] Article 12.1.1 (v) of the Anti-dumping Agreement.
[292] Section 5.1 of the Anti-dumping Regulations.
[293] Section 5.2 of the Anti-dumping Regulations.
[294] Section 5.3 of the Anti-dumping Regulations.
[295] Article 6.3 of the Anti-dumping Agreement.

other screws fully threaded with hexagon heads made of steel. The Commission, after the examination of the prima facie evidence, initiated the investigation and notified the WTO interested parties of the investigation.[296] The interested parties responded to the notice through a written and oral representations to the Commission. The ITAC considered the representations for final determination for the initiation of the investigations and a recommendation was made to the Minister of Trade and Competition for the imposition of anti-dumping measures on the allegedly dumped screws.[297] This shows that the ADR is not only largely consistent with the AD Agreement in this regard but the Commission also follows the procedures in practice as outlined in the ADR to meet its obligation.

5.3.4 Adverse party meetings

Similar to the AD Agreement, the ADR also makes room for adverse party meetings requested during the preliminary or final investigation phase.[298] Similarly, the adverse party meetings are non-obligatory and any party's failure to attend such meetings will not have any prejudicial effect to the case.[299]

5.3.5 Preliminary report

The ADR requires the Commission to make a non-confidential report accessible within seven days of publication of its preliminary finding to the public.[300] The information required in the report includes:

a) identity of the applicant;
b) a full description of the product under investigation;
c) date of the Commission's decision to initiate the investigation;
d) initiation date and notice number;
e) date of the Commission's preliminary findings on dumping and injury;
f) the margin of dumping;
g) the methodology used by the Commission to determine the margin of dumping;
h) the injury factors considered;
i) the causality factors considered;

[296] ITAC report 668 *Investigation into the extension of the safeguard measure on other screws fully threaded with hexagon heads made of steel: Final determination* (26 Jul 2021).
[297] ITAC report 668 I*nvestigation into the extension of the safeguard measure on other screws fully threaded with hexagon heads made of steel: Final determination* (26 Jul 2021).
[298] Section 6.1 of the Anti-dumping Regulations
[299] Section 6.4 of the Anti-dumping Regulations.
[300] Section 34.1 of the Anti-dumping Regulations.

j) the Commission's finding; and
k) while preserving the requirements of confidentiality, all relevant issues of fact and law considered by the Commission in reaching its preliminary determination.[301]

Once the preliminary report has been made available, all interested parties are given 14 days to respond in writing.[302] On another hand, the AD Agreement does not specifically provide guidelines of what should be included in the report, neither does it provides timeframes for the submission of the report. It however mandates the investigating authorities to disclose to all interested parties, the facts relied on before making a final determination to apply definitive measures or not. It does not provide any timeframe as to when it should be made available for interested parties to respond, it only states that 'such disclosure should take place in sufficient time for the parties to defend their interests.'[303] This means that unlike the ADR, the AD Agreement does not mandatorily require the full disclosure of the report of findings on dumping investigations to the public. Thus, although the ADR does not reflect the same as the AD Agreement in terms of disclosure of preliminary investigations, it does not render the ADR wholly inconsistent in this regard. The preliminary report is necessary to disclose to all interested parties, information and facts relied on to make a final determination. Furthermore, the seven days' period stipulated by the ADR is relevant to ensure unnecessary delays in finalisation of the investigations. It is observed that the requirements for public disclosure of preliminary report on dumping investigations as contained in the ADR is in accordance with the provisions of Section 11 PAIA which requires any public body to make records accessible to the requester, provided the information requested is non-confidential, and shall not be affected by any reason provided by the requester for access to such information.[304]

5.4 Final determinations and imposition of anti-dumping duties

The ADR refers to three types of anti-dumping measures which can be imposed, namely: 1) Provisional Measures; 2) Price Undertaking; and 3) Anti-dumping duties.

a) Provisional measures

[301] Section 34.2 of the Anti-dumping Regulations.
[302] Section 35.1 of the Anti-dumping Regulations.
[303] Article 6.9 of the Anti-dumping Agreement.
[304] Act 2 of 2002, Sec 11.

The ADR provides that no provisional measures may be imposed in less than 60 days after initiation of the investigation. In terms of the ADR, the prescribed duration for the imposition of the provisional measures is six months. Thereafter, the provisional measures may be extended to nine months upon request of any party concerned. On the contrary, the AD Agreement provides that:

> The application of provisional measures shall be limited to a short period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, during an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.[305]

The ADR is therefore not consistent with the AD Agreement in terms of imposition of provisional matter in that the ADR's duration for imposition of provisional measures is strictly six months whereas the AD Agreement specifically stated that the imposition of provisional measures is not more than six months 'upon request by exporters representing a significant percentage of the trade involved.'[306]

The inconsistency of South Africa's anti-dumping legal frameworks in imposition of provisional measures creates a problem in practical disputes. This was raised in *South Africa – anti-dumping duties on frozen meat of fowls from Brazil* WTO request for consultation dispute, Brazil emphasised that South Africa's imposition of provisional measures is inconsistent with Articles 7.1 of the AD Agreement because South Africa applied provisional measures on frozen chicken even though the investigation has not been initiated in terms of Article 5 of the AD Agreement; interested parties were not afforded a chance to respond and submit information; preliminary determination was incompatible with Article 2 and 3 of the AD Agreement; and there was no injury caused in the process of the investigation.[307]

[305] Article 7.4 of the Anti-dumping Agreement.
[306] Article 7.4 of the Anti-dumping Agreement.
[307] WT/DS439/1 G/L/990 G/ADP/D92/1 *South Africa – anti-dumping duties on frozen meat of fowls from Brazil* (25 June 2012).

b) Price undertaking

The ADR provides that where an exporter makes a satisfactory price undertaking to the Commission to cease exports from the SACU or to revise its prices, the Commission may suspend or terminate the investigation proceedings.[308] The Commission is mandated to decide on the information to be submitted for the conditions of the undertakings and the undertaking is subject to the Commission's termination where the conditions are not met.[309] In instances where the exporter violates the undertakings, in other words does not comply with the undertaking, the Commission is empowered to take speedy action which may include an immediate request to the South African Revenue Services (SARS) for the imposition of provisional payment.[310] On another hand, the AD Agreement provides that:

> In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.[311]

The ADR is like the AD Agreement in terms of the price undertaking procedure as is the same as Article 8 of the AD Agreement.

c) Anti-dumping duties

Anti-dumping duties in South Africa are regulated by Customs and Excise Act, 1964 (Act No 91 of 1964) read together with the ADR as well as the ITAA.[312] Article 9.1 of the AD Agreement provides that the investigating authorities of the importing State are responsible to, after the fulfilment of all requirements, make a decision whether to impose the anti-dumping duties or not, and whether the anti-dumping duty amount must be based on the full margin of

[308] Section 39.1 of the Anti-dumping Regulations.
[309] Section 39.2 of the Anti-dumping Regulations.
[310] Section 39.4 of the Anti-dumping Regulations.
[311] Article 8.6 of the Anti-dumping Agreement.
[312] Section 38.2 of the Anti-dumping Regulations.

dumping or less.[313] The AD Agreement further states that the amount of anti-dumping duty charged must not exceed the margin of dumping.[314] The AD Agreement provides that:

> When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.[315]

Section 16 of the ITAA empowers the Commission to evaluate:

(a) Applications in terms of Section 26 with regards to alleged dumping, or subsidised exports in or into the Republic or the Common Customs Area;
(b) Applications in terms of section 26 with regard to safeguard measures;
(c) Applications in terms of Section 26 with regard to amendment of customs duties in the Common Custom Area; and
(d) Matters with regard to safeguard measures or amendment of customs and duties in the Common Custom Area, that the
    (i) Minister directs the Commission to consider; or
    (ii) Commission considers on its own initiative.[316]

Section 16 (3) of the ITAA states that the Commission after evaluation of all the requirements, must inform the Minister and the Tariff Board of its evaluation.[317] This means that the Commission is only empowered to do evaluation of the application for dumping and investigations and thereafter submit a recommendation to the Minister of Trade and Industry for imposition of anti-dumping duties.[318] In case of *SCAW South Africa (Pty)Ltd vs The ITAC* and others, the Court noted that 'the ITAC recommendation is an important jurisdictional fact for any action the Minister of Trade and Industry might decide to take.'[319] In other words, any

[313] Article 9.1 of the Anti-dumping Agreement.
[314] Article 9.3 of the Anti-dumping Agreement.
[315] Article 9.3.1 of the Anti-dumping Agreement.
[316] Act 71 of 2002, Section 16(1) (a)-(d).
[317] Act 71 of 2002, Section 16(3)
[318] Vinti (n25 above) 4.
[319] *SCAW South Africa (Pty)Ltd vs The ITAC para 94.*

erroneous step taken by the ITAC might affect the entire dumping investigation process.[320]Thus, the ITAA is consistent with Article 9.1 of the AD Agreement in terms of empowering the investigating authorities to make decisions of whether or not to impose the anti-dumping duty and the amount of anti-dumping duties to be charged. In terms of the ADR, once the Commission has made a final determination on basis of prima facie evidence, definitive anti-dumping duties may be imposed and will remain in place for a period of five years from the date of publication of final determination by the Commission.[321]

5.5 Reviews

Review of the anti-dumping duties is possible in terms of the Anti-dumping agreement, upon a request by an interest party or by the investigating authority. The AD Agreement stipulates that final anti-dumping duty must stay on until limit essential to reduce dumping which is causing injury.[322] The AD Agreement further delivers that the imposition of the anti-dumping duty shall be reviewed where there is a need by the investigating authorities on their own proposal or, in instances where the reasonable period has elapsed since the anti-dumping duty was imposed, through request of any interested party accompanied by positive information validating the need for review. Rights exist for the interested parties to request the investigation authorities to inspect whether the continued stay on of the anti-dumping duty is necessary to compensate dumping, whether there are likelihood of the continuation of the injury or recurrence if the duty were removed or varied. In circumstances where the authorities finds that the anti-dumping duty is no longer necessary, the anti-dumping duty shall be terminated immediately.[323] The AD Agreement further mandates that the definitive anti-dumping duty shall be ended on a date no later than five years from the date of its imposition unless the authorities find that ending the continuation of the anti-dumping duty would likely results in the recurrence of the dumping and material injury. In such cases, the duty will remain in force whilst awaiting the outcome of the review.[324] Moreover, the AD Agreement necessitates that the normal procedure of Article 6, which is anti-dumping investigation procedure, shall apply

[320] *SCAW South Africa (Pty) Ltd vs The ITAC para 95.*
[321] Section 38.2 of the Anti-dumping Regulations.
[322] Article 11.1 of the Anti-dumping Agreement.
[323] Article 11.2 of the Anti-dumping Agreement.
[324] Article 11.3 of the Anti-dumping Agreement.

in review applications.[325] South African Anti-dumping legislation establishes five types of reviews. These are: (1) interim reviews; (2) new shipper reviews; (3) sunset reviews; (4) anti-convention reviews; and (5) judicial review.

5.5.1 General

Procedure for application of reviews is slightly like the anti-dumping investigation procedure. A properly documented application for review is required followed by a notification to the party concerned through a Government Gazette, which includes all non-confidential information. Thereafter, the initiation of review follows which is done through publication of notice in the Government Gazette. Interested parties then respond to the notice by way of a Commission's questionnaire. Interested parties then receive facts which must responded within 14 days of receipt.[326]

5.5.2 Interim reviews

In respect of interim review, the Commission will consider an application for interim review no later than 12 months after the finding of dumping investigations. Interim review application will only be accepted if there are changes in circumstances. A prove is required to that effect. Changes in circumstances that relates to the party who did not cooperate in anti-dumping investigations will not be considered. Recommendations for interim review may include an increase, decrease or confirmation of the scope of the application of the anti-dumping duty.[327]

5.5.3 New shipper reviews

New shipper review are reviews which are only applicable to exporters that did not export in the SACU industry during the dumping investigations. Information is required from the exporter requesting new shipper review to substantiate that it is a new exporter. Information relating to the Normal value, the export price and any other relevant information as deemed

[325] Article 11.5 of the Anti-dumping Agreement.
[326] Section 41-43 of the Anti-dumping regulations.
[327] Section 44-47 of the Anti-dumping regulations.

necessary by the Commission must be submitted for the application, in a prescribed form. The initial anti-dumping duties must be withdrawn simultaneously once the new shipper review is initiated. The exporter's margin of dumping is determined by making a difference between the normal value and the export price to South Africa. Where there is no export price to South Africa, the Commission may determine the export price on any reasonable basis. Once the procedures are finalised, the Commission may impose anti-dumping duty equal to the margin of dumping, or it may terminate the provisional payment.[328]

5.5.4. Sunset reviews

The prescription period for the imposition of anti-dumping duties in terms of South Africa's anti-dumping legislation is five years. Where sunset reviews have been initiated before the anti-dumping duty lapse such sunset review shall remain in force until the finalisation of the sunset review. The procedure for the initiation of the sunset review includes: (1) notice in the Government Gazette indicating the date of the ending period of the sunset review; (2) Interested parties receive contact directly from the Commission of the product which has been charged anti-dumping duty of the end day if the anti-dumping duty imposed on such product. Interested parties are given 30 days from the publication of the said notice to request sunset review. The anti-dumping duty can be maintained on request by the SACU industry, provided it gives necessary information for the request.[329] In cases where the SACU does not make a request to maintain the anti-dumping duty or provided information after the publication of the notice, the Commission will provide a recommendation for the anti-dumping duty to lapse on the date published on the notice. Furthermore, in instances where the exporter concerned does not provide required information or does not cooperate within the specified period, the Commission may rely on the available facts in making a final decision[330]

5.5.5 Anti-circumvention reviews

[328] Section 48-52 of the Anti-dumping regulations.
[329] Section 53-5.5 of the Anti-dumping regulations.
[330] Section 58 of the Anti-dumping regulations

In terms of South Africa's anti-dumping legislation, Anti-circumvention reviews will take place when one or more of the following conditions are met:

> (a) a change in the pattern of trade between third countries and South Africa or the common customs area of the Southern African Customs Union; (i) which results from a practice, process, or work; (ii) for which there is no or insufficient cause or economic justification other than the imposition of the anti-dumping duty;
>
> (b) remedial effects of the anti-dumping measure are being undermined in terms of the volumes or prices of the products under investigation;
>
> (c) dumping can be found in relation to normal values previously established for the like or similar products.[331]

5.5.6 Judicial review

Preliminary decision may be challenge before the finalisation of the dumping investigation if it can be proved that: (1) the Commission acted outside the scope of the ITAA or ADR; (2) the action by the Commission amounts to serious prejudicial effect to the complainant; and (3) it is not possible to undo the prejudice caused by the Commission's action in future final decisions. The complainant must give the Commission at least 30 days before the filing of judicial review regarding the preliminary of final decisions of the dumping investigations.[332]

Based on the above provisions, it is submitted that South Africa's anti-dumping procedure is like the AD Agreement in cases of review. However, there are few inconsistencies appearing in the ADR which needs major changes. These are: (1) In terms of sunset reviews, the Commission is not mandated to do necessary examination to evaluate whether expiry of anti-dumping duty will result in the likelihood of recurrence of injury and dumping. It merely authorises the Commission to make a recommendation, in instances where the SACU does not request for the continuation of the duty, that the anti-dumping duty lapses on the date publicised

[331] Section 60 (1)(a)-(c) of the Anti-dumping regulations.
[332] Section 64 of the Anti-dumping regulations.

in the notice. The failure of the Commission to make an evaluation before the end of the anti-dumping duty results in the repetition of injury and opens up for further dumping; (2) the fact that judicial review is done through the normal Courts results in improper decisions and lengthy procedures. As a result, South Africa need to modify its legislation in this aspect.

5.6 Conclusion

In the final analysis, the procedural aspects of making a finding on dumping under the South African anti-dumping legislation is relatively consistent, similar and compatible with the provisions of the AD Agreement in this regard. South Africa's anti-dumping legislature is like the AD Agreement in respect of the pre-initiation stage. Both the ADR and the AD Agreement provide those complaints must be submitted in writing through the submission of a properly documented report. Both laws also require the provision of all necessary information for initiation of dumping investigation, as well as the requirement for notification of all concerned parties to the investigation. The ADR and the AD Agreement both provide for the protection of confidentiality of all parties to the investigation although both laws require that the party claiming confidentiality must give reasons for making such claim.

The ADR and the AD Agreement both provide opportunities for all parties concerned to obtain representation throughout the investigation proceedings. However, the AD Agreement does not expressly indicate whether such representation can be provided during the initiation stage, unlike the ADR which expressly provides that representation is allowed during the initiation stage. This represents an inconsistency between the ADR and the AD Agreement albeit a positive inconsistency. In terms of conduct of hearings, both the ADR and the AD Agreement are quite similar as they both permit the parties to conduct oral hearings and allow for adverse party meetings upon request.

However, unlike the ADR, the AD Agreement does not mandatorily require the public disclosure of findings made from investigations. The ADR requires the public disclosure of findings from dumping investigation in pursuance of the legal requirement for disclosure of public information under the PAIA. Finally, both the ADR and the AD Agreement share similar provisions on price undertaking. Moreover, there are serious irregularities in terms of South Africa's Sunset reviews and Judicial reviews which need major changes.

In conclusion, the procedural aspects for adjudicating allegations of dumping as captured under the South African Anti-dumping legislation are significantly consistent and compatible with the corresponding procedural provisions under the AD Agreement.

Chapter 6

Research findings and recommendations

6. Introduction

The previous chapters discussed the History of dumping, the determination of dumping under the AD Agreement and under the South Africa anti-dumping legislation, it critically analysed the South African anti-dumping procedures and pointed out similarities and irregularities of South Africa's anti-dumping procedural laws with the AD Agreement.

This Chapter seeks to provide a summary of the discussions in the previous chapters, discussion of the findings of the research and seeks to provide recommendation to irregularities in the South African anti-dumping laws.

6.1.Summary of discussions

To sum up the previous chapters, anti-dumping law was first established in the United States before the use of anti-dumping law spread across the world. The Uruguay Round established the GATT 1994 which established the Agreement of the Implementation of Article VI of the GATT (Anti-dumping Agreement).[333] South Africa is the first country in Africa to implement Anti-dumping law since 1914. Although not promulgated into South Africa's national laws, the country is bound by the anti-dumping agreement as evidenced in Section 233 of the Constitution of the Republic of South Africa. Currently, anti-dumping law and procedure in South Africa is regulated by the International Trade and Administration Act 71 of 2002 (ITAA), read together with its Anti-dumping Regulations of 2003 which gives detailed guidelines where there are inconsistencies in the ITAA.[334]

The AD Agreement is an important tool which provides guidelines for anti-dumping law and procedures. To prove that dumping has occurred, the alleging party must first prove that the product in question is a 'like product'. This is important to enable investigation authorities to

make a proper investigation based on facts and evidence. Thereafter, the alleging state need to determine the Normal Value of the product in question. In instances where there is no Normal Value or the product is not manufactured in the export country, the Normal Value can be contracted based on sales or third country sales. Furthermore, the alleging country must establish the export price to determine the exact selling price of the like product in the manufacturing State. Once the normal value and the export price have been determined, and once it has been established that the product in question is a 'like product', a fair comparison must be made between normal value and the export price to determine the margin of dumping. The margin of dumping determines the extent of dumping of the product in question. Once all these have been proven, it will be prudent to conclude that the product is allegedly dumped. It is further necessary to note that the above only constitutes determinants for dumping, and do not constitute final finding of dumping.

6.2.Research findings

Problem 1:

The South African anti-dumping legislation is inconsistent with the AD Agreement in aspects of determining a causal link between dumping and resulting injury. Unlike the AD Agreement, the South African anti-dumping legislation does not make it mandatory for the Commission to examine or consider factors that cause injury to the domestic industry volume of sales. Furthermore, the South Africa anti-dumping legislation fails to provide specific provisions or requirements for determining or establishing a causal link between the alleged dumping and the material injury complained of. This is inconsistent with the provisions of the AD Agreement which expressly requires that the party alleging dumping must establish a causal link between the alleged act of dumping and the material injury purportedly suffered.

Problem 2:

In terms of procedural aspects, making a finding on dumping under the South African anti-dumping legislation is relatively consistent, similar and compatible with the provisions of the AD Agreement. South Africa's anti-dumping legislature is similar to the AD Agreement in respect of the pre-initiation stage. Both the ADR and the AD Agreement provide those

complaints must be submitted in writing through the submission of a properly documented report. Both laws also require the provision of all necessary information for initiation of dumping investigation, as well as the requirement for notification of all concerned parties to the investigation. The ADR and the AD Agreement both provide for the protection of confidentiality of all parties to the investigation although both laws require that the party claiming confidentiality must give reasons for making such claim. The ADR and the AD Agreement both provide opportunities for all parties concerned to obtain representation throughout the investigation proceedings.

However, the AD Agreement does not expressly indicate whether representations can be provided during the initiation stage, unlike the ADR which expressly provides that representation is allowed during the initiation stage. This represents a slight inconsistency between the ADR and the AD Agreement although a positive inconsistency.

In terms of conduct of hearings, both the ADR and the AD Agreement are quite similar as they both permit the parties to conduct oral hearings and allow for adverse party meetings upon request. However, unlike the ADR, the AD Agreement does not mandatorily require the public disclosure of findings made from investigations. The ADR requires the public disclosure of findings from dumping investigation in pursuance of the legal requirement for disclosure of public information under the PAIA, be made accessible upon request. Lastly, both the ADR and the AD Agreement share similar provisions on price undertaking.

The procedural aspects for adjudicating allegations of dumping as captured under the South African anti-dumping legislation are significantly consistent and compatible with the corresponding procedural provisions under the AD Agreement.

Problem 3:

The South African determination of dumping is not substantially compatible with Article 2.2 of the AD Agreement.[335] Article 2.2 of the AD Agreement specifically states that when there are no sales of like products in the ordinary course of trade due to the circumstances of the market, or due to the low volume of sales in the exporting country, it would not be appropriate to do a proper comparison of the sales in respect of like products. In such instance, the margin of dumping must be calculated based on the difference of the comparable price of like product when it is transported to the third country, only if the price of the allegedly dumped product

[335] Sibanda (n202 above) 268.

represents the actual domestic sales volume of the exporting country. If the price is not representative, then the margin of dumping shall be determined 'with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profit.'[336]

However, in order to remedy the incompatibility, Section 8 of the anti-dumping regulations (ADR) comes to the rescue. The problem about the ITAA and the ADR in this regard is long administration and procedural delays that result from having to compare the two provisions whenever an investigation is to be made. Having to refer to the ADR creates unnecessary administration which results in procedural delays and omissions of certain crucial aspects.

Problem 4:

In terms of determination of Normal value, the ADR appears to be in conflict with the ITAA in that it only refers to the 'third country' and not 'appropriate third or surrogate country' as specified in Section 32 (2)(b)(iii) of the ITAA.[337] In other words, the ADR and the ITAA are inconsistent with each other in this regard. The ADR were meant to give effect to provisions in the ITAA which are irregular with the AD Agreement. In this aspect, the ADR removed substantial content altogether. This creates uncertainties and incorrect procedural approach in practice.

Problem 5:

In terms of determination of injury, ADR only authorises the Commission to consider the factors for determination of injury, whereas the AD Agreement obligates the investigating authorities to make an evaluation of all listed factors based on evidence.[338] Furthermore, the AD Agreement obligates the investigating authorities to make an 'evaluation of injury caused to the domestic industry in terms of the 'actual and potential decline in sales.'[339] On the contrary, the ADR merely gives the Commission the discretion to consider injury caused to the domestic industry sales volume.[340]This means that the ITAC is not obligated to make an

[336] Article 2.2 of the AD Agreement.
[337] Sibanda (n202 above) 271.
[338] Khanderia (n6 above) 260.
[339] Khanderia (n6 above) 260.
[340] Khanderia (n6 above) 260.

evolution of the potential decline or increase of the domestic industry sales volume but may consider the effect of the injury on the sales volume of the domestic industry like product.[341] As a result, the South Africa's Anti-dumping legal framework is inconsistent with the WTO AD Agreement in this aspect. This causes a problem in anti-dumping investigations as mere consideration of factors does not an actual determination of the existence of material injury to the SACU domestic industry.

Problem 6:

Determination of a causal relationship is an important aspects of anti-dumping investigation to arrive at a finding that the alleged dumped product is causing injury to the domestic market. There is no mention of causal relationship in the ITAA.[342] Section 16 of the ADR states that the Commission must consider all relevant factors in order to establish the existence of a causal link between the dumping and the material injury.[343] Meanwhile, the AD Agreement specifically states the investigating authorities must make an 'examination of all relevant evidence' to determine the existence of a causal relationship between the dumped product and the material injury.[344] In terms of the ADR however, the Commission is mandated to only 'consider' the factors and says nothing in terms of examining the evidence. As a result, there is a problem in terms of the wording of the ADR which results in incorrect application thereof. It does not state what the Commission should rely on when making the consideration of the factors. As a result, the ADR is not acting within the ambit of Article 3.5 of the Anti-dumping Agreement due to failure to mandate the Commission to make an examination on the basis of positive evidence that there is a causal link between the dumped product and the material injury.

Problem 7:

Unlike the ADR, the AD Agreement does not mandatorily require the full disclosure of the report of findings on dumping investigations to the public. Thus, although the ADR does not reflect exactly the same as the AD Agreement in terms of disclosure of preliminary investigations, it does not render the ADR wholly inconsistent in this regard.

[341] Khanderia (n6 above) 260.
[342] Brink (n217 above) 24.
[343] Section 16.1 of the Anti-dumping Regulations.
[344] Article 3.5 of the Anti-dumping Agreement.

Problem 8:

There are irregularities in terms of South Africa's Review procedure which results in long procedures. These are: (1) in terms of sunset reviews, the Commission does not have to make a necessary examination to evaluate whether the lapsing of anti-dumping duty will result in the likelihood of recurrence of injury and dumping. It merely authorises the Commission to make a recommendation, in instances where the SACU does not request for the continuation of the duty, that the anti-dumping duty lapses on the date publicised in the notice. The failure of the Commission to make an evaluation before the end of the anti-dumping duty results in the repetition of injury and opens for further dumping; (2) the fact that judicial review is done through the normal Courts results in improper decisions and lengthy procedures. As a result, South Africa need to modify its legislation in this aspect.

6.3.Recommendations

Other than the above relatively few inconsistencies, it is clear that the provisions of the South African anti-dumping legislation are largely consistent with the provisions of the AD Agreement on the definition and determinants of dumping. Few amendments need to be made in order to make South Africa's anti-dumping procedural law be compatible with the World Trade Organisation AD Agreement. South Africa need to amend its anti-dumping legislations to make it correspond with the AD Agreement. The delay in completion of anti-dumping investigations due to technicalities, lengthy and unclear procedures provided in the legislation of the affected State often leads to the victim State suffering more injury while investigations are being conducted.

As a result, the International Trade and Administration Act needs to be amended to bring effect to both the substantial and procedural inconsistencies. The Anti-dumping Regulations has to be incorporated in one document to bring effect to the amendments in one documented legislation, instead of referring to the ADR. This causes unnecessary administration and delays in finalisations of the anti-dumping investigations. There has to be one properly documented legislation to govern anti-dumping procedures in South Africa, which will in turn reduce the administration, costs and delays in anti-dumping investigations. Furthermore, South Africa further needs to establish an International Commission to deal with anti-dumping reviews.

Currently, in South Africa, the process of filing reviews in the normal courts is too lengthy and costly. There must be a specific Commission that will deal with anti-dumping reviews to minimise time and costs.

BIBLIOGRAPHY

7.1.Case law

7.1.1. South Africa Case law

Association of Meat Importers v ITAC 2013 4 All SA 253 (SCA)

International Trade and Administration Commission vs *International Trade Administrations and others* CCT 59/09; [2010] ZACC

7.1.2. WTO Trade disputes

WT/DS8/R Japan –Taxes on Alcoholic Beverages

WT/DS500/1 G/L/1139 G/ADP/D112/1: *South Africa — Provisional Anti-Dumping Duties on Portland Cement from Pakistan*

WT/DS439/1 South *Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil* 73 (25 June 2012) (*South Africa – Poultry*).

7.2.Books

Human, CJ & Miranda, J et el (ed) A Handbook on Anti-Dumping Investigations Cambridge University Press (2003).

Bagwell K & Bermann, GA *et el Law and economics of contingent protection in* ***international trade*** *(*2010).

7.3.International Treaties

Agreement on the Implementation of General Agreement of Tariffs and Trade 1994.

7.4.Journal Articles

Brink, G ‘Anti-dumping and Judicial review in South Africa: An Urgent need for change’ (2012) 7 *Global Trade Custom Journal.*

Brink, G ‘On “Dumping” and the Competition Act of South Africa: No “double remedy”’ (2021) 54 *De Jure Law Journal.*

Brink, G 'One hundred years of anti-dumping in South Africa' (2015) 49 *Journal of World Trade.*

Brink, G 'X-raying injury in South Africa’s Anti-dumping investigations (2015) 23 *African Journal of International and Comparative Law*.

Brink, G ‘The 10 major problems with the55 Anti-Dumping Instrument in South Africa’ (2005) 39/1 Journal of World Trade

De Lange, C ‘An Overview of the History of Dumping in South Africa over the past one hundred years’ (2014) tax talk.

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

Khanderia, S ‘The determination of injury in South African anti-dumping investigations: recent approaches’ (2016) 49 *The Comparative and International Law Journal of Southern Africa.*

Ndlovu, L ‘South Africa and the World Trade Organization Anti-dumping Agreement nineteen years into democracy’ (2013) 28 *South African Public Law Journal.*

Osgode, PC ‘Assessment of the WTO-Consistency of the Procedural Aspects of South African Anti-Dumping Law and Practice, An’ (2003) 22 *Penn State International Law Review*.

Radu, KD ‘World Trade Organisation Agreement of Anti-dumping: A GATT/WTO Indian jurisprudence’ (2008) Kluwer *Law International*

Sibanda, OS ‘South African Anti-dumping law and practice: A judicial and comparative analysis of procedural and substantive issues’ (2011) *Foreign Trade Review.*

Vinti C ‘A Spring without Water: The Conundrum of Anti-Dumping Duties in South African Law’ (2016) 19 *Potchefstroom Electronical Law Journal.*

Vinti C‘ “Dumping” and the Competition Act of South Africa’ (2019) 52 *De Jure Law Journal.*

7.5.Internet Websites

An overview of ITAC *http://www.itac.org.za/pages/about-itac/an-overview-of* (accessed 25 May 2021).

From the GATT to the WTO: "A Brief Overview" *https://guides.ll.georgetown.edu/c.php?g=363556&p=4108235* (accessed 25 May 2021).

Jourbet, N Managing the challenges of WTO participation: case study 38 'The Reform of South Africa's Anti-Dumping Regime' *https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm* (accessed on 13 June 2021).

ITAC: Trade Remedies *http://www.itac.org.za/pages/services/trade-remedies* (accessed 29 August 2021).

World Trade Organization "Technical information on anti-dumping" *https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm* (accessed 22 August 2021).

7.6.Legislations

Board on Tariffs and Trade Act 107 of 1986

Board on Tariffs and Trade Amendment Act, of 1992

Constitution of the Republic of South Africa, 1996

Customs and Excise Act 71 of 1964

Customs Tariff Act of 1914

Excise and Customs Act 35 of 1944

International Trade Administration Commission Act 61 of 2002

Promotion of Access to Information Act 2 of 2000

7.7.Thesis

Tao, M 'Dumping and antidumping regulations with specific reference to legal framework in South Africa and China' unpublished LLM thesis, University of Free State, 2006.

Tabane, RJ 'An Examination of the Effectiveness of Anti-dumping Laws in South Africa' unpublished LLM Thesis, University of KwaZulu Natal.

Andrew, IG 'Implementing effective trade remedy mechanisms: A critical analysis of Nigeria's Anti-Dumping and Countervailing Bill' unpublished LLM mini-thesis, University of Pretoria (2014).