SOUTH AFRICAN ANTI-DUMPING LAW AND PRACTICE: A JURIDICAL AND COMPARATIVE ANALYSIS OF PROCEDURAL AND SUBSTANTIVE ISSUES

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United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions, 37 Supp BISD 288 (1990)

US – Fibre Underwear, Panel Report
United States – Restrictions on Imports of Cotton and Manmade Fibre Underwear, WT/DS24/R (8 November 1996)

US – Japan Carbon Steel, Appellate Body Report
United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (adopted 15 Dec. 2003)

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United States – Anti-dumping Measures on Certain Hot-rolled Steel Products from Japan, WT/DS184/AB/R, adopted 23 August 2001

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United States – Final Anti-dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, 30 April 2008

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United States – Anti-dumping and Countervailing Measures on Steel Plate from India, WT/DS206/R/Corr.1, adopted 29 July 2002

US – URAA, Panel Report
United States – Section 129(c)(1) of the Uruguay Round Agreement Act, WT/DS221/R circulated 15 July 2002

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LIST OF ABBREVIATIONS

1.	AB	Appellate Body
2.	ABA	American Bar Association
3.	AD	Anti-dumping
4.	ADR	Anti-dumping regulations
5.	URAA	Uruguay Round Agreement on Implementation of Article VI of the GATT 1994
6.	ADP Committee	WTO Committee on Anti-Dumping Practices
7.	ACP	African, Caribbean, and Pacific group countries
8.	African J. Int' & Comp L	African Journal of International and Comparative Law
9.	Am. J. Int'l L	American Journal of International Law
10.	Am. Buss. L. J.	American Business Law Journal
11.	SCM	Agreement on Subsidies and Countervailing Duties
12.	Berk. J. Int'l L.	Berkely Journal of International Law
13.	Brooklyn J. Int' l L.	Brooklyn Journal of International Law
14.	BISD	Basic Instruments and Selected Documents

15.	BLN(S)	Botswana, Lesotho, Swaziland (and Namibia)
16.	BoP Committee	Committee on Balance of Payments
17.	Boston Univ. Int' l L.J	Boston University International Law Journal
18.	BTI	Board on Trade and Industry
19.	BTTA	Board on Tariffs and Trade Act
20.	BOFT	Bureau of Fair Trade for Imports and Exports (China)
21.	BOTT	Board of Tariffs and Trade
22.	B.U. Int'l L.J	Boston University International Law Journal
23.	B.U.L.J	Boston University Law Journal
24.	CAA	Customs Amendment Act (Australia)
25.	Case. W. Res. J. Int' l L.	Case Western Reserve Journal of International Law
26.	CILSA	Comparative and International Law Journal of Southern Africa
27.	Colum. Bus. L. Rev.	Columbia Business Law Review
28.	Column. J. Trans' l L.	Columbia Journal of Transnational Law
29.	Com.Mkt. L. Rev	Common Market law Review

30.	Cornell L. Rev.	Cornell Law Review
31.	CCA	Common Customs Area
32.	CCP	Constructed Cost of Production Price
33.	CFA	Committee on Finance and Administration
34.	C.I.F	Cost, Insurance and Freight
35.	CoB	Committee on Budget
36.	CoM	Council of Ministers
37.	CPA	Criminal Procedure Act (South Africa)
38.	CRTA	Committee on Regional Trade Agreements
39.	CSP	Country-Specific Preferences
40.	CTD	Committee on Trade and Development
41.	CTE	Committee on Trade and the Environment
42.	Denv J. Int' L	Denver Journal of International Law and Policy
43.	DOC	United States' Department of Commerce
44.	DSB	Dispute Settlement Body
45.	DSU	Uruguay Round Dispute Settlement Understanding
46.	DTI	Department of Trade and Industry
47.	DMECs	Developed Market Economy Countries

48.	Duke L. J.	Duke Law Journal
49.	EC	European Community
50.	EDMP	Export Country' s Domestic Market Price
51.	EEC	European Economic Community
52.	EHMP	Exporter Home Market Price
53.	EJIR	European Journal of International Relations
54.	EU	European Union
55.	Estey J. of Int'l L & Trade Pol'y	The Estey Centre Journal of International Law and Trade Policy
56.	Fin. Times	Financial Times
57.	FMP	Foreign market price
58.	FMV	Foreign Market Value
59.	FTA	Free Trade Agreement
60.	GAAP	Generally Accepted Accounting Practice
61.	GATT 1947	General Agreement on Tariffs and Trade of 1947
62.	GATT	General Agreement on Tariffs and Trade of 1994
63.	GATS	General Agreement on Trade in Services
64.	GEIS	General Export Incentive Scheme

65.	Geo. Wash. J. Int'l L & Prac	George Washington Journal of International Law and Practice
66.	GDP	Gross Domestic Product
67.	GSP	Generalized System of Preferences
68.	Harvard Int'l L. J	Harvard International Law Journal
69.	HCR	High Court Rules
70.	I.C.L.Q	International and Comparative Law Quarterly
71.	IGD	Institute of Global Dialogue
72.	I.L.M	International Legal Materials
73.	IMF	International Monetary Fund
75	Int'l Trade Rep	International Trade Report
75.	INT.TLR	International Trade Law Review
76.	Int'l Rev. L & Econ	International Review of Law and Economics
77.	ITAA	International Trade Administration Act
78.	ITAC	International Trade Administration Commission of South Africa
79.	Israel L Rev	Israel Law Review
80.	ITO	International Trade Organization
81.	JBL	Journal of Business Law

82.	JICL	Journal of International Commercial Law
83.	JIEL	Journal of International Economic Law
84.	J. Int'l L. Bus.	Journal of International Law and Business
85.	J. Int'l L. & Prac	Journal of International Law and Practice
86.	J. Int' l Leg. Stud.	Journal of International legal Studies
87.	J.W.T	Journal of World Trade
88.	JWTL	Journal of World Trade Law
89.	Law & Pol'y Int'l Bus.	Law and Policy in International Business
90.	Lawsa	The Law of South Africa
91.	LDCs	Least developed countries
92.	Lomé I Convention	First ACP-EEC Convention of Lomé
93.	Lomé II Convention	Second ACP-EEC Convention of Lomé
94.	Lomé III Convention	Third ACP-EEC Convention of Lomé
95.	Lomé IV Convention	Fourth ACP-EEC Convention of Lomé
96.	MacGill L.J	McGill Law Journal
97.	Md. J. Int'l L & Trade	Maryland Journal of International Law and Trade
98.	ME	Market economy
99.	Melbourne J. Int'l L	Melbourne Journal of International Law
100.	Mich. J. Int'l L	Michigan Journal of International Law
101.	Mich. L. Rev.	Michigan Law Review
102.	MMPA	Marine Mammals Protection Act (USA)
103.	MNCs	Multinational corporations

104.	MNF	Most favoured nation
105.	NAFTA	North American Free Trade Agreement
106.	N.C.J. Int'l.& Com	North Carolina Journal of International Law and Commerce
107.	NGDOs	Non-governmental development organisations
108.	NGO	Non-governmental organisation
109.	NLR	New York Law Review
110.	NME	Non-market economy
111.	NT	National treatment
112.	Nw. J. Int'l & Bus.	Northwestern Journal of International Law and Business
113.	N.Y.U.L. Rev	New York University Law Review
113.	Ohio N.U.L. Rev	Ohio Northern University Law Review
115.	OTCA	Omnibus Trade and Competitiveness Act (USA)
116.	PADR	Proposed Anti-Dumping Regulations
117.	PPA	Protocol of the Provisional Application of the General Agreement on Tariffs and Trade
118.	PAJA	Promotion of Administrative Justice Act
119.	Penn St. Int'l L. Rev.	Penn State International Law Review

119.	Potchefstroom Elec. L.J	Potchefstroom Electronic Law Journal
121.	Prac. Law. Inst.	Practising Law Institute
122.	PRC	People' s Republic of China
123.	ROOs	Rules of Origin
124.	RoU	Record of Understanding
125.	SACU	Southern African Customs Union
126.	SADC	Southern African Development Community
127.	SARB	South African Reserve Bank
128.	SAYIL	South African Yearbook of International Law
129.	SCA	Supreme Court of Appeal
130.	SCM	Uruguay Round Agreement on Subsidies and Countervailing Measures
131.	S.Cal.L.Rev	South California Law Review
132.	SDT	Special and Differential Treatment
133.	SME's	Small and Medium-Sized Enterprises
134.	SPA	SADC Programme of Action
135.	SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures

136.	URAA	Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade
137.	Vand. J. Transnat'l L	Vanderbilt Journal of Transnational Law
138.	World Bank	International Bank for Reconstruction and Development
139.	WTO Ann.Rep	World Trade Organization Annotated Reports
140.	WTO	World Trade Organization
141.	WT/DS.../AB	WTO Document containing Appellate Body Reports
142.	WT/DS.../R	WTO Document containing WTO Panel Reports
143.	TBT Agreement	Agreement on Technical Barriers to Trade
144.	TCP	Third Country Price
145.	Texas Int' I L. J.	Texas International Law Journal
146.	TPRB	Trade Policy Review Body
147.	TRIMS	Agreement on Trade-Related Investment Measures
148.	TRIPS	Agreement of Trade-Related Aspects of Intellectual Property Rights

149.	Tul. J. Int'l & Comp. L	Tulane Journal of International and Comparative Law
150.	UCLA J. Int'l L. & Foreign Aff.	UCLA J Journal of International Law and Foreign Affairs
151.	Univ. Chic. L.R	University of Chicago Law Review
152.	UNCTAD	United Nations Conference on Trade and Development
153.	U.N.T.S	United Nations Treaty Series
154.	USA	United States of America
155.	USDOC	United States' Department of Commerce
156.	U. Pa. J. Int' l Econ. L.	University of Pennsylvania Journal of International Economic Law
157.	UK	United Kingdom

DECLARATION BY CANDIDATE

I, **Omphemetse Stephen Sibanda**, do hereby declare that this thesis for the Degree of Doctor of Laws at the North-West University entitled: *The South African Anti-Dumping Law and Practice: A Juridical and Comparative Analysis of Procedural and Substantive Issues,* is my own work and that to the best of my knowledge and belief it contains no material previously published or written by another person, nor material which to a substantial extent has been accepted for award of any degree or diploma at this or any other university or other institute of higher learning, except where due acknowledgement is made in the text.

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OMPHEMETSE STEPHEN SIBANDA

DECLARATION BY PROMOTER

I Proffessor Melvin LM Mbao hereby declare that this thesis by candidate no. 10451927, Omphemetse Stephen Sibanda, entitled: *The South African Anti-Dumping Law and Practice: A Juridical and Comparative Analysis of Procedural and Substantive Issues,* for the Degree of Doctor of Laws in the Department of Public Law and Legal Philosophy, be accepted for examination.

PROF MLM MBAO

DEDICATION

I dedicate this work to the following very special people:

To my dear wife, Gladys Mankoana Sibanda, and my children for the support and the strength they gave me to work under challenging conditions. You accepted my long hours at the office and sometimes sleepless nights to complete my work. A very special thank for your practical and emotional support as I added the roles of husband and then father, to the competing demands of work, study and personal development. Without my wife lifting me up when this thesis seemed interminable, I doubt it would ever have been completed. Gladys, thank you so much for all your friendship, love, understanding, and support along this long journey.

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> *I will proclaim your greatness, my god and King; I will thank you forever and ever. Every day I will thank you; I will praise you forever and ever. The Lord is great and is to be highly praised; his greatness is beyond understanding. What you have done will be praised from one generation to the next. They will proclaim your mighty acts.* Psalms 15 verse 1–4.

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ABSTRACT

This thesis addresses issues of anti-dumping law and practice from a critical and juridical analysis position. In particular, the thesis seeks to determine whether the South African anti-dumping regime is compliant with the anti-dumping regime of the World Trade Organization (hereafter WTO), and to consider possible solutions for addressing instances where the South African law is not WTO compatible. The thesis departs from the hypothesis that the WTO merely requires functional equivalence of the implementation of national legislation on anti-dumping, and not the *verbatim* adoption of WTO jurisprudence and relevant provisions of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (hereafter URAA), into the legislation of State Parties. Some of the provisions of the URAA are not completely clear, and are cast in convoluted and complicated technical jargon, leaving loopholes that may be justifiably exploited by State Parties.

The study in this thesis was achieved through the critical analysis of legislation and relevant legal documents, case law and contemporary literature. The primary research paradigm used in this study is interpretive and analytical, which is the same as qualitative research methodology. The legal comparative research method, with a historical component, also played an important role in this study.

The literature study undertaken and the critical analyses made of the South African anti-dumping regime show mixed findings. The South African anti-dumping regime was found to have both positive aspects and problematic aspects when compared with WTO regulations. Some of the critical areas of the South African anti-dumping regime are WTO compatible whilst others are not. In some areas the South African anti-dumping regime has adopted functionally equivalent provisions to the provisions of the WTO law. However, the practice of the International Trade Administration Commission (ITAC) is sometimes fraught

with inconsistencies. The compatibility of the South African anti-dumping system with the WTO regime came close to being examined by the WTO on 1 April 1999 in the dispute of *South Africa – Anti-dumping*

Duties on the Import of Certain Pharmaceutical Products from India based on allegations that the method for calculating normal value used by the ITAC was found to be inconsistent with the URAA. Similarly, the conformity of the procedures and findings of the International Trade and Administration Act (ITAA) in anti-dumping cases came under attack in the cases of *Algorax v The International Trade Administration Commission and others,* and *Scaw* v *The International Trade Administration Commission and others,* respectively.

Finally, the thesis ends with recommendations in response to the challenges identified and key submissions made throughout the analysis. Key recommendations include the broadening of the concept of interested parties to include registered trade unions and trade union federations; introducing an explicit and mandatory "public Interests" provision to ensure that South Africa's anti-dumping administration is free from political trappings in the form of the involvement of the Minister of Trade and Industry; introducing the new section 31*bis* of the ADR in order to allow the initiation of anti-dumping petitions by a registered trade union or trade union federation; providing procedural guidelines for self-initiation of anti-dumping petitions by the ITAC; increasing transparency in anti-dumping proceedings and enquires; setting realistic time-lines for all anti-dumping processes and ensuring compliance with the same; improving the institutional and functional capacity of the ITAC; amending section 18.3 of the ADR to allow search and seizure operations pursuant to the provisions of the Criminal Procedure Act 51 of 1977 and the Customs Act; having a clear provision on verification visits confidentiality and a clear provision on producer knowledge; introducing a clear provision in the ADR dealing explicitly with zeroing pursuant to Article 2.4.3 (ii) of URAA; and the introduction of duty refund procedures.

It is hoped that the recommendations made in this thesis, which are in the form of suggested legislative interventions required to upgrade certain areas of South African anti-dumping law and practice to be fully WTO compliant, will influence the introduction of suitably crafted anti-dumping legislation in South Africa. It is further hoped that the thesis will become an invaluable source of information for practitioners and students, and a critical source on the best practice for the imposition and implementation of anti-dumping measures. Moreover, the thesis will add to the body of academic writing on South African anti-dumping law.

CHAPTER ONE: INTRODUCTION

1.1 Introductory Remarks

The subject of this study is the critical and juridical analysis of the consistency of the South African anti-dumping regime with the anti-dumping rules of the World Trade Organization (hereafter WTO), to which South Africa is a founding member.[1] South Africa was also a founding member of its predecessor, the General Agreement on Tariffs and Trade of 1947 (hereafter GATT 1947).[2] The WTO, which is a rule-based multilateral trade governing body established in 1994 by the Marrakesh Agreement Establishing the World Trade Organization[3] (hereafter WTO Agreement), allows the use of anti-dumping measures to combat dumping. The WTO provides a framework and standards that govern national anti-dumping laws through the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade* of 1994,[4] (hereafter URAA), and Article VI of the 1994 *General Agreement on Trade and Tariffs*[5] (hereafter GATT). In light of the WTO anti-dumping framework, Member States are obliged on an ongoing basis to notify their anti-dumping legislation and/or regulations, or lack thereof. This continuing obligation includes the notification of the enactment of new legislation or the amendment of existing legislation.[6]

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1 South Africa deposited her instrument of accession to the WTO with the WTO Secretariat on 2 Dec 1994. Subsequently, South Africa ratified the GATT on 6 April 1995. See Blumberg *South Africa* 213.

2 The General Agreement on Tariffs and Trade of 1947, (1947) 55 *U.N.T.S.* 187, reprinted in (1969) 44 B.I.S.D 1 [GATT 1947]. Until 1995 GATT 1947 operated as both an agreement and an international institution governing multilateral trade. See Ch 2 infra par 2.2.1. South Africa left GATT 1947 because of her segregation policies, and opted for an isolationist and protectionist trade policy until 1995. See Santos the *Compendium of Foreign Trade Laws* 275.

3 The Marrakech Agreement Establishing the World Trade Organization, April 15, 1994: The Legal Texts – The Result of the Uruguay Round of Multilateral Trade Negotiations 4 (1999) 1867 U.N.T.S. 154 [hereafter WTA], *reprinted in* (1994) 33 ILM 1144–52.

4 WTO Agreement, Annex 1A, Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (URAA).

5 General Agreement on Tariffs and Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts – The Result of the Uruguay Round of Multilateral Trade Negotiations 17 (1999) 1869 U.N.T.S. 187, *reprinted in* (1994) 33 *I.L.M.* 1153. Art. II [hereafter GATT].

6 The *WTO Annual Report* 2006, 29 http://www.wto.int/english/res_e/booksp_e/anrep_e/anrep06.

In classic economic literature, dumping is described as the selling of goods in an importing market at a price lower than the price on the producer's home market or at a price lower than the cost of production. This definition can be traced back to the work of economist Jacob Viner, which presents dumping as a form of price discrimination or differential pricing of different units of the same good sold at different prices.[7] This simply means that consumers in the importing country are paying a lower price for the goods being dumped than the consumer in the country where the goods are manufactured or made. In principle, and from the consumer's perspective, there is nothing sinister or wrong with paying lower prices for goods. The problem arises when the low prices of goods distort the domestic competing industry by shifting production in the importing country to such an extent that the domestic industry needs to adjust its costs and/or in any way that hurt or retard the development of the competing industry.

Many countries continue to battle with the problem of dumping that causes injury or threatens to cause injury to the domestic industry. Consequently, there is an increase in the number of WTO members enacting anti-dumping legislation. For example, by 2008 about 70 WTO Members had notified the Anti-Dumping Committee that they had anti-dumping legislation in place. Frequent use has also been made of anti-dumping measures by WTO Members, with a high number of investigations initiated in 1999 and 2001.

The reports by the WTO Secretariat on anti-dumping, supported by charts 1 to 3 below, demonstrate the increased global use of anti-dumping measures. In

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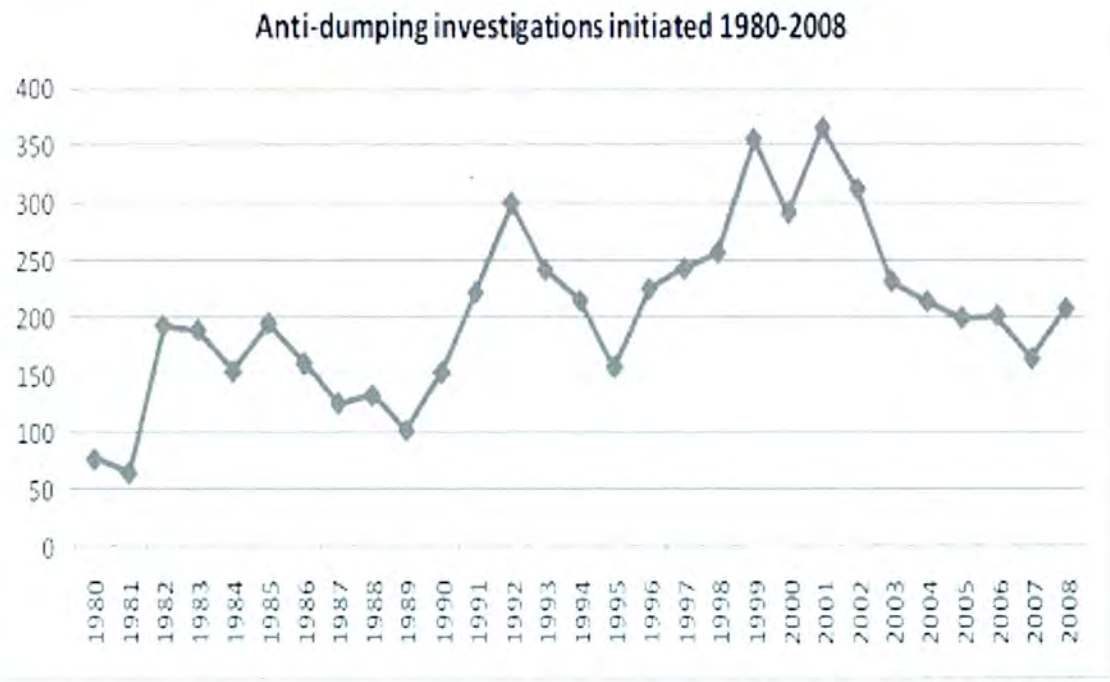
7 See Viner *Dumping – A Problem in International Trade* 35–68. See also Dale *Anti-dumping Law in a Liberal Trade Order* 2; Brink *Anti-dumping and Countervailing Investigations* 1–2. For a historical account of the current definitions of dumping, and their theoretical inadequacies, see Kerr "Dumping: Trade Policy in Need of Theoretical Makeover" 2006 *Canadian J of Agric Econ* 11–31. Dumping can also be as a result of the disposal of casual overstock; accidental dumping; to maintain customer base in a market that is not viable; to retaliate against original dumping; or for pure mercantilist reasons. See generally Sibanda "Are Anti-Dumping Measures in Multilateral Trade Justiciable or Not? 2003 *Codicillus* 86; Bekker *Anti-dumping Measures in International Trade* 150–159. It is submitted that in the context of this study the reasons why goods are dumped are

December 2000, there were about 1 119 anti-dumping measures in place worldwide, and South Africa was one of the four new users. According to the WTO Secretariat, during the period 1 July–31 December 2008, the number of initiations of new anti-dumping investigations increased by 17 per cent compared with the corresponding period in 2007. The number of new measures applied also increased in this period. The Secretariat reported that there were 208 initiations of new anti-dumping investigations in 2008, as compared to 163 in 2007 and 202 in 2006.[8] The WTO Secretariat reported that there were 36 new final anti-dumping measures applied by developed countries during the second half of 2008, compared to 11 measures by developed countries during the same period in 2007.

Chart 1.1: Anti-dumping initiated 1980–2008

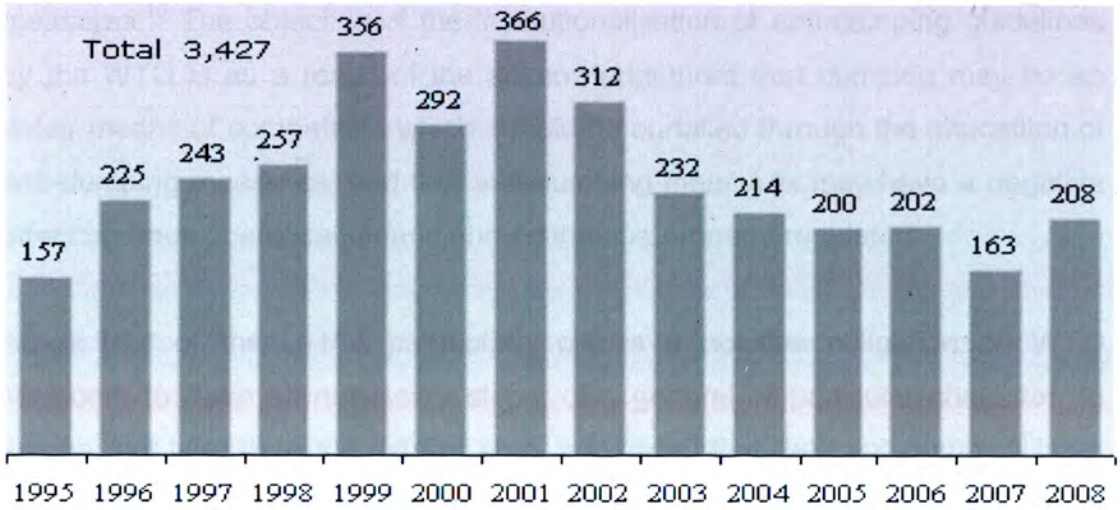


(Source: WTO Institute for International Studies)

irrelevant; the study is more concerned about the juridical aspects of anti-dumping regimes.

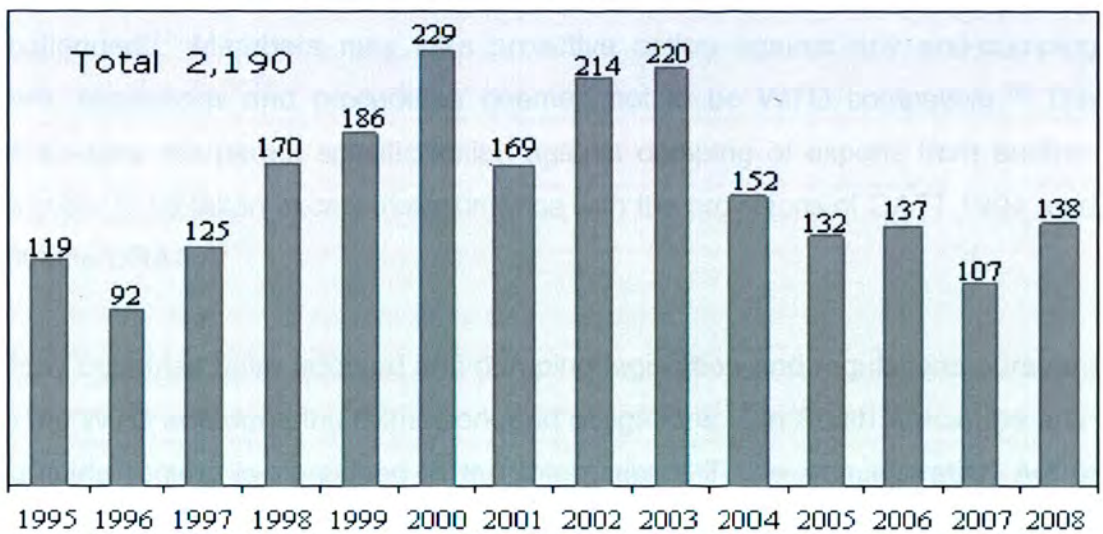
8 See the WTO Secretariat Report on Anti-dumping PRESS/556, 7 May 2009 http://www.wto.org/english/news_e/pres09_e/pr556_e.htm [hereafter WTO Anti-dumping Report 2009]

Table 1.1: Anti-dumping investigations initiated 1995–2008



(Source: WTO Anti-Dumping Report 2009)

Table 1.2: New final anti-dumping measures applied 2007–2008.



(Source: WTO Anti-Dumping Report 2009)

Petersen once remarked that South Africa is fast becoming the dumping ground of Africa.[9] However, it is submitted here that South Africa is rather the dumping ground of countries like China, and this has resulted in the need for South Africa to take remedial action and measures to counter the problem of dumping. The

9 Petersen "African Dumping Ground: South Africa's Struggle against Unfair Trade" 1996 *B.U. Int'l L.J.* 283, 384. See also Corr "Trade Protection in the New Millennium: The Ascendancy of Anti-dumping Measures" 1997 *JWT* 42, 56, and 59 n41; WTO Ann. Rep. 1995, at 31; WTO Ann. Rep. 1996, at 104.

problem of injurious dumping is primarily dealt with globally using anti-dumping measures.[10] The objective of the institutionalisation of anti-dumping guidelines by the WTO is as a result of the acknowledgement that dumping may be an unfair means of competition which should be curtailed through the imposition of anti-dumping measures, and that anti-dumping measures may have a negative effect on trade liberalisation and should thus be properly regulated.

Article 18.4 of the URAA particularly places a positive obligation on WTO Members to "take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force" that their anti-dumping laws, regulations and procedures are compliant with the provisions of the URAA. As held by the Appellate Body in the dispute involving the United States Anti-Dumping Act of 1916, this obligation is not dependent on anti-dumping measures specified in Article 17.4 of the URAA being adopted and challenged.[11] Members may take proactive action against any anti-dumping laws, regulations and procedures deemed not to be WTO compatible.[12] The WTO does not permit specific action against dumping of exports from another Member to be taken except in accordance with the provisions of GATT 1994 read with the URAA.[13]

Many countries have adopted anti-dumping legislation and regulations pursuant to the WTO anti-dumping framework and obligations.[14] In South Africa, the anti-dumping regime is contained in the International Trade Administration Act of 2002[15] (hereafter ITAA), which came into operation in June 2004; the Anti-

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10 Harpaz "Dumping the Anti-dumping Instruments in the Trade Relations between the European Union and the State of Israel? – The European Union Perspective" 2005 *JWT* 445, 452.

11 See *United States – Anti-Dumping Act of 1916*, 136/AB/R, WT/DS162/AB/R (28 August 2000), par 78 (hereafter Appellate Body Report, US-Anti-Dumping Act of 1916).

12 *US-Anti-Dumping Act of 1916*, Appellate Body Report, par 79.

13 See URAA Art 18.1

14 See generally Vermulst *Anti-dumping and Anti-subsidy Concerns for Developing Countries*; and Miranda, Tores and Reiz "The International Use of Anti-dumping" 1998 *JWT* 5.

15 International Trade Administration Act 71 of 2002 (hereafter ITAA).

Dumping Regulations of 2003[16] (hereafter ADR), which are in fact "second-tier legislation",[17] implementing the ITAA; and in the Customs and Excise Act of 1964.[18] However, the South African anti-dumping regime is one of the oldest in the world. The law can be traced back to 1914, when the Customs Tariff Act,[19] was, through a series of amendments, re-enacted into the now repealed Board on Tariffs and Trade Act of 1986[20] (hereafter BTTA). The ITAA and the ADR are also applied to national territories of members of the Southern African Development Community[21] (hereafter SADC) and the Southern African Customs Union[22] (hereafter SACU). At the time of writing, the South African Department of Trade and Industry (hereafter DTI) was considering amending the ITAA through the International Trade Administration Amendment Bill of 2005[23] (hereafter ITAA Amendment Bill), and the ADR through the Proposed Anti-Dumping Regulations of 2006[24] (hereafter PADR). These amendments are important in the context of this study and will thus be considered, where necessary. The PADR seeks to address certain deficiencies in the current anti-dumping regulations. According to the Explanatory Document of the PADR,

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16 See Nakawaga "Anti-dumping 2008" for a summary of the provisions of the Anti-Dumping Regulations of 2003 (hereafter ADR).

17 See Kommerskollegium/Swedish National Board of Trade Report *The Use of Anti-Dumping in Brazil, China, India and South Africa* 58.

18 Customs and Excise Act 91 of 1964.

19 Customs Tariff Act 26 of 1914.

20 Board on Tariffs and Trade Act 107 of 1996 (hereafter BTTA).

21 The Southern African Development Community (hereafter SADC), formed in 1992 as an integration organisation transforming the then Southern African Development Co-ordination Conference (hereafter SADCC). It is constituted by Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Tanzania, Zambia, Zimbabwe, South Africa and Swaziland. For more on the SADCC, including its formation and anticipated demise post-apartheid South Africa see generally Mafume "The Future of Southern African Development Conference (SADCC)" 1993 Botswana *Journal of African Studies* 14. See also Bowen "The Southern African Development Conference (SADCC)" 1990 *Trócaire Development Review* 29.

22 The Southern African Customs Union (hereafter SACU) is constituted by South Africa, Botswana, Lesotho, Namibia and Swaziland. SACU is the oldest customs union in the world and was formed in 1910. See generally, Kirk and Stern *The New Southern African Customs Union Agreement* (2003) 1–23.

23 The International Trade Administration Amendment Bill of 2005 (hereafter ITAA Bill) will effect some changes to current anti-dumping law and practice. At the time of writing the ITAA Bill had not yet been enacted into law.

24 The Proposed Anti-dumping Regulations (hereafter PADR) were published by the ITAC on 10 November 2006. See Notice 1606 0f 2006, *Government Gazette* No 29382 of 10 November 2006. Note that the PADR does not propose a wholesale amendment to the ADR. The PADR Explanatory Document states that it merely identifies certain

amendments to the ADRs should be informed by the ITAC's past and current experience in administering the anti-dumping remedies, the Draft International Trade Administration Amendment Bill, the requirements of the WTO Agreements, in particular the URAA, decisions of the WTO Appellate Body, as well as the policies of the DTI.

The South African anti-dumping regime is intended to make the South African anti-dumping law more WTO compatible. The ITAA, the ADR and the Customs and Excise Act 91 of 1964, were first notified to the WTO in 1995. The 1995 notification was later replaced by a new one in 2004.[25] However, as it will be discussed in depth in Chapter 4.3.4.1.2 *infra*, there are prominent South African scholars who are of the view that WTO agreements may not be directly applied as international law in South African municipal law. The status and the manner of the applicability of WTO law as international law under the Constitution of the Republic of South Africa of 1996[26] is a complex and intriguing subject. This is contrary to the reception of public international law in the South African municipal law, which seems to have been settled over years even before the Constitution of 1996. The complexity arises from the fact that the Constitution of 1993[27] [hereafter Interim Constitution], under which WTO Agreements were approved for ratification, expressly required that WTO Agreements be enacted

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amendments and calls for focused comments on certain aspects of these identified amendments.

25 See *WTO Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements* – South Africa, G/ADP/N/1/ZAF/2G/SCM/N/1/ZAF/2 (20 January 2004).

26 Note that as from 27 June 2005, any reference to the "Constitution of the Republic of South Africa Act No 108 of 1996" contained in any document or any legal instrument in force prior to that date, must be construed as referring to the "Constitution of the Republic of South Africa, 1996" (hereafter Constitution of 1996) and no Act number is to be associated with or mentioned in reference to the Constitution of 1996, or be associated with or allocated to any law amending the Constitution. See section 1(1) and 1(2) of the Citation of Constitution Laws Act No 5 of 2005. When the Constitutional Assembly embarked on the process of drafting the 1996 Constitution it erroneously allocated an Act number. The numbering was not necessary because the 1996 Constitution is the supreme law of the land and it was drafted by the Constitutional Assembly and not by Parliament. See generally Van Heerden "The 1996 Constitution of the Republic of South Africa: Ultimately Supreme without a Number" 2007 *Politeia* 33 giving a full account of the allocation of an Act number to the Constitution of 1996.

27 Constitution of the Republic of South Africa Act 200 of 1993 (hereafter Interim Constitution).

into national law by legislation to have direct effect[28] in the Republic of South Africa. Although the WTO Agreement was approved by Parliament on 6 April 1995, it has not yet been enacted into municipal law.[29] It is on this basis that it has been argued by some scholars that the URAA does not form part of South African municipal law, and that WTO law has no legal force in South Africa.[30] It is submitted that the correct position is that WTO Agreements have no direct effect on South African national law. However, the provisions of the Agreements are binding on South Africa.

A further complexity regarding the direct applicability of WTO law to South Africa revolves around the question of whether the WTO Agreements should be evaluated under the Interim Constitution or under the new Constitution of 1996? From the outset we would like to express the view that the issue is peripheral. The current constitutional dispensation, discussed fully in Chapter 4.3.4 *infra*, is relevant to the determination of the status and application of WTO law in South Africa, as is the Interim Constitution jurisprudence, which cannot be readily jettisoned.

In brief, while the South African anti-dumping system must be workable to afford South African industries protection against injurious imports, it should also be compatible with the WTO anti-dumping regime under the URAA and Article VI

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28 See Dugard and Currie "International Law and Foreign Relations" 1995 *Annual Survey of South African Law* 77–79, noting that WTO Agreements were excluded from the list of treaties resolved to have direct effect by Parliament.

29 Dugard *International Law* 434–435. Similarly, the legislation that approved the GATT and which was intended to enact the GATT 1947 into municipal law, the Geneva General Agreement on Tariffs and Trade Act 29 of 1948, was approved by Parliament but was not promulgated into law. The Geneva General Agreement on Tariffs and Trade Act of 1948 was assented to on 27 March 1948. See Eisenberg "The GATT and the WTO Agreements: Comments on their Legal Applicability to the Republic of South Africa" 1993 *SAYIL* 127. For more on the interface between WTO law and South African national law see discussions in Chapter 4.3.4.2.

30 Brink *Theoretical Framework for South African Anti-Dumping Law* 731 and 732 n313. See generally Eisenberg 1993 *SAYIL* 127. Brink *Theoretical Framework for South African Anti-Dumping Law* 731; Schlemmer "South Africa and the WTO Ten Years into Democracy" 2004 *SAYIL* 135. See also Erasmus "The Incorporation of International Trade Agreements into South African Law: The Extent of Constitutional Guidance" 2003 *SAYIL* 157; See also Dugard "International Law and the South African Constitution" 1997 *EJIL* 80. For more information on the application of WTO law in South African municipal law, see generally in-depth discussions in Chapter 4.3.4.

of GATT. As stated in Chapter 1.3 *infra*, the aim of this thesis is to determine the compatibility of the South African anti-dumping regime with WTO law. The latter, it is submitted, applies as international law. The simplistic approach through which the URAA is dismissed as not being international law in South African municipal law cannot be fully supported. Even the South African courts are not in favour of such an overly simplistic approach.[31]

1.2 Statement of the Problem

The use of anti-dumping measures as trade remedies against dumped goods is preferred by WTO Members.[32] South Africa is regarded as one of the growing and prolific users of anti-dumping measures, fast catching up with traditional users like Canada, the EC, New Zealand and the USA.[33] For example, from the establishment of the WTO in 1995 to December 2006, South Africa initiated 200 anti-dumping investigations, and applied 106 anti-dumping measures during the period 1 January 1995 to 30 June 2002, making it the fifth largest user of anti-dumping actions (after the United States, the European Union (EU), India, and Argentina).[34] As at 30 June 2002, South Africa had 98 definitive anti-dumping duties in force. This is a relatively large number compared to 35 at the end of 1996.

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31 See, for example, The *Chairman of Board on Tariffs and Trade and Others v Brenco Inc. and Others* (2001) 4 SA 511 (SCA) [hereafter *BOTT v Brenco*; *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA) [hereafter *Progress Office Machines*]; *International Trade Administration Commission v SCAW South Africa (Pty)* Ltd 2010 (5) BCLR 457 (CC) [hereinafter ITAC v Scaw]. The cases are further discussed in Chapter 4.3.1 But see Erasmus 2003 *SAYIL* 177 and 180 who warns against the dire implications of the SCA decision in *AM Moolla Group Limited and Others v Commissioner for SARS and Others* (139/2002) [2003] ZASCA 18 (26 March 2003), which stated that international agreement can become part of municipal law once domestic rules and notices have been published. Erasmus' contention, and correctly so, is with the court's assertion that public authorities can change the meaning and content of international agreements through the publication of mere notices. This judgment will affect the principle of the separation of powers, because Parliament, and not the executive, is the supreme legislature who has the sole responsibility of approving international agreements, argued Erasmus.

32 For example, the WTO Secretariat reported that during the period 1 July – 31 December 2008, the number of initiations of new anti-dumping investigations showed a 17 per cent increase compared with the corresponding period of 2007. See *WTO Press Release*, Press/556 of 7 May 2009 http://www.wto.org/english/news_e/pres09_e/pr556_e.htm

33 See generally Nakawaga *Anti-dumping Law and Practices* 229 – 232 for statistical representation of South Africa's use of anti-dumping measures.

As at 31 December 2006, South Africa had 71 definitive anti-dumping duties, 16 of which were against China, ten against India, and five each against Indonesia and the United States of America (USA).[35] By 30 June 2008, there were 56 definitive duties in force; 14 of which were against China and eight against India. Other countries against which South Africa had definitive duties in force were Australia, Brazil, Chinese Taipei, Egypt, France, Germany, Indonesia, Italy, the Republic of Korea, Malaysia, Poland, Thailand, Turkey, the United Kingdom and the USA.[36]

Brink points out that between 1921 and 1947 South Africa had commenced at least 95 anti-dumping and countervailing investigations. This number shot up between 1948 and 2001, with the commencement of 818 anti-dumping and countervailing investigations.[37]

According to Gao, the rate of initiations of anti-dumping measures in South Africa, for the period 1995 to 2007, was "10 times higher than its share of world imports".[38] Gao further maintains that South Africa has only 0.54 per cent share of world imports but accounts for 5.13 per cent of all anti-dumping investigations by WTO members.[39]

The numerical information on measures applied by South Africa paints a picture of a country with a high preference for anti-dumping and countervailing measures, as opposed to the low anti-dumping measures taken against South Africa. A study conducted by the Swedish National Board of Trade showed that, between 1995 and 2003, South Africa faced a total of 34 anti-dumping

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34 WTO Anti-Dumping Report 2002.
35 See ITAC http://www.itac.org.za/docs.asp?dID=357&cID=6&scID=0.
36 See ITAC http://www.itac.org.za/docs.asp?dID=357&cID=6&scID=0.
37 Brink *Anti-dumping and Countervailing Investigations in SA* 3.
38 Gao *Proliferation of Anti-dumping* 29.
39 Gao *Proliferation of Anti-dumping* 22.

measures, as opposed to the 108 anti-dumping measures it applied during the same period.[40]

Table 1.3: Definitive duties imposed

No. of countries	Definitive duties – total	Period of imposition/in force
17	56	30 June 2008
21	71	31 December 2006
	98	30 June 2002
	35	December 1996

Is the fact that South Africa is increasingly resorting to anti-dumping measures a problem? It is submitted that the volume of anti-dumping investigations instituted by South Africa is not a problem in itself. However, a problem would arise should the institution of anti-dumping actions and investigations not be in conformity with the WTO agreements, in particular the URAA. WTO Member States have an obligation to respect and promote all the agreements of the WTO. In the context of anti-dumping law and practice, any Member that adopts and/or maintains a WTO-inconsistent measure will be in violation of its obligations under Article 18.4 of the URAA and Article XVI:4 of the Marrakesh Agreement. In such cases, the basis of the violation would be the failure of the WTO Member to take all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the URAA and GATT 1994. South Africa faces the formidable challenge of ensuring that the country's anti-dumping law and practice is WTO compliant, while on the other hand ensuring that local industries are protected from unfair trade practices.[41]

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40 Kommerskollegium/Sweden National Board of Trade Report *The Use of Anti-dumping in Brazil, China, India and South Africa* 55.

41 Grimmet, in *Protectionism and Compliance with the GATT* 186, observes that South Africa has a long history of discrimination against imports and free trade, over and above ant-dumping laws.

The compatibility of the South African anti-dumping system with the GATT/WTO regime has already been questioned, and it came close to being examined by the WTO on 1 April 1999 in the dispute of *South Africa – Anti-dumping Duties on the Import of Certain Pharmaceutical Products from India*[42] (hereafter SA – Indian Pharmaceuticals). In this case, Turkey argued that the method used for calculating normal value was inconsistent with GATT and the URAA. On 10 April 2003, Turkey requested consultations with South Africa concerning its definitive anti-dumping measures imposed by the BOTT on imports of blankets originating in or imported from Turkey for the alleged circumvention of anti-dumping duties on blankets originating in or imported from Turkey.

One of the claims by Turkey was that the South African anti-dumping authorities did not properly notify Turkey of the investigations; and that the evaluation of the facts of the dispute was not unbiased and objective, particularly in relation to the initiation and the conduct of the investigation, as well as the imposition of the anti-dumping duty. Turkey argued that South Africa's measures were in violation of Articles 5.5, 6.1, 6.1.3, 6.2, 6.9, 6.10, 9.2, 9.3 and 12.1 of the URAA; and Articles III and X of the GATT 1994.[43] In 2008, the WTO received a request from Indonesia for consultation with South Africa after the latter's failure to terminate anti-dumping measures imposed on imports of uncoated woodfree white A4 paper from Indonesia, arguing that the measures were inconsistent with South Africa's obligation under Article 11.3 of the URAA to terminate anti-dumping measures not later than five years following the date of imposition.[44]

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42 In *South Africa – Anti-dumping Duties on the Import of Certain Pharmaceutical Products From India: Request for Consultation By India*, WT/DS168/1, and 1 April 1999 (hereafter South Africa – Indian Pharmaceuticals).

43 In *South Africa – Anti-dumping Duties – Definitive Anti-dumping Measures on Blanketing from Turkey: Request for Consultation by Turkey*, WT/DS288/1, 09 April 2009 (hereafter SA – Blankets from Turkey). The matter was subsequently settled amicably between the South African and the Turkish authorities.

44 *South Africa – Anti-dumping Measures on Woodfree Paper: Request for Consultation by Indonesia*, WT/DS374/1 G/L/850 G/ADP/D73/1, 16 May 2008 (hereafter South Africa – Woodfree Paper). Indonesia's request for consultation was later withdrawn and settlement took place after Indonesia, on 20 November 2008, informed the DSB that South Africa had promulgated an amendment to the Schedule of the Customs and Excise Act withdrawing the anti-dumping measures imposed on uncoated woodfree white A4 paper from Indonesia with retrospective effect from 27 November 2003.

The following issues and questions need to be investigated and answered: To what extent is current South African anti-dumping law and practice compatible or incompatible with WTO/GATT law? What can be done to remedy this incompatibility, if anything? These are just two of the issues and questions that are investigated and answered in this thesis. At the heart of this enquiry is the overwhelming desire to bring the country's domestic legislation in line with its international obligations.

1.3 Objectives of the Study

Although the WTO allows its Members a considerable amount of latitude in formulating their own domestic anti-dumping legislation, the legislation should be WTO compliant. This study seeks to do the following:

(a) Undertake a detailed and holistic comparative analysis of the WTO jurisprudence and the substantive and procedural aspects of the anti-dumping regime in South Africa. Such a comparative analysis will assist in efforts to develop or apply the current anti-dumping law and practice in South Africa. Where appropriate, the study will also compare aspects of South Africa's national anti-dumping law with its counterparts in countries like Australia, Canada, the EU, India, Pakistan, the USA, and Trinidad and Tobago.[45]

(b) Examine and evaluate the consistency of current South African anti-dumping law and practice with the URAA.

(c) Determine a more acceptable anti-dumping regime for South Africa, in view of South Africa's WTO obligations and commitments.

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[45] In this study we have been mindful of the pitfalls of a comparative study with federal systems such as the United States and Canada. In some cases a proper and fair comparison may not be possible.

(d) Make recommendations for ideal anti-dumping law and practice for South Africa.[46]

1.4 Hypothesis

The thesis hypothesises that

(a) the WTO only requires functional equivalence of compliance with its obligations as set out in various associated agreements, not verbatim adoption of provisions of associated provisions.

(b) the argument that South African anti-dumping law and practice is not compatible with WTO law may be erroneous and substantively flawed.

(c) South African anti-dumping law and practice may be fundamentally and substantively WTO consistent, and only few specific areas need consideration.

(d) the evolution of South African anti-dumping law may represent a significant development for SACU partners.

(e) the revisionist approach in dealing with the issue of the application of WTO law in national courts can no longer be sustained, irrespective of the view that the localisation of WTO law requirement is trite law.

(f) it may not be desirable fo enforce a distinct separation between the application of WTO law with regard to discharging South Africa's obligations as a member of the WTO, and the application of WTO law and case law by private individuals in national courts.

Later on, the thesis will appraise the relevant literature on anti-dumping, and critically examine current South African anti-dumping law and practice in order

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[46] The recommendations are fully outlined in Chapter 9.3 of this study.

to test the hypothesis as to whether antidumping law and practice is WTO consistent.

1.5 Justification and Rationale for the Study

The main motivation for this study emerges from the *SA – Indian Pharmaceuticals* case, discussed in Chapter 2.1 *infra*, in which India accused South Africa of maintaining anti-dumping law and practices which were not WTO/GATT compliant. This study was further necessitated by the following facts:

(a) The available studies on South African anti-dumping law and practice are either too focused on the pre-ITAA law or undertook a superficial exploration of compatibility with WTO rules. Only a few of the studies dealt with the consistency of the post-ITAA anti-dumping framework's compatibility with the URAA.[47]

(b) There is a need for some reform of the South African anti-dumping regulatory system and law. This study goes beyond a mere call for adjusting the South African anti-dumping law to the URAA. The significant part of the study is the outlining of proposals intended to improve current South African anti-dumping law and practice in line with the WTO system, in the form of proposed draft anti-dumping legislative provisions.

(c) Research and a literature review has indicated that there is a critical need to investigate the WTO compliance of South African anti-dumping law and practice, and thereby make valuable contributions to this area of the law from a South African perspective.

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[47] See Brink *Theoretical Framework for South African Anti-Dumping Law.* Some of these studies do not deal in depth with the South African anti-dumping regime's compatibility with the URAA. See, for example, Theron *Anti-dumping Procedures.*

(d) Furthermore, although there are strong contextual and textual arguments made supporting the doubts about South Africa's compliance with her WTO obligations, instances of the inconsistency of the anti-dumping regime with the URAA have been very few and do not justify a broader view that the South African regime is incompatible with the URAA.

1.6 Methodology and Data Collection

1.6.1 Research Method

Mouton describes research methodology as the set of all strategies and specific methods that could be chosen to deal with specific issues in the research.[48] In order to address the research issue and its sub-issues, a preliminary study was conducted in 1999 and 2001 to evaluate the academic contribution of the study which culminated in a short publication in a journal.[49]

Further research studies were undertaken between 2002 and 2008, particularly with a view to ensuring the currency of the study in the light of national and international developments in anti-dumping law and, where necessary, to redefine the research approaches and the problem statement. The main empirical study was conducted using qualitative research approaches and paradigms. The main research methodologies or paradigms are explained in the following sections, and the reasons for their use in this thesis are also outlined.

1.6.2 Research Paradigm

The term "paradigm" has been explained as a conceptual framework that includes a set of interrelated assumptions which provides philosophical values and beliefs for the organised study of the social world. The concern here is

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48 Mouton *Research Methodology* 55-56.
49 See Sibanda 2001 *CILSA*.

particularly with guidelines for researchers about how they should conduct their research, and the methods and techniques that are adopted to conduct the research.[50] The following are the research paradigms used in this study:

1.6.2.1 Interpretive Paradigm

The primary research paradigm used in this study is interpretive or analytical, and is the same as qualitative research methodology. An interpretive paradigm is a way to gain insights through discovering meanings and understanding the phenomenon of anti-dumping by exploring the depth and complexity of the phenomenon. The method used was preferred because it is qualitative, and the logic deductive. Qualitative research covers an array of techniques which seek to describe, translate and decode. However, it should not be assumed that the quantitative approach is less important, as there is always a way of using quantitative data in interpretative research, as shown in our charts and flow diagrams in this study.

1.6.2.2 Critical Paradigm

According to Neil, critical theory explores the social world, critiques it, and seeks to empower the individual to overcome problems in the social world.[51] Critical theory serves to challenge the status quo. In the context of this study, the goal is to critically understand anti-dumping law and practice in South Africa against the model set by the WTO, and to challenge and eliminate misinterpretations of the current law. This is a naturalistic enquiry, using a qualitative research method, including interviews.

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50 See generally Ponterotto "Qualitative Research in Counseling Psychology: A Prime Research Paradigm and Philosophy of Science" (2005) *Journal of Counseling Psychology*" 126–136.

51 Neil *Analysis of Professional Literature Class 6: Qualitative Research I* (2006).

1.6.2.3 Comparative Paradigm

The legal comparative research method[52] played an important role in this study. The decision to use the comparative method was taken for several reasons, including the fact that South African anti-dumping law is still in the early stages of development, and because comparative research can lead to new insights and new, significant knowledge on the subject of this thesis. The historical component is important in clarifying the current status of the anti-dumping regimes of South Africa and the WTO. The historical component of this study, however, will consist mainly of a historical overview, and not an in-depth legal-historical approach.

Furthermore, the research is based on the tradition of the phenomenological method, because it also deals with the understanding of the phenomenon of "dumping" and explores its reception in national jurisdictions.

1.6.3 Data Collection

1.6.3.1 Literature Texts

This study was informed largely by literary texts. Relevant legislation, commission reports, academic writings such as theses and dissertations; articles in journals and newspapers were analysed and criticised. In this study the following specific literary sources were consulted:

(a) The ITAA provisions, anti-dumping regulations and amendments thereto, the investigation reports and decisions of the ITAC, and of its predecessor the Board on Tariffs and Trade (hereafter BOTT). The ITAC plays a very important role in the construction and application of trade laws, some of

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[52] Commenting on the importance of the use of case studies by historical-comparative researchers, Neuman *Social Research Methods* 387–389 quotes a statement by Bradshaw and Wallace that, without case studies, scholars "would continue to advance theoretical arguments that are inappropriate, out-dated, or totally irrelevant for a specific region".

which are not even clearly spelt out in the statute. A consideration of reports and regulations on the BOTT was also important since it created a backdrop against which the thesis was prosecuted.

(b) The URAA and the decisions of WTO's Dispute Settlement Body (hereafter DSB) panels and Appellate Body. The URAA, and proposed amendments to the URAA, will form the pivotal point of our discussion from an international perspective.

(c) The 2002 SACU Agreement[53] and relevant SACU determinations. According to Schedule I to the ITAA, the SACU Agreement is to become law in South Africa once all constitutional requirements pertaining to international agreements have been met. The importance of reference to the SACU Agreement in this regard stems from the fact that the Agreement requires Member States to apply similar legislation with regard to customs and duties,[54] including anti-dumping duties, and to adhere to similar procedures.[55]

1.6.3.2 Interviews

In a qualitative study such as the current one, it is apposite to obtain ITAC's point of view on the consistency of South Africa's anti-dumping law and practice with WTO law using interviews and observations. The primary advantage of in-depth interviews is that they provide far more detailed information than is available through other data collection methods, such as literature surveys. In-depth interviews with ITAC staff, in particular commissioners and investigators, were planned. Unfortunately, little progress could be made in obtaining the involvement of ITAC in the interviews.[56] The ITAC officials who were approached were of the view that such an in-depth and structured interview

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53 2002 *Southern African Customs Union Agreement* [hereinafter 2002 SACU Agreement].
54 See 2002 SACU Agreement, Art 22.
55 See 2002 SACU Agreement, Art 14(2).
56 Request for interviews made in 2009.

would be difficult and challenging to conduct because ITAC commissioners are, for example, appointed part time and are, hence, not readily available.

1.6.3.4 Other Sources

As indicated in Chapter 1.4 above, we may, in addition to WTO law and rules, consider foreign law. However, the foreign law position on any matter discussed herein will be of only influential value and any conscious decision not to consider any foreign law for purposes other than comparative discussions will have no bearing on the validity of claims and assertions in this study. Statutory foreign law is merely of persuasive value to the Court in interpreting the Bill of Rights. Section 39(1)(c) of the Constitution of 1996 provides that South African courts and tribunals "may consider foreign law". Thus, South African courts and tribunals are granted discretionary powers to consider and apply foreign law. The ITAC, courts and other tribunals adjudicating an anti-dumping issue may choose to consider case law and legislation (and regulations) from other jurisdictions, such as the EU, Canada, the USA, and others, where authoritative anti-dumping law sources of South Africa provide insufficient guidance in resolving any issue before the court.

In a conference presentation in 2010, Justice Dikgang Moseneke of the South African Constitutional Court noted a few reasons for the cautious approach to using comparative foreign law. The most relevant of the reasons given by Justice Moseneke in the context of this study is the fact that the dissimilar contexts in which laws and rules are applied may not permit a fruitful comparison of judicial authority in these different countries.[57] In this regard, Justice Moseneke referred to the Constitutional Court in *S v Makwanyane,*[58] in which the court acknowledged that "comparative research is generally valuable and all the more so when dealing with problems new to our jurisprudence but

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57 Justice Dikgang Moseneke "The Role of Comparative and Public International Law in Domestic Legal Systems" Key note address at the Middle Temple and South African Conference, held in Cape Town, on Friday 24 September 2010, at 6 - 7.

58 *S v Makwanyane and Others* 1995 (6) BCLR 665 (CC).

well developed in mature constitutional democracies ... . Nevertheless the use of foreign precedent requires circumspection and acknowledgement that transplants require careful management". In the context of this study, it has been borne in mind that the dissimilar contexts in which anti-dumping law and rules are applied, for example foreign jurisdictions such as Canada and the USA being federal countries, as such may not permit an appropriate and meaningful comparison of judicial authority with South Africa, because the latter is not a federal country.

1.7 Limitations on the Study

The following are the points of note in respect of the limitations to this study:

(a) Anti-dumping issues are broad and wide ranging. Consequently, this study does not purport to deal with all issues relevant and incidental to anti-dumping law and practice. Therefore, only the important issues are discussed herein, leaving out the minutiae.

(b) The WTO constantly seeks to improve its anti-dumping regulations. For instance, the Doha Ministerial Declaration on WTO Rules of 20 November 2001[59] mandated the Geneva Round to hold further negotiations with a view of "clarifying and improving" the provisions of the URAA, while preserving its basic concepts, principles and effectiveness, and objectives, taking into account the needs of developing countries.[60] This was followed on 30 November 2007 by the publication of draft amendments, the Doha Draft Anti-dumping Agreement[61] (hereafter DDAA), outlined in Chapter 3.2.2.3 *infra*. Thus, this study anticipates a possible major redraft of the

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59 The Doha Ministerial Declaration, *WT/MIN (01)/DEC/1* (adopted 14 Nov 2001) (hereafter Doha Ministerial Declaration).

60 See The Doha Ministerial Declaration, par.28.

61 WTO Draft Consolidated Chair Texts of the AD and SCM Agreement – Annex A – Anti-dumping (Doha Draft Anti-dumping Agreement (DDAA)) TN/RL/W/213. Online: at http://commerce.nic.in/trade/WD_from_the_Chairman_Annx_A.pdf, accessed on 28/11/2008.

URAA, which may impact on the result and/or recommendations of the study undertaken here or have some ramifications not anticipated in this study. As a pre-emptive measure, this study takes into consideration the redrafted provisions of the URAA, which itself may undergo further changes, as the first text by the Chairman of the Rules Negotiating Group, Ambassador Guillermo Vales-Galmes of Uruguay suggests.[62]

(c) It has not been long since the enactment of ITAA, hence it still remains to be seen how the international community will respond to it. The potential areas of concern about the ITAA have not yet reached the WTO for review. Moreover, the proposed changes to the ITAA by the ITAA Amendment Bill may also influence the outcome of this study. In this study reference will also be made to the ITAA Amendment Bill, as it proposes significant changes to the country's anti-dumping law and ITAC's implementation of the law, and the Proposed Anti-dumping Regulations (hereafter PADR).

1.8 Literature Review

1.8.1 General

Anti-dumping measures are among the primary trade remedies used by WTO Members and have engendered conflicting views and varying levels of acceptance. Generally, there is a widely published body of knowledge on anti-dumping as a trade remedy. The research reported in such literature ranges from empirical studies on the impact of anti-dumping law and practice on international trade relations; the efficacy of anti-dumping duties as a tool for protecting domestic industries; to the consistency of national anti-dumping laws and practice with WTO rules. This study focuses primarily on the consistency of South African anti-dumping law and practice with the URAA, and thereby

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62 The African Group has had a serious contribution to make towards the DURAA, and the general need to reform the WTO anti-dumping rules. For more on this see generally, Kufuor 2009 *African J. of Int'l & Comp L* 166–177.

contributes to a different branch of anti-dumping literature which investigates and analyses the procedural and substantive aspects of the South African law, determining to what extent it conforms to WTO law. Specific commentary on some of the literature follows immediately hereunder.

1.8.2 Justification for Use of Anti-dumping Laws and Measures

Although WTO law does not provide an explicit justification for anti-dumping law, there are varying justifications for anti-dumping laws and related measures, all of which are underlined by the importing country's desire to protect domestic industry. In his address to the 5th Anniversary of the ITAC on 16 October 2008, the ITAC Chief Commissioner stated that, in South Africa, actions against injurious dumping remain a critical government intervention to protect jobs and sustain investments in cases where action was justified.[63] The need for government intervention as a justification for anti-dumping measures finds support from several scholars and commentators. According to the economists, Barcelo,[64] Deardorff,[65] Viner,[66] and Trebilcock and Quinn,[67] for example, the justification for anti-dumping laws is that these laws protect the fair competitive process and consumers from the monopoly power of foreign exporters. Thus, strategic trade policy and consumer welfare arguments are advanced as justifications for anti-dumping laws.[68]

Finding support from scholars like Brander and Spencer, Katrak, and Svedberg,[69] the strategic trade policy arguments maintain that domestic

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63 Address to the 5th Anniversary of the ITAC by the Chief Commissioner, 16 October 2008 Online at: http://www.itac.org.za/docs/5th-anniversary-chief-commissioner.pdf.

64 Barcelo "Anti-dumping Laws as Barriers to Trade: The US and the international Dumping Code" 1971 Cornell LR 491–560.

65 Deardorff *Economic Perspectives on Anti-dumping Law* 135.

66 See generally, Viner *Dumping: A Problem in International Trade.*

67 Trebilcock and Quinn "The Canadian Anti-dumping Act: A Reaction to Professor Slayton" 1979 *Canadian-US Law Journal* 101.

68 See generally, Skyes "Anti-dumping and Antitrust: What Problems does each Address?" (1988). See also Messerlin and Tharakan "The Question of Contingent Protection" 1999 *The World Economy* 1251–1270; Phillips and Turner "Predatory Pricing and Related Practices under Section 2 of the Sherman Act" 1975 *Harvard Law Review* 697–733.

69 See Katrak "Multinational Monopolies and Commercial Policy" 1977 *Oxford Economic Papers*, 283–291. See also Svedberg "Optimal Tariff Policy on Imports from

industries are forever exposed to imperfect competitive markets which are characterised by external economies of scale, and have the potential of delimiting their effectiveness in competitive markets. The consumer protection arguments infer that the economic rationale for anti-dumping laws is to prevent predatory pricing. However, opponents and critics of anti-dumping legislation find little or no economic argument to justify the practice of anti-dumping. The political argument for anti-dumping laws and measures seems to lean on the appeasement of influential domestic industries, producers and oligopolists, who seek protection by government from import competition.

1.8.3 Anti-Dumping: An Abused, Competition-distorting and Protectionist Instrument

The proliferation of anti-dumping laws has been met with allegations of misuse.[70] According to Gingerich, quoting Corr, anti-dumping is "one significant threat to sanguine prospects for freer international trade".[71] Bhala, too, describes anti-dumping law as a weapon for protectionists seeking undeserved protection from competitive imports. Bhala argues that anti-dumping measures are misused to deny market access and as tools to further perpetuate countries' protectionist tendencies.[72] Similarly, Bekker believes that anti-dumping measures can be manipulated in favour of domestic industries.[73] Denton's major concern is that anti-dumping legislation and/or measures may be used to

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Multinationals" 1979 *Economic Record* 64–67; Brander and Spencer "Tariffs and the Extraction of Foreign Monopoly Rents under Potential Entry" 1981 *Canadian Journal of Economics* 371–389.

70 See generally, Chakraborty "Misuse of Anti-dumping Provisions: What do the WTO Disputes Reveal?" 158–159.

71 Gingerich "Comment: Why the WTO Should Require the Application of the Evidentiary Threshold Requirement in Anti-dumping Investigations" 1998 *American University Law Review* 145.

72 Bhala "Rethinking Anti-dumping Law" 1995 *Geo.Wash.J.Int'l L & Econ.* 1, 5. A submission by Australia in 1989 to the Negotiating Group on MTN Agreements and Arrangements sums up the views on the misuse of anti-dumping measures. Australia argued against the "abuse of anti-dumping procedures by contracting parties". In particular, Australia stated that "the application of anti-dumping measures as a punitive or protectionist instrument, as a means to harass importers or as a means to deter potential market entrants". See Amendments to the Anti-dumping Code, Submission by Australia, MTN.GNG/NG8/W/66/22 December 1989, Special Distribution, http://www.worldtradelaw.net/history/urad/w66.pdf.

perpetuate protectionist trade policies and practices, even when "the alleged dumping is acting in an economically rational manner".[74] According to Tao, anti-dumping laws have the effect of distorting an exporter's decisions about foreign direct investment.[75]

Prusa equates the current use of anti-dumping measures to "medication" that is more dangerous than the "disease" it originally was intended to cure.[76] According to Prusa, modern anti-dumping law has nothing to do with "economically harmful practices" and it is just a "cleverly designed form of protectionism".[77] Similarly, Gao regards anti-dumping as a rhetorical and discriminatory tool devoid of any fairness and having nothing to do with levelling playing fields.[78] Gao's argument is essentially that anti-dumping is laden with anti-competitive characteristics.[79] Alavi and Ahamat point to the loopholes in the WTO anti-dumping regime as a source for the tendency to use anti-dumping measures to shield ineffective industries from fair competition.[80]

1.8.4 Compliance of South African Anti-dumping Law with the WTO

While there is a long history of such an analysis in other jurisdictions like the USA, there has not been enough substantial jurisprudence and research on the subject in South Africa from the perspective and the context of this study. This has had a limiting effect on gathering South African-specific cases and literature. Be that as it may, it is submitted that commentators such as Basson,[81] Blumberg,[82] Brink,[83] De Lange,[84] Gao,[85] Matoma,[86] Petersen,[87] Van

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73 Bekker "Anti-dumping Measures in International Trade" 11.
74 Denton "(Why) should Nations utilize Anti-dumping Measures" 1998 *Mich J Int'l L* 252.
75 Tao *Dumping and Antidumping Regulations* 28–28.
76 Prusa 2005 *The World Economy* 683.
77 Prusa 2005 *The World Economy* 683–684.
78 Gao *Proliferation of Anti-dumping* 8 and 17.
79 See generally Gao *Proliferation of Anti-dumping* 8–15.
80 Alavi and Ahamat "Predation" 2004 *Journal of Economic Cooperation* 78.
81 See Basson *Dumping.*
82 See Blumberg *South Africa.*
83 Brink *Anti-dumping and Countervailing Investigations*; Brink 2005 *JWT.*
84 See De Lange *Guide to Trade Remedies.*
85 See Gao *Proliferation of Anti-Dumping.*
86 See Matona *GATT, Dumping and Anti-dumping.*

Eeden,[88] Roper,[89] Sibanda,[90] Theron,[91] Nakawaga,[92] Ndlovu,[93] MacCarthy,[94] Osode,[95] and Tao[96] provide interesting studies on South African anti-dumping law and practice. However, very few of these works focus exclusively on in-depth discussion of the consistency of the law and practice with WTO disciplines, including both the Panels and the Appellate Body reports. Most of these studies were focused on the pre-ITAA law,[97] and were not, it is submitted, so positive.[98] However, we have to admit from the outset that these pre-ITAA studies are a valuable foundation when conducting a study such as this.

Theron undertakes a rather general examination of South African anti-dumping law and practice.[99] In respect to the pre-ITAA law, Blumberg argues that some of the provisions of the BTTA were so far-reaching and may lead to absurd results.[100] Brink has provided a very interesting and illuminating coverage of, and guide to, anti-dumping and countervailing investigations in South Africa,[101] drawing largely on his experiences as trade remedies director at the DTI. By and large Brink concludes that the law was not compatible with WTO rules.

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87 See Petersen 1996 *B.U. Int'l L.J.* 283.

88 See Van Eeden *The Regulation of Trade Practice.*

89 See Roper *The Development of the GATT.*

90 Sibanda "The South African Anti-dumping Law: Consistency with GATT Antidumping Code" 2001 *CILSA* 242.

91 See Theron "Anti-dumping Procedures: Lessons for the Developing Countries with Special Emphasis on the South African Experience".

92 See Nakawaga *Anti-Dumping Law.*

93 See Ndlovu "An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa's Dumping and Anti-dumping Law" 2010 *JICL* 29.

94 See MacCarthy *Anti-dumping in South Africa.*

95 Osode "An Assessment of the WTO-Consistency of the Procedural Aspects of South African Anti-dumping Law and Practice" 2003 *Penn State International Law Review* 19. See also Osode "The Scope of Interested Party Rights to Procedural Fairness in the Enforcement of South African Ant-dumping Law: Board on Tariffs and Trade & Others v Brenco Inc & Others" 2002 Speculum *Juris* 290.

96 See Tao *Dumping and Antidumping Regulations.*

97 See, for example, Brink *Anti-dumping and Countervailing Investigations.* Matona *GATT, Dumping and Anti-dumping*; Blumberg *Anti-Dumping under the WTO: A Comparative Review*; De Lange *Business Guide to Trade Remedies in South Africa and the Southern African Customs Union;* Basson *Dumping*; Roper *The Development of the GATT*; Van Eeden *The regulation of trade practices*; Sibanda 2001 *CILSA* 242; Osode 2002 Speculum Juris; Osode 2003 *Penn St. Int'l L Rev.*

98 Particularly during the period of the BOTT.

99 See generally Theron *Anti-dumping Procedures.*

100 Blumberg 1997 *J.B.L.* 246 & fn 21.

101 See Brink *Anti-dumping and Countervailing Investigations.*

Santos has described the South African anti-dumping law as "unsatisfactory, outdated, and out of step with the requirements" of the WTO.[102]

Foreign governments have already questioned the compatibility of South African anti-dumping law with the WTO disciplines. In the *SA – Indian Pharmaceuticals* case, for example, India argued that the definition and calculation of the normal value by South African authorities was inconsistent with the provisions of the WTO, and that the authorities use erroneous methodology in determining normal value and the resulting margin of dumping. Furthermore, India argued that the country's method for arriving at constructed export price was unreasonable, and that the determination of injury was not based on positive evidence and proper evaluation of all factors and indices.[103]

Similarly, Petersen has argued that the constructed costs of the production method used by the South African anti-dumping authorities violated the country's GATT obligations.[104] However, Petersen does not seem to suggest that the WTO precludes the use of constructed price to find dumping when the home market or country of origin price cannot be determined. Article 2.2.2 of the URAA permits countries to use "any reasonable methods" to determine dumping. The other substantively flawed criticism by and concern of Petersen was that the powers the BOTT was given were too wide to determine third country price, and that the exercise of such wide powers could lead to "... inflated and artificially constructed duty". [105]

In another pre-ITAA study, which at least reviewed the South African law positively, Osode concluded that the South African anti-dumping law and practice, at least as far as procedural fairness aspects are concerned, satisfies

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102 Santos *The Compendium of Foreign Trade Laws* 286.

103 The *SA – Indian Pharmaceuticals* case was later withdrawn after the governments of India and South Africa reached an amicable solution. The Indian domestic industry subsequently and unsuccessfully took the matter to the South African High Court in *Ranbaxy Limited v Chairman, Board on Tariffs and Trade* (Unreported Case No 659/98).

104 Petersen 1996 *BU Int'l LJ* 399.

105 Petersen 1996 *BU Int'l LJ* 392. But see Sibanda 2001 *CILSA* 248.

the requirements of the applicable WTO rules and principles.[106] Osode also opined that South African authorities are employing best practices in matters such as the judicial review of administrative actions as contemplated by the URAA.[107] Having analysed the SCA ruling in the *Brenco*[108] case, Osode seems to be suggesting that South Africa is doing her best to have the anti-dumping law and practice compliant with WTO rules.[109] The court's ruling in the *Brenco* case was perhaps to be expected, seeing that South Africa has had a long history of using anti-dumping measures.[110]

However, considering that the procedural rules contained in the URAA are complex and technical and that, as such, they may present significant challenges to the investigating authorities,[111] Sibanda has argued that the law should be reformed and consolidated into a "comprehensive statute", which is designed and modelled on the URAA so as to be fully compatible with the WTO system.[112] Since South Africa's re-entry into the international trading system in 1995, South Africa has committed itself to, and consequently embarked on, a process for aligning its anti-dumping law and practice with WTO rules. At the time of writing, the ITAA, for instance, was undergoing a re-drafting or amending process. Interestingly, the ITAA, which was intended to reform South African anti-dumping law in order to conform to the URAA, has already been subject to some criticism and reservations, while at the same time getting a limited approval. In this regard, Brink lists what he calls ten major problems with the current South African anti-dumping system,[113] including, amongst others, the lack of transparency in the system,[114] the lack of provision for the refund of anti-dumping duties,[115] the unsatisfactory dumping methodology that is

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106 Osode 2003 *Penn State International Law Review* 29.
107 Osode 2003 *Penn State International Law Review* 32.
108 See Osode 2002 *Specullus Juris* discussing Brenco in the context of interested parties' rights to procedural fairness.
109 Osode 2003 *Penn State International Law Review* 32.
110 Osode 2003 *Penn State International Law Review* 32.
111 Osode 2003 *Penn State International Law Review* 32
112 Sibanda 2001 *CILSA* 257.
113 Brink "The 10 Major Problems with the Anti-dumping Instrument in South Africa" 2005 *JWT* 148.
114 Brink 2005 *JWT* 149.
115 Brink 2005 *JWT* 151.

applicable to non-market economies,[116] and the problem with injury determinations.[117]

An interesting argument and observation by Ndlovu is that the proposed amendment to the selected anti-dumping regulations through the ITAA Amendment Bill goes against the object and purport of the URAA. In respect to the ITAA Amendment Bill, Ndlovu observes that the amendments are in conflict with the provisions of the ITAA itself and that the new law intended in the Bill is unlikely to be WTO compliant.[118]

In a rather sharp criticism, Gao states that the South African anti-dumping regime is typical of a discipline that is cast in convoluted and complicated jargon and used by domestic industries in an almost anti-competitive manner. In particular, Gao is of the view that South African industries are using anti-dumping measures in an essentially anti-competitive manner by exploiting the convoluted nature of the anti-dumping rules and the national anti-dumping authority's "relatively poor governance" in the decision-making process.[119] Referring to the failure of the ITAC to sometimes meet its own timeframes, Gao suggests that South Africa's good faith in fulfilling its WTO obligations is doubtful.[120] Moreover, Gao seems to suggest that the entire anti-dumping system in South Africa is not sufficiently supportive of the rule of law.[121]

It is submitted that Gao's evaluation of South African anti-dumping law and practice is rather harsh, and incorrectly justified by past historical events and the narrow understanding of WTO rules through a strict textual interpretation that confuses the meaning and intent of the rules. For example, in an assertion that demonstrates ignorance of legal development in the South African anti-dumping regime, Gao claims that South Arica is "unwilling to scrub its [anti-

116 Brink 2005 *JWT 157.*
117 Brink 2005 *JWT* 155.
118 See Ndlovu 2010 *JICL* 30.
119 Gao *Proliferation of Anti-Dumping* 7.
120 Gao *Proliferation of Anti-Dumping* 33.
121 Gao *Proliferation of Anti-Dumping* 33.

dumping] laws".[122] On the other hand, Nakawaga, for example, maintains that the ITAA "almost fully transposed the obligations of the relevant WTO Agreements into South African law."[123] Nevertheless, the study does not necessarily conclude that the South African law is WTO compliant. Unlike Nakawaga, Tao is of the view that certain areas of the South African anti-dumping law, such as the determination of injury, are "strictly consistent with the WTO provisions".[124] However, Tao is much concerned about the fact that there are some gaps or loopholes in the South African regulations. For example, the ADRs do not deal with price-undertaking reviews compared with the definite provisions on price-undertaking reviews in the United States and the Chinese law.[125] In general, Tao seems to suggest that the South African anti-dumping law is largely WTO compliant but laments that it is not comprehensive enough. Tao submits that the law be refined to improve South Africa's global competitiveness, while at the same time ensuring that the law acts as a dissuasive measure for foreign manufacturers who view the Southern African region as a dumping ground.[126]

The ITAC is partly to blame for the negative reviews of the South African anti-dumping regime. In what seems to be a case of sloppy investigative procedures and poor rulings, between 2008 and May 2009, the ITAC had to defend and lost eight cases related to trade remedies law and practice. In particular, the courts in both *Algorax v The International Trade Administration Commission and others*[127] (hereafter Algorax v ITAC), and *Scaw* v *The International Trade Administration Commission and others*[128] (hereafter Scaw v ITAC), noted with concern, and lambasted, the flawed procedures and findings of the ITAC. Similarly, the ITAC's calculation of the five-year period in sunset reviews has

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122 Gao *Proliferation of Anti-dumping* 32.

123 Nakawaga *Anti-dumping Law and Practice* 234.

124 Tao *Dumping and Anti-dumping Regulations* 80.

125 Tao *Dumping and Anti-dumping Regulations* 147.

126 Tao *Dumping and Anti-dumping Regulations* 149.

127 *Algorax v The International Trade Administration Commission and others (Unreported* case *18829/2006TPD)* [hereafter Algorax v ITAC]. See paragraph 6.5.3.3 *infra* for more discussions.

128 *Scaw v The International Trade Administration Commission and others (*unreported case 18829/2006TPD) [hereafter Scaw v ITAC]. See paragraph 6.5.5.3.5 for more discussions.

been struck down as erroneous and not in conformity with international practices by the Supreme Court of Appeal in *Progress Office Machines v SARS.*[129] It is submitted that the current state of the body of knowledge reviewed, with specific reference to the consistency of the South African anti-dumping law and practice with the WTO rules, shows some serious methodological flaws and/or gaps in research in this area. Moreover, the body of knowledge shows some inconsistencies in theory and findings. Consequently, there are areas or issues pertinent to future study. This study, therefore, hopes to propose reforms in the law and practice which the preceding studies have not done.

1.9 Scope of the Study

This study consists of nine chapters. In Chapter one, we introduced the study to the reader, noting the problem statement, the aims and objectives of the study, the methodology employed and the description of how the investigation in this study was conducted. In order to lay a proper foundation for this study, and to achieve the set aims and objectives, Chapter two deals with the history and origins of the institutional structure of the WTO. Chapter two will also deal with the basic foundational principles which govern international trade under the WTO framework, as an examination of controversial WTO rules on issues such as anti-dumping would be incomplete and unjustifiably truncated without a consideration of these basic principles. For the purposes of this study the principles include trade liberalisation and protection through tariffs, non-discrimination, reciprocity and dispute settlement.

Chapter three provides an overview of anti-dumping law under the GATT/WTO framework. Like the approach in Chapter two, Chapter three provides a historical account of the GATT/WTO anti-dumping rules in order to introduce the reader to the multilateral anti-dumping system. The recount of the law under

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[129] *Progress Office Machines v SARS* 2007 SA 118 (SCA). See paragraph 6.5.3.2 for more discussions.

GATT 1947 is particularly important, since the WTO regime derives from it and, in most cases, replicates it. Most importantly, we highlight the relevant basic provisions of the GATT/WTO regime. In order to maintain the emphasis on the thesis of this study, and to avoid unnecessary repetition in chapters four, five, six, seven and eight, we provide only an outline of the GATT/WTO anti-dumping provisions. A detailed discussion and in-depth analysis of GATT/WTO anti-dumping law and practice is comparatively considered in chapters five, six, seven and eight.

In Chapter four, we discuss the adjudication and review of anti-dumping disputes in the WTO in terms of the URAA, and the Understanding on Rules and Procedures Governing the Settlement of Disputes[130] (hereafter DSU), which are administered through the DSB. There is an overlapping relationship between the DSU and the URAA, as the former establishes the general procedural rights and channels for the settlement of all disputes in the WTO. Specifically, Chapter four sets out the basic aspects of litigating an anti-dumping complaint before the DSB. In this regard, we will examine the issues of participation in anti-dumping litigation, the standard of review to determine the matter before the DSB, the onus of proof, and the relevance of previous decisions on disputes before the DSB. Chapter four further examines the remedial actions that are available to WTO member countries in cases where another member's anti-dumping law and policies do not comply with the URAA, and are being implemented contrary to WTO obligations.

Chapters five and six outline and critically appraise the procedural aspects of anti-dumping law in South Africa. In Chapter five, we critically examine the initiation and investigation of anti-dumping complaints, and the prosecution thereof in comparison with WTO anti-dumping law. Chapter five also deals with the various relief measures that can be applied by the South African authorities

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130 *Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization*, Annex 2 The Legal Texts – The Result of the Uruguay Round of Multilateral Trade Negotiations (1999) 1869 U.N.T.S. 401 (hereafter DSU), *reprinted in* 1994 *I.L.M* 1226.

when they find that injurious dumping is taking place, or is threatening to take place. These relief measures may take the form of price undertakings and definitive or provisional duties.

Chapter six deals with reviews and other administrative remedies; it specifically considers change of circumstances reviews, new shipper reviews, sunset reviews and anti-circumvention reviews, all of which are adjudicated by the ITAC, and appeals and reviews, which are adjudicated by the ordinary South African courts.

Chapters seven and eight provide a critical and comparative evaluation of the substantive provisions of South African anti-dumping law. Chapter seven will addresses in particular the determination of "dumping" and the determination of the normal value of products allegedly dumped. Chapter eight will provide an analysis and determination of "injury" to the domestic industry, and the causal connection between the dumped goods and the injury complained of.

Chapter nine provides a summary of our major deductions, conclusions, submissions and recommendations. In brief, chapter nine brings to a final synthesis the insights and standpoints that are discussed throughout the thesis, and makes ten recommendations for improving the South African anti-dumping regime.

1.10 Summary

This introductory chapter set out to identify the problem under investigation; set out the aims and objectives of the study; reviewed the literature and revealed the gaps in the existing body of knowledge necessitating further study; discussed the methodologies adopted; and set out the scope of this thesis.

The next chapter deals with the historical origins of the WTO, its institutional structure, and its basic foundational principles and rules.

CHAPTER TWO: THE WORLD TRADE ORGANIZATION FROM AN HISTORICAL PERSPECTIVE

2.1 Introduction

This chapter consists of a historical overview of the origins of the WTO, its institutional structure and its basic rules and principles.[131] We will consider the historical development of the multilateral trade regime and governing structures under both the GATT 1947 and the WTO. The basic rules and principles considered here include the principles of trade predictability, liberalisation and protection through tariffs, non-discrimination, reciprocity and dispute settlement.

2.2 Establishment of the World Trade Organization

2.2.1 Foundations: GATT 1947 and the Havana Charter

The GATT 1947 can be traced back to the Bretton Woods Conference held immediately after World War II, in New Hampshire, the United States of America (hereafter USA). At the Bretton Woods Conference, a group of states negotiated, amongst other things, an agreement on tariffs and trade to provide a set of rules for the conduct of international trade. This led to the establishment of GATT 1947,[132] which was signed by 23 states, officially referred to as Contracting Parties.[133] GATT 1947 came into force on 1 January 1948 and has

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131 Otherwise the subject is dealt with extensively elsewhere. See for example, Bettlehem "International Economic Relations" in Dugard *International Law* (2005) 347–372; Griesgraber and Gunter (ed) *World Trade: Toward Fair and Free Trade in the Twenty First Century*; Jackson *Restructuring of the GATT System*; Steward *The Uruguay Round: A Negotiating History – 1986–1992*; Jones and Whittingham *Understanding the World Trade Organization: Implications and Possibilities for the South*; Vernon "The World Trade Organization: A New Stage in International Trade and Development" 1995 *Harvard Int'l LJ* 329; Piontek "The Principles of Equality and Reciprocity in International Economic Law: Mere Concept or Legal Reality?".

132 The other Bretton Woods institutions are the World Bank and the International Monetary Fund.

133 The GATT 1947 Contracting Parties were Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, the Republic of China, Cuba, Czechoslovakia, France, India, Lebanon,

since been amended and improved in subsequent trade negotiating rounds.[134] Interestingly, the negotiations on GATT 1947 were conducted in parallel to the negotiations on the Charter of the International Trade Organization (hereafter Havana Charter).[135] The Havana Charter was agreed upon at the United Nations Conference on Trade and Employment,[136] held in Havana, Cuba, from 21 November 1947 to 24 March 1948 under the auspices of the United Nations Organization (hereafter UN).

The objectives of the Havana Charter included the promotion of trade liberalisation on a non-discriminatory, reciprocal and mutual basis,[137] and the maximisation of countries' access to trade opportunities in order to make them abstain from policies that disrupt trade.[138] From a trade perspective, the Havana Charter aimed at establishing an organisation to govern international trade, called the International Trade Organization[139] (hereafter ITO). The ITO was intended to complete the Bretton Woods structure of international economic institutions already consisting at the time of the International Bank for

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Luxembourg, the Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom (hereafter UK) and the United States of America (hereafter USA).

134 Multilateral trade negotiating rounds were initiated or commenced in the cities/towns after which they are named, while others were named after certain individuals: The Annecy Round of 1949 was initiated in Annecy, France; the Torquay Round of 1951 was initiated in Torquay, England; the Geneva Round of 1955–1956 was initiated in Geneva, Switzerland; while the Dillon Round of 1960–1962 was initiated in Geneva, Switzerland and was named after the US Treasury Secretary and former Under Secretary of State, Douglas Dillon, who first proposed the talks; the Kennedy Round negotiations were held in 1964–1967 in Geneva, Switzerland And named after American President John F. Kennedy who died the year before the opening negotiations and during whose presidency in 1962 the Trade Expansion Act was passed (Pub.L. 87-794, 76 Stat. 872, enacted October 11, 1962, 19 U.S.C. § 1801) which authorised the White House to conduct mutual tariff negotiations ultimately leading to the Kennedy Round; the Tokyo Round of 1973–1979, originally called the Nixon Round, was initiated in Geneva, Switzerland; and the Uruguay Round of 1986–1994 was initiated in Punte del Este, Uruguay. The Uruguay Round was finalised in Marrakesh, Morocco in 1994 and transformed the GATT 1947 into the WTO.

135 "Havana Charter for an International Trade Organization", *reprinted in* US Dept of State Publications 3117 *Com. Pol'y Series* 113 [hereafter Havana Charter].

136 United Nations Conference on Trade and Employment: Final Act and Related Documents, Havana, Cuba, March 1947.

137 ITO Charter, Art 1:4.

138 ITO Charter, Art 1:5.

139 ITO Charter, Arts 71–81.

Reconstruction and Development (hereafter World Bank) and the International Monetary Fund (hereafter IMF).

GATT 1947 was originally intended as an international agreement on trade and not as an international organisation. However, because of the failure to implement the results of the Havana Charter, GATT 1947 assumed the role of being both a de facto international trade regulatory "institution" and a binding international "treaty", setting out a general body of trade rules.[140] The non-implementation of the results of the Havana Charter has been attributed mainly to the failure of the United States to ratify the Havana Charter, which interestingly made the initial proposals for the creation of the ITO.[141]

The collapse of the ITO has been explained by a number of reasons including the deterioration of the Havana Charter's value to the United States; the failure of the Charter to generate sufficient domestic support; and President Truman's lack of political support and will to win the ratification of the Havana Charter.[142] Consequently, the Havana Charter's trade policy was implemented in advance on a provisional basis as GATT.[143] Like the Charter, GATT 1947 was itself never officially ratified by the parliaments of the contracting parties. It derives its legal basis from the Protocol of the Provisional Application of the General Agreement on Tariffs and Trade (PPA),[144] which was intended to justify the

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140 The GATT 1947, as both an agreement and an international institution, ceased to exist from 1995. For more on GATT 1947 see Dam *The GATT* (reviewing GATT from an organisational and legal perspective). See also *GATT/CP/86* (6 December 1950); Steward *The Uruguay Round: A Negotiating History* 1581 (recounting the changeover from the GATT to the WTO); Hudec *Developing Countries in the GATT Legal System* 144 (on the resurrection of ITO trade policy in GATT 1947); Sercevic "Impact of the Monetary System on World Trade" 210 (on GATT 1947 as a de jure agreement and a de facto institution); Jones and Whittingham *Understanding the World Trade Organization* 9–12 (outlining the origins of the WTO since the Havana Charter).

141 Viner *Anti-dumping* 293.

142 See generally Bettlehem "The United States, the ITO, and the WTO: Exit Options, Agent Slack, and the Presidential Leadership". On the role of the United States in the ITO's ultimate failure, see further Gardner *Dollar Diplomacy* 378; McGovern *International Trade Regulation* 3–4. See also Bhala *International Trade Law: Cases and Materials* 85; Reuvid *A Handbook of World Trade* 5.

143 Reference here is to GATT 1947.

144 Protocol of Provisional Application of the General Agreement on Tariffs and Trade 55 UNTS 308 (30 October 1947) (hereafter PPA).

implementation of the GATT until an international body regulating trade was established.

2.2.2 Formation of the World Trade Organization

The origins of the WTO lie partly in both the GATT 1947 and the Havana Charter. Based in Geneva, Switzerland, the WTO was established in 1994 and came into operation on 1 January 1995. The process of establishing the WTO began in September 1986 at the eighth round of trade negotiations, known as the "Uruguay Round", and was completed when signed into a binding agreement in April 1994 at the Ministerial Conference held at Marrakesh in Morocco. The WTO replaced GATT 1947 as a formal international institution responsible for the promulgation and/or development of the multilateral trading system, rules and regulations, intended to be binding on the nations of the world.[145]

The WTO provides for the substantive rights and obligations of members, and multilateral rules and principles or rules applicable to WTO Members regarding trade in goods, services and trade-related aspects of intellectual property rights. The WTO builds upon the organisational structure and the part played de facto by the defunct GATT 1947. It is also based on the major rules, principles and decisions of GATT 1947. Furthermore, GATT 1994 incorporates the GATT 1947 agreement as amended.[146] According to Article 6.1 of the WTO Agreement, "[e]xcept as otherwise provided, the WTO shall be guided by the decisions, processes and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947".

The WTO has had a profound impact on world trade and has seen a rapid rise in membership compared to GATT 1947. For example, by 23 July 2008, WTO

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145 See Article 2(2) of the WTO Agreement read with Arts 2 (3) and 25(5).

146 See WT Agreement Art 2 (4); the General Agreement on Tariffs and Trade of 1994 (GATT 1994), Annex 1. Note that GATT 1947 continued to coexist alongside GATT 1994 until 1995, to allow its member countries to accede to the WTO. In terms of Article 4 of

membership had risen to 153, although few governments and other institutions[147] enjoyed observer status[148]. Its creation marked the beginning of a new era in the domain of international trade law. This era of reconstruction of international trade was characterised by dynamism, unification and a legalistic approach to international trade and trade disputes in comparison with GATT 1947. Under the WTO regime, areas of international trade law and other issues, which were covered by GATT 1947, were re-evaluated and expanded. In fact, the WTO framework and mandate have been extended beyond that of GATT 1947, which primarily focused on trade in goods, to include trade in services and aspects related to non-material property trade.[149]

2.3 Objectives and Functions of the World Trade Organization

The WTO seeks to liberalise international trade through an integrated, more viable and multilateral trading system, based on open markets and fair competition. Except for some few additions and modifications, the objectives of the WTO remain the same as those of GATT 1947.[150] According to the preamble of the WTO Agreement, the ultimate objectives of the WTO is the raising of standards of living, creation of full employment opportunities, enhancing the growth of real income and demand, and the expansion of the production of, and trade in, goods and services. The attainment of these objectives has to take into account the need to preserve a sustainable

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the WTO Agreement during this period of coexistence, GATT 1947 was regarded as legally distinct from GATT 1994.

147 For example, the United Nations Organization (hereafter UN), the United Nations Conference on Trade and Development (hereafter UNCTAD), the International Monetary Fund (hereafter IMF), the World Bank, the Food and Agriculture Organization (hereafter FAO), the World Intellectual Property Organization (hereafter WIPO), and the Organization for Economic Co-operation and Development (hereafter OECD).

148 About 30 governments by June 2009.

149 In General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts – The Result of the Uruguay Round of Multilateral Trade Negotiations 284 (1999) 1869 UNTS 183 [hereafter GATS], *reprinted in* (1994) 33 *ILM* 1167. Agreement on Trade-Related Aspects of Intellectual Property, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts – The Result of the Uruguay Round of Multilateral Trade Negotiations 320 (1999) 1869 UNTS 299 [hereafter TRIPS Agreement], *reprinted in* (1994) *ILM* 1197. See Kennedy "Services join GATT: An analysis of the General Agreement on Trade in Services" 1995 *INT.TLR* 11.

150 See *The WTO Secretariat: Guide to the Uruguay Round Agreements* (1999) 3.

environment and the sustainable development needs of developing countries.[151] According to the Appellate body, the objectives of the WTO can no longer be considered in isolation from other disciplines and rules of international law.[152]

The WTO functions range from the monitoring and facilitating of the implementation of Members' contractual undertakings, and of GATT 1994 and its associated Plurilateral Trade Agreements[153] (hereafter PTA); receiving complaints and adjudicating disputes between signatories relating to the associated agreements;[154] providing a forum for multilateral negotiations;[155] administering the Trade Policy Review Mechanism (hereafter TPRM);[156] to cooperating with other international institutions, like the World Bank and the IMF.[157]

2.4 Institutional Structures of the World Trade Organization

2.4.1 Ministerial Conference

The WTO consists of a multilevel structure comprising several interrelated bodies, as set out in Article VI of the WTO Agreement. The structure is headed by the Ministerial Conference consisting of international trade ministers from all member countries. In brief, the Ministerial Conference is the supreme body of the WTO. In terms of Article VI (1) of the WTO Agreement, the Ministerial Conference is tasked with carrying out the functions of the WTO. The Ministerial

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151 See WTO Agreement Art III: 3.

152 The *United States – Standard for Reformulated and Conventional Gasoline* (hereafter Reformulated Gasoline, Appellate Body Report), WT/DS/9, 20 May 1996, par 18. See also the *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 15 October 1998, par 116 (hereafter Shrimp – Turtles, Appellate Body Report). See also, Sibanda "Reviewing the State of Sustainable Environmental Protection in the WTO: Some Signs of a Slow but Progressive Paradigm Shift" 2005 *OBITER* 388, and Sibanda "A human rights approach to World Trade Organization trade policy: Another Medium for the Promotion of Human Rights in Africa" 2005 *AHRLJ* 392–393.

153 See WTA, Art III: 1.

154 See WTA, Art III: 3.

155 See WTA, Art III: 2.

156 See WTA, Art III: 4.

157 See WTO Agreement, Arts III: 5 & V. See further *Guide to the Uruguay Round Agreements* 15–17.

Conference enjoys supreme authority, including the authority to take decisions on all matters under any Multilateral Trade Agreement. It is generally responsible for the strategic direction of the WTO.

2.4.2 General Council

When the Ministerial Conference is not in session, its functions are performed by the General Council. The General Council is made up of all the Members of the WTO, represented by ambassador-level diplomats.[158] This interim exercise of power by the General Council is important for continuity of management in the WTO. In addition to the interim exercise of the functions of the Ministerial Conference, the General Council is also responsible for overseeing the day-to-day business and management of the WTO.

The General Council may convene as the DSB[159] and the Trade Policy Review Body (hereafter TPRB).[160] Accordingly, the DSB oversees the implementation and effectiveness of the dispute resolution mechanisms of all the WTO agreements, while the TPRB oversees the implementation of the Trade Policy Review Mechanism by periodically reviewing the trade policies and practices of all member states in order to determine how members are implementing their WTO obligations.

2.4.3 Specialised Councils

There are three main subsidiary councils whose work is overseen by the General Council. These are the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade-Related Aspects of Intellectual Property. All the WTO members are represented in these Councils. These specialised Councils are responsible for overseeing and supervising the

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158 See WTO Agreement, Art IV(2).
159 See WTO Agreement, Art IV(3).
160 See WTO Agreement, Art IV(4).

operational aspects of the WTO,[161] and for the implementation of agreements in their respective subjects. The Councils also play a vital role in the procedure for the adoption of waivers and the amendment of decision-making procedure.[162] The Council for Trade in Goods, for instance, covers all the agreements in Annex 1A of the WTO Agreement. It also has several subsidiary committees, set up to assist it in carrying out its functions.

In the context of this study, it is important to note the ADP Committee. This Committee, which is composed of representatives of each of the WTO countries, serves as an institution for dealing with all anti-dumping measures and related matters, and to which all such matters are reported.[163] In fact, the ADP Committee is an anti-dumping regime watchdog. This Committee is not a novel institution in a multilateral trade regime framework, as it is a successor to the 1969 Committee on Anti-dumping Practices of GATT 1947. The latter was responsible for implementing the *Agreement on the Implementation of Article VI of GATT 1947* (commonly referred to as the Kennedy Round Anti-dumping Code).

2.4.4 General Committees and Working Groups

There are certain permanent committees that report directly to the General Council, and assist the Ministerial Conference and the General Council in carrying out their functions. The most notable are the Committee on Trade and Development (CTD); the Committee on Trade and the Environment (CTE); the Committee on Balance of Payments Restrictions (BoP Committee); the Committee on Budget (CoB); the Committee on Finance and Administration (CFA); and the Committee on Regional Trade Agreements (CRTA). The CTD and the CTE are, for example, responsible for trade issues of interest to least developed countries (LDCs). The CTE was established by the WTO General

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161 See WTO Agreement, Art IV (5) and IX: 2.
162 See WTO Agreement, Art IX: 2.
163 See URAA, Arts 16.1 & 16.4.

Council in January 1995[164] and was specifically mandated to look into trade and environmental matters. One of its main tasks was to consider how best to achieve and regulate the enhancement of mutually supportive and positive interactions between trade and environmental measures or policies for the promotion of sustainable development.[165]

The BoP Committee is responsible for consulting with countries that adopt restrictive trade measures because of balance of payments problems. In consulting with such countries, the BoP Committee seeks to determine whether the use of restrictive measures is necessary or desirable for addressing balance of payments difficulties. The Committee on Budget and the Committee on Finance and Administration are responsible for the WTO budget and financing, respectively.

2.4.5 Plurilateral Trade Committees

Plurilateral Trade Agreements (hereafter PTAs) are agreements that apply only to those WTO members that have accepted them. The PTA committees, whose operations do not extend to all WTO Members, exist to administer the PTAs. These committees conduct their operations within the institutional framework of the WTO, however, and report to the General Council on their activities. The PTA committees currently include the Committee on Trade in Civil Aircraft (Aircraft Committee) and the Committee on Government Procurement (hereafter Procurement Committee). The Procurement Committee is responsible for implementing the WTO Government Procurement Agreement of 1994, which deals with issues such as non-discrimination and transparency in

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164 The establishment of the Committee on Trade and the Environment (hereafter CTE) can be traced back to its forerunner, the Group on Environmental Measures and International Trade of 1971 (hereafter EMIT group), which had a narrow mandate to examine upon request any specific matters relevant to trade policy aspects of measures to control pollution and protect the environment, especially with regard to the application of the GATT provisions. The EMIT group did not meet until 1992, after the February 1991 request by the European Free Trade Association. See GATT Council Meeting of 24 April 1991, doc.C/m/247 (22 May 1991).

national tendering processes,[166] while the Aircraft Committee is responsible for the implementation of the 1979 Agreement on Trade in Civil Aircraft, which aims at reducing tariffs and non-tariff barriers in civil aircraft trade.[167]

2.4.6 The Secretariat

The WTO has a Secretariat based in Geneva, Switzerland. The main functions of the WTO Secretariat are to provide technical assistance to developing countries, to monitor and analyse developments in world trade, to advise governments of countries wishing to become Members of the WTO, and to provide necessary information to the public and to the media. The WTO Secretariat also has the responsibility of assisting dispute settlement panels on some issues, including the legal, historical and procedural aspects of issues dealt with, and of providing secretarial and technical support to the panels.[168]

The Secretariat is headed by a Director-General, who is assisted by four Deputy Directors-General. The Director-General is appointed by the Ministerial Conference.[169] The Secretariat is organised into divisions with functional roles[170] and divisions with support roles.[171] The divisions are generally headed by a Director, who reports to one of the WTO's four Deputy Directors-General or who report directly to the Director-General. Unlike in other bodies of the WTO, the Director-General and the WTO staff are independent international officials. They are not representatives of member governments.

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165 See WTO Trade and Environment Decision, MTN/TNC/45 (MIN) (hereafter Decision on Trade and Environment).

166 See generally Hoekman and Kostecki *Political Economy* 369–380.

167 See Hoekman and Kostecki *Political Economy* 380–381.

168 See DSU, Art 27.1.

169 See WTO Agreement, Art VI: 2.

170 For example, the Agriculture and Commodities Division and the Market Access Division.

171 For example, the Administration and General Services Division.

2.5 Foundational Principles of the WTO Regime

2.5.1 Trade Liberalisation and Predictability

The WTO has what is commonly referred to as its foundational principles, which are fundamental to its trade regulatory regime.[172] Trade liberalisation and trade predictability are some of these fundamental principles. In this regard, trade liberalisation is considered as a vehicle for delivering economic growth, development and prosperity to nations.[173] According to the Preamble to the WTO Agreement, Member States should conduct their trade relations with a view to raising the standard of living, ensuring full employment opportunities for their respective societies, and endeavouring to achieve growth in volumes of real income and expansion of the production of trade in goods and services.

In terms of the WTO market access ideal, trade is to be encouraged by the lowering of and/or elimination of trade barriers and related measures, which may be in the form of quotas, import bans, customs duties or tariffs.[174] However, it is fruitless to expect countries to lower or break down trade barriers in their economies in favour of open trade if no mechanism is put in place to commit them not to alter their existing liberalised regimes negatively at any time in the future. Thus, in order to secure stability and predictability in the WTO, Article 2(c) of the GATT enjoins member states to bind their customs tariffs (customs duties). This is called a locking-in of commitments by the WTO member states. However, under Article 17 of the GATT a WTO member is allowed to withdraw a binding if it negotiates substantially similar concessions on the other products of interest to the principal beneficiaries of the original binding.

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172 For more in-depth discussions on these and other principles, see generally Piontek *Principles of Equality* 1. See also Roper *The Development of the GATT* 8–10.

173 See Stahl "Liberalizing International Trade in Services: The Case for Sidestepping the GATT" 1994 *Yale J Int'l L.* 413–415 (outlining the goals and benefits of trade liberalisation).

174 The lowering and/or elimination of trade barriers is seen as a vehicle for achieving the progressive goal of freer or liberalised trade, and for levelling the playing field between strong and weaker countries. See Doha Ministerial Declaration (adopted 14 November 2001), WT/MIN (01)/DEC/1, paras 1 & 2.

2.5.1.1 Anti-dumping Measures as an Exception

Anti-dumping measures constitute some of the few exceptions to trade liberalisation and predictability principles in that they allow WTO member countries to impose anti-dumping duties in order to offset the anti-competitive effects of open trading, thereby protecting national industries.

2.5.2 Non-discrimination

The concept of non-discrimination forms an integral part of WTO trade regulation. In fact it is a key constitutional principle of trade regulation. WTO rules express the requirement of non-discrimination primarily through the "most-favoured nation treatment" and the "national treatment" provisions.

2.5.2.1 Most favoured nation treatment

The most favoured nation (hereafter MFN) treatment is a principle that seeks to harmonise the treatment of goods, services and items of immaterial property among parties to a particular trade arrangement that has now become the fundamental equality clause of GATT/WTO agreements, both substantively and procedurally. The MFN obligation, therefore, is one of the important features of the WTO trading system. The MFN in international trade law marks the transposition of equality under public international law into the commercial field, because it requires trade relations to be based on the fundamental principles of equality and non-discrimination with regard to any advantages, favours, privileges or immunities.[175] It is "basic to the whole edifice" of the WTO,[176] and ensures uniformity in the application of commitments made among WTO members. The MFN treatment is explicitly required in Article 1 of GATT 1994 in respect of trade in goods. Article 1 of GATT 1994 requires that member countries treat imports and exports of other members in at least as favourable a

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175 Piontek Principles *of Equality* 90.
176 *Guide to Uruguay Round Agreements* 39.

way as they treat imports and exports from other countries. In terms of Article 1(1), the granting of any advantage, favour, privilege or immunity by a contracting party to a product originating in or destined for any other country should be extended immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. The GATT MFN obligation applies immediately and unconditionally, irrespective of whether reciprocal trade concessions are granted.[177] *Prima facie*, this means that a state can ask for the MFN treatment without granting any reciprocal advantage. If South Africa, for example, were to grant Zimbabwean maize growers duty-free importation of their maize products into South Africa, the unconditional MFN obligation would require that all other maize growers from other countries be granted the right to import their maize products free of any duty too.

The MFN obligation similar to that imposed by GATT is explicitly provided for in other WTO-covered agreements. For example, Article 4 of the Agreement on Trade-Related Aspects of Intellectual Property (hereafter TRIPS) contains an analogous MFN obligation. An additional aspect of the TRIPS MFN obligation, which is absent from the text of GATT Article 1(1) provision, is the explicit granting of exemptions from the MFN obligation to extend certain advantages, favours, privileges and immunities under certain circumstances. As under TRIPS, Article 2 of the General Agreement on Trade in Services (hereafter GATS) contains an immediate and unconditional MFN obligation, subject to certain explicit exemptions relating to air transport services, financial services, telecommunications and maritime transport service negotiations.

Other GATT/WTO agreements maintain a slightly different MFN obligation, which is devoid of any indication whether the obligation applies unconditionally or not. An example is the MFN provision in the Agreement on Technical Barriers

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[177] The MFN obligation was first tested by the GATT 1947 Panel in *Belgian Family Allowances (Allocations Familiales)*, 7 November 1952, GATT BISD (1st Supp), 59 (1953).

to Trade[178] (hereafter TBT Agreement), in respect of the preparation, adoption and application of technical regulations by central governments.[179] Article 2.1 of the TBT Agreement provides the following: "Members shall ensure that in respect of their technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."

Based on the unqualified provisions of Article 2.1, supplemented by the proper reading and textual analysis of other provisions, it can be submitted that the TBT Agreement's MFN obligation is per se not unconditional like the WTO's broad MFN rule under GATT. Article 6.3 of the TBT Agreement on mutual recognition agreements strengthens the assertion that the MFN obligation in the TBT Agreement is per se not unconditional by stating that Member States may require that such agreements fulfil the criteria of Article 6.1 on assessment procedures, read with Article 6.4, and give mutual satisfaction regarding their potential for facilitating trade in the products concerned.[180]

Clearly, the TBT Agreement has adopted non-peremptory language in its MFN provisions. First, countries are only encouraged to enter into mutual recognition agreements with others, and the incentive for them to enter into such an agreement is to allow them to exercise their free will and freedom to choose partners.[181] Second, contrary to the immediacy and non-conditionality of the MFN rule found in GATT, the TBT Agreement permits countries to require that the assessment procedures of other countries be equivalent to theirs or in

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178 The Agreement on Technical Barriers of Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts – The Result of the Uruguay Round of Multilateral Trade Negotiations 320 (1999) 1869 UNTS 299 (hereafter TBT Agreement), *reprinted in* 1994 *ILM* 1197.

179 Article 2.1 of the TBT Agreement provides that:

> Members shall ensure that in respect of their technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

180 *Emphasis added.*

181 See TBT Agreement, Art 6.3.

conformity with theirs. This implies that a degree of reciprocity is required in mutual recognition agreements. Finally, the MFN clause in Article 6.4 is not couched in peremptory language. WTO Members are only encouraged to adhere to it. In conclusion, the GATT-fashioned MFN principle does not apply in the TBT Agreement.[182]

2.5.2.2 *National Treatment*

Like the MFN principle, the national treatment (NT) principle has become the fundamental equality clause of GATT/WTO agreements. The NT principle requires that imported goods, foreign service providers, or an item of immaterial property be treated equally, although not identically, with local goods, local service providers, or a local item of immaterial property, once they have entered the local market. The NT principle, therefore, prohibits WTO Members from adopting domestic or national policies aimed at favouring domestic producers of a given product over foreign producers. [183] The NT obligation is spread over several of the WTO-covered agreements, for instance, GATS[184], TRIPS[185] and Agreement on Trade-Related Investment Measures[186] (hereafter TRIMS).

The NT obligation has been extensively dealt with in the *European Communities – Measures Concerning Meat and Meat Products*[187] (hereafter EC – Beef Hormones, Panel Report) dispute. The *EC – Beef Hormones* dispute was the first to address the non-discriminatory and consistent application of food safety measures under the Agreement on the Application of Sanitary and

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182 See Beynon "Community Mutual Recognition Agreements, Technical Barriers to Trade and the WTO's Most Favoured Nation Principle" 2003 *EL Rev Apr* 231.

183 See GATT, Art III.

184 GATS, Art 17.

185 TRIPS Agreement, Art III.

186 Agreement Trade-Related Investment Measures, April 15, 1994, The Result of the Uruguay Round of Multilateral Trade Negotiations 284 (1999) 1869 U.N.T.S. 299, *reprinted in* 1994 *I.L.M.* 1197, Art II (hereafter TRIMS Agreement).

187 European Communities – Measures Concerning Meat and Meat Products, WT/DS26/R (18 Aug. 1997) (hereafter EC – Beef Hormones, Panel Report]. See also, Japan – *Taxes on Alcoholic Beverages*, WTO Doc. AB-1996-2, and 4 October 1996 (hereafter Japan – Sochu, Appellate Body Report].

Phytosanitary Measures[188] (hereafter SPS Agreement). The EC beef regime dates back to 1987 following concerns on the part of consumers over the safety of hormone-fed beef. All imports into the EC of animals and meat from countries where animals were fed with growth-promoting hormones were banned.

Though the EC measure was initiated long before the SPS Agreement came into force on 1 January 1995, the DSB Panel *in limine* ruled that the SPS Agreement applied to the measure because it remained in force after the coming into force of the SPS Agreement.[189] The Panel found the EC measure to be inconsistent with its WTO obligations. First, the measure did not comply with Article 2 of the SPS Agreement on the scientifically based assessment of risk due to the consumption of growth hormone-fed beef. Second, even if the EC had produced some scientific proof, as required, the measures were arbitrary, unjustifiable and discriminatory, and a disguised trade restriction with regard to naturally occurring growth hormones. In this latter regard the EC measure violated the NT obligation, as there was a distinction between products with higher levels of hormones that occurred naturally, such as soya oil and eggs, which were not subject to the ban and the imported meat and meat products with lower naturally occurring hormones that were subject to an import ban.[190]

The EC could not justify the difference in treatment between imported products with lower, naturally occurring hormones that were subject to an import ban and the products with higher levels of naturally occurring hormones that were not subject to an import ban.[191] The Appellate Body in *European Communities* -

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188 SPS Agreement. According to Article 2.3 of the SPS Agreement, all WTO Members have a legitimate right to establish measures they deem appropriate to protect human, animal, and plant life and health. These measures should, however, meet certain procedural requirements, which ensure that they provide scientifically based protection, that is, not a disguised trade barrier.

189 *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/R (18 Aug. 1997) (hereafter EC – Beef Hormones, Panel Report).

190 *EC-Beef Hormones*, para. 8.197 – 8.203.

191 *EC-Beef Hormones*, para. 8.214 & 8.216.

Measures Concerning Meat and Meat Products[192] (hereafter EC-Beef Hormones, Appellate Body Report) upheld in part, modified in part, and reversed in part the *EC-Beef Hormones* findings. With regard to the obligation, the Appellate Body reversed the Panel's finding that the EC measures were arbitrary or unjustifiable.[193]

Anti-dumping measures and regulations prima facie contravene the WTO national treatment principle. Contrary to the principle of equality of treatment, which is the gist of the NT obligation, foreign goods that have entered the local market and are competing with similar local goods are subject to additional duty measures if it is determined that they are dumped or subsidised goods. The additional duty treatment is not meted out to similar national (local) goods and industries.

2.5.2.3 Selected Exceptions to the Non-discrimination Principle

In this section, some of the exceptions to the MFN obligations of the GATT will be discussed, the most significant being the exceptions based on historical preferences under Article I: 2-4 of GATT; regional trade agreements (hereafter RTAs) in the form of, for example, customs unions and free trade agreements (hereafter FTAs) under Article XXIV: 5, exceptions for preferences to developing countries in terms of the 1979 Enabling Clause, and waivers to preferential schemes or programmes under Article IX: 3 of the WTO, and the general exceptions under Article XX of the GATT.

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192 *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R (16 Jan 1998) (hereafter EC – Beef Hormones, Appellate Body Report).

193 *EC – Beef Hormones, Appellate Body Report*, para. 245 states that:

> We are unable to share the inference that the Panel apparently draws that the import ban on treated meat and the Community-wide prohibition of the use of the hormones here in dispute for growth promotion purposes in the beef sector were not really designed to keep out US and Canadian hormone-treated beef and thereby protect the domestic beef producers in the EC.

Of course, in addition to market access schemes countries may have a variety of programmes, some with trade-related components, which have implications on the MFN obligations. For an example, the EC has provided financial and technical assistance to ACP countries under the Stabex[194] scheme. Other exceptions, not discussed in this study, may be in the form of schemes such as the economic partnership agreements[195] (hereafter EPAs), and preferential trade agreements (hereafter PTAs).[196] Other exceptions to the obligation of non-discrimination of the GATT include traffic frontiers under Article XXIV:3, security-related exceptions under Article XXI, safeguard measures for a country's financial position and balance of payments under Articles XII and XVIII:B, and the infant industry protection exception under Article XVIII:C. However, these will not be discussed here.[197]

2.5.2.3.1 Special and Differential Treatment for Developing Countries

As stated earlier, the special economic circumstances and needs of less developed countries (LDCs) and developing countries necessitated the inclusion of provisions for special conditions and preferential treatment (hereafter SDT) for them in GATT/WTO.[198] With regard to the economic interests of developing countries, these special economic needs and conditions resulted in the creation of preferential trading schemes in various forms, such as the general system of preferences (hereafter GSP) and the country-specific system of preferences (hereafter CSP), and others. The inclusion of special

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194 The Stabex scheme was introduced in the first Lomé Convention with the intention of insuring against fluctuations in export earnings for certain commodities on which the ACP countries were heavily dependent. See generally, Hewitt "Stabex: An Evaluation of the Economic Impact over the First Five Years" 1983 *World Development* 1005–1027.

195 On economic partnership agreements (hereafter EPAs), see Chanda *Regional Integration in Southern Africa* 19–20, 25–25.

196 Srinivasan "Non-discrimination in GATT/WTO: Was there anything to begin with and is there anything left?' 2005 *World Trade Review* 93 argues that the proliferation of Preferential Trade Agreements (hereafter PTAs) has "'undermined', "'almost completely' the non-discrimination principle of the WTO".

197 An in-depth discussion of the principles of non-discrimination is beyond the scope of this thesis. Moreover, non-discrimination and exceptions thereto is covered in a variety of WTO agreements. Thus, its discussion may never be exhaustive.

198 *Guide to Uruguay Round Agreements* 223. See paragraph 2 of the preamble of the WTO Agreement.

conditions and preferential treatment for developing and LDCs meant that they are in many areas provided with longer periods in which to implement WTO policies,[199] and have fewer cumbersome obligations. The SDT provision was designed to enable countries in the early stages of development to access, adequately benefit from and share in the growth of international trade.[200] In addition, it was intended to breach the developmental "gap" between the developed and the developing countries.[201] According to Manero-Salvador, SDT derives from what used to be called Differential and More Favourable Treatment (hereafter DMFT) prior to the Uruguay Round, which later graduated from a developmental tool under GATT 1947 to an adjustment tool under the WTO.[202] Das traces the introduction of SDT in multilateral trade to the mid-1960s, when Articles XXXVI, XXXVII and XXXVIII were introduced into the GATT 1947.[203]

Under the GATT 1947, developed Contracting Parties noted that they could allow less-developed parties to use special measures to promote their trade and development.[204] In principle, the developed Contracting Parties could not expect reciprocal actions in return for special commitments that they made in favour of less-developed Contracting Parties.[205] Furthermore, developed countries committed themselves to the "fullest extent possible to give priority to the products of interest to developing countries in trade liberalization initiatives".[206]

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199 For example, developing countries (LDCs) and/or least-developed countries were given a longer period to implement obligations under the TRIPS Agreement. Developing countries were, until 1 January 2000, exempted from the application of the TRIPS Agreement (until 1 January 2006 for LDCs in terms of article 66.1), whilst developed country Members had to apply TRIPS provisions as of 1 January 1996. A similar provisional exemption to developing and/or LDCs existed under Article 9.2 of Safe Guard Agreement; Article 15.2 of the Agreement on Agriculture; Article 27.3 SCM Agreement.

200 See GATT, Art 36. See also Das "Special Treatment and Policy Space for the Developing Economies in the Multilateral Trade Regime" 2007 *Estey Centre J. Int'l. L & Trd. Pol'y* 41. But see Kerr "Special and Differential Treatment: A Mechanism to Promote Development?" 2005 *Estey Centre J. Int'l. L & Trd. Pol'y* 84–87 who regards special and differential treatment clauses as more of a political compromise which is against "the promotion of economic development", and another "polite term for protectionism".

201 See GATT 1947, Art XXXVI(1)(c).

202 Manero-Salvador "Special and Differential Treatment in World Trade Rules" 2007 *Estey Centre J. Int'l. L & Trd. Pol'y* 104–107.

203 See Das 2007 *Estey Centre J. Int'l. L & Trd. Pol'y* 40–43 for historical and intellectual foundations of special and differential treatment.

204 See GATT 1947, Art XXXVI(1)(f).

205 See GATT 1947, Art XXXVI(8).

206 See GATT 1947, Art XXXVII(1).

Developed countries also committed themselves to "have special regard" to the interests of LDCs in applying GATT permitted measures and remedies.[207] The overarching special treatment provision of GATT 1947 is contained in the 1979 *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*[208] (hereafter 1979 Enabling Clause), which permits, subject to certain requirements, preferential treatment for and among developing countries contrary to the MFN obligation. This was confirmed by the Appellate Body in the *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*[209] dispute (hereafter EC – Tariff Preferences, Appellate Body Report).

The 1979 Enabling Clause laid the foundation for a long-term legal basis for the functioning of SDT and the GSP, which before 1979 relied on waivers.[210] The 1979 Enabling Clause permits GATT 1947 Contracting Parties to "accord differential treatment and more favourable treatment to developing countries".[211] Notable in these conditions are the requirements that special and differential treatment must not be used to raise barriers to or create undue difficulties for the trade of any other Contracting Parties [212] and that it must not impede the reduction or elimination of tariffs and other restrictions to trade on a MFN basis.[213] As in Article XXXVI (8) of GATT, the Enabling Clause contains a similar clear statement of non-reciprocity by developed countries.[214]

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207 See GATT 1947, Art XXXVII(3)(c). Furthermore, Article XXXVIII called for a joint action by developed countries where necessary and for the setting up of institutional arrangements where appropriate, to further the objectives set forth in Article XXXVI and implement the provisions of Part IV of GATT 1947.

208 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries Decision of 28 November 1979, L/4903), BISD 26S/203). [Hereafter 1979 Enabling Clause].

209 See *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, par.111. [Hereafter EC – Tariff Preferences, Appellate Body Report].

210 For analyses of a similar waiver granted in 1971 for a period of ten years, see Jackson *The World Trading System, Law and Policy* 322–324; Espeil "GATT: Accommodating Generalized Preferences" 1974 *JWTL* 363.

211 1979 Enabling Clause, para. 1.

212 1979 Enabling Clause, para. 3(a).

213 1979 Enabling Clause, para. 3(b).

214 See 1979 Enabling Clause, para. 5.

Several of the WTO agreements carry the special and differential arrangements ideal and provisions or easing rules, mostly transposed unchanged from GATT 1947.[215] The SDT, or "easing rules" as they are sometimes called, are included in roughly about 150 WTO provisions[216] and are maintained on a number of subjects, including dispute settlement, subsidies, anti-dumping and countervailing measures, agriculture, intellectual property, services, safeguards measures, and technical assistance by the WTO.[217] Like the free trade arrangements which favour industries from member counties or products from member countries over industries or products from non-member countries, the SDT discriminates between WTO members, namely between developed and developing countries. As correctly stated by Moon,[218] the aim is to reduce the unequal capacity of developing countries to participate on a proportionately beneficial basis in international trade, by going beyond formal guarantees of equality, which is the objective of the WTO, and authorising positive steps to promote developing countries' capacity.

The granting of SDT status to LDCs on a non-reciprocity basis is gradually being displaced by the growing insistence on reciprocity in trade relations.[219] The developing countries, sometimes in a robust manner, invoke the "balanced concessions" qualification to the non-reciprocity principles expressed in the Punta del Este Ministerial Declaration on the Uruguay Round adopted on September 20, 1986.

There has been criticism of the SDT practice. Opponents of the SDT are of the view that it is a real threat to integration in the WTO. Their viewpoint is that integration into the world economy will serve as a better vehicle for the most

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215 *Guide to Uruguay Round Agreements* 223.

216 Moon "Trade and Equality: A Relationship to Discover" 2009 *JIEL* 612, 618.

217 For a synopsis of the provisions of the Uruguay Round agreements on special and differential treatment see generally, *Guide to Uruguay Agreements* 225–246. For an extensive examination and review of the GATT/WTO special and differential treatment see Hindley "Different and more Favorable Treatment – and Graduation"; Whalley "Special and Differential Treatment in the Millennium Round", May 1999, CSGR Working Paper No.30/99.

218 Moon "Trade and Equality: A Relationship to Discover" 2009 *JIEL* 619.

219 See the discussion in Kerr 2005 *Estey Centre J. Int'l. L & Trd. Pol'y* 84.

sustainable economic and social development of LDCs.[220] Another view point is that the SDT as constructed under WTO law has failed to reduce trade-related inequality between industrialised and developing country members of the WTO.[221] As constructed under the WTO, the SDT is seen as a deficient measure which is subject to abuse and manipulation because of its lack of reasonable and objective criteria for eligible groups. GSP schemes are illustrative of the manipulation and abuse of the SDT system by some industrialised countries like the United States for political or strategic reasons.[222]

Title I of the Trade and Development Act of 2000 (United States),[223] the Extension of Certain Trade Benefits to Sub-Saharan Africa, generally known as the Africa Growth and Opportunity Act[224] (hereafter AGOA), is a typical SDT programme operated by the United States. The aim of AGOA is to provide designated African countries with increased and liberal access to the United States market.[225] The United States' Congress, through the AGOA programme, seeks to promote "stable and sustainable economic growth and development in sub-Saharan Africa".[226] To this end, the United States has considered establishing a free trade agreement with sub-Saharan African countries,[227] and extending the special and preferential treatment of sub-Saharan African countries in trade relations.

According to section 102 (9) of AGOA, offering the countries of sub-Saharan Africa enhanced trade preferences is intended to encourage both higher levels of trade and direct investment in support of the positive economic and political developments in the region. The AGOA system of preference gives suppliers

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220 See Carl "Current Trade Problems of Developing Nations" 118. See also Moon 2009 *JIEL* 528. But see Krasner "State power and the structure of international trade" 22.

221 See Moon 2009 *JIEL* 528.

222 See Moon 2009 *JIEL* 633.

223 Trade and Development Act 2000, HR 434, Public Law 106 – 2000. The Trade and Development Act came into law on May 18, 2000.

224 Title I – Extension of Certain Trade Benefits to Sub-Saharan Africa: the African Growth and Opportunity Act, US Public Law 106 – 200, HR 434, Sec 101–200.

225 The United States also benefits through increased access and opportunities for her investors and businesses in sub-Saharan Africa.

226 AGOA, s 102(1).

227 See specifically AGOA, ss 102(10), 103(4) and 116.

from the designated sub-Saharan African countries a competitive edge over supplies from outside the AGOA countries. AGOA also provides for the duty-free importation of certain articles from designated sub-Saharan African countries to the United States up to September 30, 2008, with certain qualifications. The SDT provision in AGOA is applied in conjunction with the GSP programme in the United States.[228] In order to be imported into the United States duty free, the import should satisfy the GSP rules of origin. Most importantly, the imported product or article should have been grown, produced or manufactured in the beneficiary country, or have been produced or manufactured with materials from other AGOA countries pursuant to the provisions of section 506A(b)(1) of Title V of the Trade Act of 1974.[229]

2.5.2.3.2 Preferential Trading Schemes

(a) Generalised System of Preferences

The generalised system of preferences, created through a decision by the GATT of 25 June 1971,[230] is one of the well-established exceptions to the MFN requirement of the WTO.[231] The system is justified under the 1979 Enabling Clause. Accordingly, a generalised system of preferences scheme exists whereby developed countries grant, without a reciprocal obligation, products originating in "eligible" developing countries lower tariff rates than those normally enjoyed under MFN status with the main objective of making the exports from the developing countries competitive in the developed country markets.[232] Article I of GATT allows exceptions for preferential arrangements in Annexes A to F of GATT on which the British Commonwealth preferences exemptions are based.

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228 GSP was first adopted by the US with the passing of the Trade Act of 1974.

229 See AGOA, sec. 111.

230 See GATT 1947: *Annex 1 – Generalised System of Preferences, Decision of 25 June 1971 (BISD 18S/24).*

231 For an in-depth discussion of the generalised system of preference (GSP) as an exception to the MFN, including the origins of the GSP schemes, see generally Kabajulizi *The Cost of Bypassing MFN Obligations through GSP Schemes* 10–24.

232 Kabajulizi *The Cost of Bypassing MFN Obligations Through GSP Schemes* 1.

The commonwealth GSP scheme, which applies to countries with a special historical and political relationship, has had its share of controversy. The controversy surrounding the GSP scheme came before the GATT/WTO dispute settlement bodies in disputes between the United States and a group of Latin American states on the one hand, and the European Community, now the European Union (hereafter EU), on the other hand, regarding the EU's banana imports regime. The banana imports regime involved the EU's long-standing preferential banana market access arrangement with the African, Caribbean, and Pacific (hereafter ACP) banana-exporting countries, which are mainly ex-colonies of the EC member states.[233]

The EU's preferential banana trade arrangement was pursuant to the series of Lomé Conventions, particularly the 1989 Fourth Lomé Convention[234] (hereafter Lomé IV Convention), which aimed at promoting the economic development of the ACP countries through non-reciprocal duty-free and quota-free access to the EC markets by the ACP countries.[235] One of the EC access regimes governed the importation of bananas into the EC area. The banana arrangement gave preference to bananas originating in the ACP countries, shielding them from competition mainly from the Latin American countries.[236] Article 168(1) of Lomé IV Convention gave bananas from the ACP countries special and differential treatment by allowing them to enter the EC duty free.[237]

Further protection of the ACP banana imports took the form of quantitative restrictions against non-ACP states.[238] The February 1993 uniform banana regime adopted by the EEC Council, took effect on 1 July 1993. The uniform

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233 See Bessko "Going Bananas over EEC Preferences?: A Look at the Banana Trade War and the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes" 1996 *Case W. Res. J. Int'l L* 265 fn3.

234 Fourth ACP–EEC Convention of Lome, 15 Dec. 1989, reprinted in (1990) 29 *ILM* 783 (hereafter Lome IV Convention). Other Lome Conventions are the First ACP-EEC Convention of Lome, Feb 28, 1975, reprinted in 1975 *ILM* 595 [hereafter Lome I Convention]; the Second ACP–EEC Convention of Lome, Oct. 31, 1979, reprinted in (1980) 19 *ILM* 327 (hereafter Lome II Convention); the Third ACP–EEC Convention of Lome, Dec 8, 1984, reprinted in 1985 *ILM* 571 (hereafter Lome III Convention).

235 See Lome IV Convention 268–278.

236 Lome IV Convention 270.

237 Lome IV Convention 271.

regime, Regulation 404/93,[239] established four categories of suppliers which were subject to different tariff quota systems. These were the traditional ACP country suppliers, non-traditional ACP country suppliers, non-ACP country suppliers, and EEC suppliers.[240] Accordingly, the ACP suppliers entered the EEC market duty free. Both the non-traditional ACP suppliers and third-country imports entered the EEC market with 100 ECU per ton tariff.[241]

Although it had been "established" in terms of Article XXV of GATT, among others, the EEC banana regime did not go unchallenged.[242] In February 1993, in what came to be known as the "banana wars", a group of Latin American banana producing countries, often called the "dollar zone" group, consisting of Colombia, Costa Rica, Gautemala, Nicaragua, and Venezuela, complained to the GATT about the EEC banana import quota restrictions and the ACP banana preferences.

In this, the first complaint against the banana regime, the *EEC–Member State's Import Regimes for Bananas* (hereafter EEC–Bananas, GATT Panel Report),[243] the Latin American countries argued that the regime was inconsistent with several GATT 1947 provisions, including Article I.1 on the application of the MFN treatment to the SDT under the GSP; Article XIII.1 on the elimination of quantitative restrictions, and Article XXIV on the establishment and maintenance of preferential trading blocs. The MFN treatment challenge was on the basis that the EU banana regime had a preferential tariff provision which discriminated between imports from the ACP States and other developing

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238 Lome IV Convention 272.

239 ECC Commission Regulation 404/93, 1993 OJ (l 47).

240 Bessko 1996 *Case W. Res. J. Int'l L* 273.

241 Bessko 1996 *Case W. Res. J. Int'l L* 273.

242 For an account of the EC/EU banana regime, and the banana disputes see generally Bessko 1996 *Case W. Res. J. Int'l L* 265–312; Read "The Anatomy of the EU–US WTO Banana Trade Dispute" 2001 *Estey Centre J. Int'l. L & Trd. Pol'y* 257; Read "The EC Internal Banana Market: the Issues and Dilemma" 1994 *World Economy* 219; Sutton "The Banana Regime of the European Union, the Caribbean and Latin America" 1997 *Journal of Inter-American Studies & World Affairs* 5–36. For an interesting discussion on GATT Article XXV, see Lang *Renegotiating GATT Article XXV.*

243 *EEC–Member State's Import Regimes for Bananas* DS32/R (issued June, 3, 1993, but not adopted) [hereafter EEC–Bananas, GATT Panel Report]. The GATT Panel ruled in favour of the complainants.

countries.[244] The GATT Panel ruled in favour of the Latin American countries.[245] However, the EU disregarded the GATT Panel ruling, arguing that its regime was temporary.[246] The disregarding of the GATT Panel by the EU prompted another complaint to the GATT Panel by the Latin American countries in July 1993, on which the GATT Panel ruled in their favour.[247] The EU banana regime controversies also featured before the WTO Panel and Appellate Body on very similar but distinct grounds[248] to those in the two *EEC Bananas 1993* complaints. In both instances the WTO Panel and the Appellate Body ruled against the EU banana import regime. The WTO banana dispute started in 1996 with a formal complaint against the EU banana regime before the DSB by the United States and a group of Latin American countries consisting of Ecuador, Guatemala, Honduras, Mexico and Panama.

The United States and the Latin American countries complained that the banana import regime favoured ACP countries in a manner not consistent with WTO obligations. The United States, which is not a major banana producer in the world, acted on behalf of her banana marketing companies[249] that wanted to have duty-free access to the EC market (or reduced-tariff access to the EC market) like ACP countries.[250] Both the WTO Panel and the Appellate Body found the EU regime to be in violation of various provisions of GATT and GATS, and recommended that the EU bring its banana regime into conformity with its WTO obligations in the *European Communities – Regime for the Importation, Sale and distribution of Bananas*[251] (EC-Bananas, WTO Panel Report) and

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244 See Read 2001 *Estey Centre J. Int'l. L & Trd. Pol'y* 265.

245 For a detailed study of the pre-WTO banana dispute see generally Bessko 1996 *Case W. Res. J. Int'l L* 265–312.

246 See Read 2001 *Estey Centre J. Int'l. L & Trd. Pol'y* 265.

247 See Read 2001 *Estey Centre J. Int'l. L & Trd. Pol'y* 266.

248 See Read 2001 *Estey Centre J. Int'l. L & Trd. Pol'y* 270–271.

249 The Chiquita Brands International, a Cincinnati based company producing Chiquita brand of bananas, and Dole foods.

250 See "Banana split" http://www.newint.org/issue317/keynote.htm; "The Banana Wars and the WTO" http://www.pbs.org/livelyhood/planetwork/surviving/banana.htm1.

251 In European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/USA, WT/DS/27/R/ECU, WT/DS27/R/GTM, WT/R/HND, WTDS27/R/MEX (adopted 25 September 1997) [hereafter EC–Bananas, WTO Panel Report].

European Community – Regime for the Importation, Sale and Distribution of Bananas (hereafter EC – Bananas, Appellate Body Report)[252] respectively.

(b) Country-specific Preferences

In addition to GSP schemes, WTO members enter into country-specific preference arrangements, which are, in essence, GSPs but which are, by design, narrower than the GSP. A typical CSP may be structured in one of the following ways: First, although bound by the non-discrimination obligation, each country is allowed to compile its own negative list of exemptions regarding certain industries or measures where it will not apply the non-discrimination rule. Second, although bound by the non-discrimination obligation, each country is allowed to compile and register its own positive list of commitments regarding certain industries or measures where it will apply the rule of non-discrimination. The EU, for example, operates country-specific tariff preference schemes for Moldova and countries in the Western Balkans. For these, though not for the EPA Regulation, the EU has obtained appropriate WTO waivers.[253]

2.5.2.3.3 Regional Trade Agreements – GATT Article XXIV

A large majority of the WTO membership is made up of developing countries and LDCs. It is therefore not surprising that the Preamble to the WTO Agreement recognised their position as developing and least-developed and the need for the world trading system to put in place positive measures designed to allow them to share in the growth of international trade "commensurate" with the needs of their economic development.[254] The recognition of the interests and needs of the developing countries and LDCs has resulted in the adoption of

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252 European Community – Regime for the Importation, Sale and Distribution of Bananas WT/DS27/AB/R (September 9, 1997) [hereafter EC – Bananas, Appellate Body Report].

253 US – Caribbean Basin Economic Recovery Act, Renewal of Waiver, Decision of 27 May 2009,WT/L/753; US – African Growth and Opportunity Act, Decision of 27 May 2009, WT/L/754; US – Andean Trade Preference Act, Renewal of Waiver, Decision of 27 May 2009, WT/ L/755.

254 Preamble of the Agreement, para. 2. See also the Doha Ministerial Declaration, 14 November 2001, *WT/MIN (01)/DEC/1*, paras 2 and 3.

several agreements by the WTO containing provisions that explicitly allow exceptions to the basic principles of non-discrimination in the form of regional market access and integration regimes.[255] One of the most basic and prominent of these exceptions is Article XXIV of GATT.[256] According to Kerr, at the end of 2010, for example, the WTO had been notified of more than two hundred preferential trade agreements, and of more than 100 new preferential trade agreements that were being negotiated by respective countries.[257]

Perhaps we should from the outset note that Africa has been pursuing an integration agenda for a very long time. From as early as the 1960s, there has been a number of integration groupings in Africa which, interestingly, were not founded on Article XXIV of GATT. For example, the Africa Common Market comprising Algeria, Egypt, Ghana, Guinea, Mali and Morocco was formed in 1962; and the Equatorial Customs Union composed of Cameroon, Central African Republic, Chad, Congo and Gabon was formed in 1962. This eventually led to the present Central African Economic and Monitory Community (hereafter CEMAC). In addition, the East African Community (hereafter EAC), comprising Kenya, Tanzania and Uganda, was formed in 1967.[258]

Article XXIV of GATT allows for discriminatory treatment contrary to the MFN obligation in RTAs designed to establish a trading bloc (economic integration). However, Article XXIV of the GATT sets conditions under which RTAs can derogate from the MFN obligations contained in Article I of the GATT.[259] First,

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255 See Thomas "The EU–South Africa Trade, Development and Cooperation Agreement: Precedent or Complication Factor?" 2000 SAYIL 33–36 (discussing the regional arrangements as one of the several exceptions to the non-discrimination principles).

256 For a detailed analysis of Art. XXIV GATT see Matsushita, Schoenbaum, Mavoroidis *The World Trade Organization* 548–549; Jackson, Davey and Sykes *Legal Problems of International Economic Relations* 452–465; Cottier "The Challenge of Regionalism and Preferential Relations in World Trade Law and Policy" 1996 *European Foreign Affairs Review* 149, 157–170. See further Chase "Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV" 2006 *World Trade Review* 1–30 for an interesting discussion on the origins of GATT Article XXIV.

257 See generally Kerr "The Preference for New Preferential Trade Agreements: Does It Lead to a Good Use of Scarce Resources?" 2010 *Estey Centre J. Int'l. L & Trd. Pol'y* 1, at 3.

258 See Chandra *Regional Integration in Southern Africa* 21.

259 In 1996 the General Council created the Committee on regional Trade Agreements whose roles is to review matters related to regional integration and to examine the compatibility of RTAs with WTO rules, particularly looking at the systematic implications

tariffs and other barriers to trade must be eliminated with respect to substantially all trade within the region.[260] With respect to customs unions, the WTO members are further required to apply substantially the same duties and other trade restrictions to products of third parties. Second, the liberalisation of trade among the RTA members must be achieved "within a reasonable length of time". Reasonable length of time is explained in the 1994 Understanding as a period not exceeding 10 years, unless under exceptional circumstances. Third, the tariffs and other barriers to trade applied to outside countries must not be higher or more restrictive than they were prior to the establishment of regional integration.[261] In other words, the impact of RTAs on third countries should be neutral.[262]

The purpose of Article XXIV is to facilitate trade between the constituent territories and not to raise barriers to the trade of such territories.[263] Thus, WTO members should ensure that there is reconciliation between regional integration and the multilateral trading system. Fourth, RTA members must notify the WTO and provide the agreements and all relevant information. Many preferential trade arrangements, mostly in the form of customs unions and FTAs, have been notified to GATT/WTO pursuant to Article XXIV of GATT.[264]

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of RTAs for the multilateral trading system. See *WT/L/127 Decision of 6 February 1996, Committee on Regional Trade Agreements.*

260 See GATT Article XXIV: 8.

261 See Article XXIV: 5 of GATT.

262 For the DSB's jurisprudence on the clarity and interpretation of the element of "neutrality" in RTAs as it was dealt with by the DSB in the Turkey textile dispute, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34 R, 31 May 1999 [hereinafter Turkey–Textile, Panel Report] appealed in *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, 19 November 1999 [hereinafter *Turkey – Textile Appellate Body report],* see generally Trachtman "Decision of the Appellate Body of the World Trade Organization: Turkey – Restrictions on Import of Textile and Clothing Products" 2000 *EJIL* 217; *Marceau and Reiman Legal Issues of Economic Integration* 2001. See also Devuys and Serdarevic "The Trade Organisation and Regional Trade Agreements: Bridging the Constitutional Credibility Gap" 2006 *Duke J. of Comp. & Int'l L* 1.

263 See Article XXIV: 4 of GATT 1994, second sentence.

264 WTO website at: http://www.wto.org/English/tratop_e/region_/status_e.xls (for a list of notified RTAs by status). See Chandra *Regional Integration in Southern Africa* 21 (on the official notification of SADC FTA to the WTO under Article XXIV of the GATT 1994 in 2006).

Interestingly, Article XXIV contains two internal exemptions from the requirements of paragraph 5 in its paragraphs 10 and 11. Article XXIV: 10 states that the WTO compatibility[265] of RTAs can be approved even if the proposed arrangement does "not fully comply with the requirements of paragraphs 5 to 9 inclusive", provided that such approval is granted by two-thirds of the membership. Article XXIV: 10 creates a form of waiver to the general requirements in paragraph 5. Article XXIV:11 is a transitional provision in terms of which India and Pakistan are in their trading arrangement allowed to breach the fundamental principles of the GATT owing to "exceptional circumstances" and because they long "constituted an economic unit" prior to their independence.

The jury is still out on the exact meaning of "an economic unit". Article XXIV: 11 can be subject to different interpretations. In this regard, Remi Lang advances an argument that though, for example, the ACP and EU do not constitute an economic unit in the same manner as India and Pakistan, the "long-standing and economically important preferences" offered by the EU to the ACP countries under the Lomé and Contonou conventions may justify a case for paragraph 11 exemptions.[266] An FTA, for example the North American Free Trade Agreement (hereafter NAFTA),[267] is a type of trade bloc established pursuant to Article XXIV in which duties and other restrictive trade regulations are eliminated on substantially all the trade between all the contracting territories on products originating in such territories.[268] All internal barriers to trade among FTA members on mutual trade are removed, while they are maintained against non-members.

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265 See generally Marcaeu and Reiman *When and How is a Regional Trade Agreement Compatible with the WTO?* (for a discussion on the compatibility of RTAs with the WTO).

266 Lang *Renegotiating GATT Article XXIV* 22.

267 Consisting of Canada, Mexico and the United States. The North American Free Trade Agreement (NAFTA) was formed as the Canadian–US Free Trade Agreement (CUFTA) and later in 1994 changed to NAFTA when Mexico joined. One of the criticisms against NAFTA is that it has "no recontracting provision." This, according Kerr, makes it problematic for moving the process of liberalisation forward. Unlike the WTO, NAFTA does not allow new rounds of negotiations. NAFTA is "essentially a one-shot deal". See Kerr 2010 *The Estey Centre J. of Int'l L. & Trade Pol'y* 5.

There are divergent views on the value of FTAs. It is argued by Schott, perhaps because of the non-beneficiation of non-members, that FTAs could "threaten to fragment the multilateral trading system and to undermine its core principle of the most-favoured-nation treatment".[269] Others are of the view that an FTA is "shallow level of regional integration". [270] Indeed there is currently some sort of fragmentation of the multilateral trading system, as evidenced by the proliferation of global economic integration through FTAs. Loewen reports that in 2009 there were about 300 bilateral and regional FTAs globally.[271] The current FTAs are experiencing cross-membership, which resembles a "noodle-bowl of FTAs in the world".[272] or a spaghetti junction of FTAs, if you can call it that. The problem is that some of these FTAs, be they multilateral or bilateral, are not conducted on a level playing field and they may be biased in favour of developed countries. As stated by Trakman, enjoyment of the benefits of bilateralism in trade is sometimes "tinged with a mixture of privilege and opportunism".[273] The different views about FTAs may be summarised by what has been said by Trakman as follows:

> For some, bilateral trade agreements will help trade to expand incrementally. For others, bilateral agreements will create "systemic problems", subjecting multilateral trade relationships to disparate preferences, inconsistent tariff schedules and variable rules of origin. For yet others, bilateral agreements will lead to social transformation within developing States, while others will view such a result with skepticism. [274]

A customs union, for an example SACU, which is the oldest in the world, is "the substitution of a single customs territory for two or more customs territories".[275] In simple terms, customs unions combine two or more countries or states within a single customs area. Like FTAs, customs unions aim at establishing free trade

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268 See GATT, Art XXIV 8(b).

269 Schott *Free Trade Agreements* 7 quoted by Loewen "WTO Compatibility and Rules of Origin – Assessing Bilateral Trade Agreements between Latin America and East Asia" 2009 *Journal of Current Southeast Asian Affairs* 73.

270 Chanda *Regional Integration in Southern Africa* 9

271 Loewen 2009 *Journal of Current Southeast Asian Affairs* 70.

272 Loewen 2009 *Journal of Current Southeast Asian Affairs* 71 and 79.

273 Trakman "The Proliferation of Free Trade Agreements: Bane or Beauty?" 2008 *JWT* 378.

274 Trakman "The Proliferation of Free Trade Agreements: Bane or Beauty?" 2008 *JWT* 387.

through the elimination of international trade barriers applicable to trade among member countries. However, customs unions go a step further by establishing a common or uniform external tariff to be imposed on imports from non-member counties.[276] The important qualification with regard to the setting of common external tariffs is that such tariffs should have no effect on the aggregate trade flows of the customs union members with non-members.[277]

As noted by Chanda, although SACU has been in existence for over a hundred years, the process of its notification to the WTO only started a few years ago. The process of notifying SACU to the WTO gained momentum at the 10th SACU Council meeting held in April 2007, where member states contemplated on whether the notification of SACU to the WTO would be beneficial or not, and also considered whether this would result in onerous and new commitments for SACU. The SACU Council of Ministers agreed that SACU should be notified to the WTO under Article XXIV of the GATT. Following this, SACU was officially notified to the WTO on 25 June 2007, after ensuring the legal and practical requirements in order for SACU to be notified to the WTO (SACU 2009).[278]

2.5.2.3.4 Other Exceptions

(a) GATT Article IX: 3 Waivers

It is also possible to obtain a waiver to constitute an exception to the MFN principle. Under Article IX:3 of the WTO Agreement, countries may, with the permission of the Ministerial Conference, waive their obligations under the agreement. New waivers, however, can only be obtained under exceptional circumstances, and require the consent of three-quarters of the Members. Article IX:4 provides that, in exceptional circumstances, the terms and

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275 Czinkota *et al Global Business* 139.

276 Chanda *Regional Integration in Southern Africa* 9 observes that that most of the countries in southern Africa have followed the "linear approach to regional integration" with the monitory union being the last in the integration process.

277 See GATT 1947, Art XXIV (5)(a).

278 See Chandra Regional *Integration in Southern Africa* 18–19.

conditions governing the application[279] of the waiver, and the date on which the waiver will be terminated shall be clearly stated, and that waivers are subject to annual review.

After the *1994 EC – Bananas II, GATT Panel*[280] ruling, the EC applied for and was granted a waiver. In this dispute the Panel held that the Lomé Convention, as an arrangement providing for discriminatory non-reciprocal trade preferences, cannot be justified as a regional trade agreement under Article XXIV GATT. The reasoning of the panel, which is somewhat questionable, was that the principle of non-reciprocity in trade negotiations set out in Part IV of the GATT did not apply to Article XXIV. Following its blocking of this Panel report, the EC in the short term applied for and obtained a waiver of the MFN obligation in Article I GATT. The waiver was for preferential treatment for products originating in ACP states, as required by the relevant provisions of the Fourth Lomé Convention. Similar preferences in the Cotonou Agreement, negotiated in the wake of EC – *Bananas II, GATT Panel*, were maintained under the equivalent waiver, which expired on 31 December 2007.[281]

There were few waivers in existence at the time of writing. The EU had obtained a waiver to operate country-specific preferences for countries in the Western Balkans[282] and Moldova.[283] The United States, for example, has a waiver for tariff preferences for the former Trust Territory of the Pacific Islands until 31

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279 For the guiding principles the Ministerial Conference follow when considering applications for waivers, see the *Understanding in Respect to Waivers of Obligations under the General Agreement on Tariffs and Trade 1994*, BISD 5S/25 (adopted on 1 November 1956), and the *Decision-making Procedures under Articles IX and XII of the WTO Agreement*, WT/L/93 (agreed by the General Council on 15 November 1995).

280 GATT Panel Report, *European Economic Community – Import Regime for Bananas II*, DS38/R, an adopted, circulated 11 February 1994 [hereinafter *EC – Bananas II*, GATT Panel].

281 *ACP – EC Partnership Agreement, Decision of 14 Nov. 2001, WTO Doc WT/MIN (01)/15, 14 Nov. 2001.*

282 Such as EC – Preferences for Albania, Bosnia–Herzegovina, Croatia, The Federal Republic of Yugoslavia, and the Former Yugoslav Republic of Macedonia, Decision of 8 December 2000, WT/L/380.

283 EC – Application of Autonomous Preferential Treatment to Moldova, Decision of 7 May 2008, WT/L/722.

December 2016.[284] The waiver covers Republic of the Marshall Islands, Federated States of Micronesia, Commonwealth of the Northern Mariana Islands, and Republic of Palau. The United States holds waivers to operate autonomous tariff preference programmes targeted at specific developing countries. Notable among these waivers is the Caribbean Basin Economic Recovery Act (CBERA), the Andean Trade Preference Act (ATPA), and AGOA, which were granted in May 2009.[285] For years these tariff preference programmes were in legal limbo and could not qualify for GSP schemes status as discussed in 2.5.2.3.2 above, because they discriminate between developing countries.

(b) GATT Article XX General Exceptions

General exceptions to the GATT that may be applied to the MFN principle include Article XX regarding general exceptions for measures necessary to protect public morals, life and health, and Article XXI regarding security exceptions. GATT general exceptions to the MFN obligation can be justified by environmental, security and human rights[286] considerations. Article XX of the GATT in relevant parts states:

> Subject to the requirements that such measures are *not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination* between countries ..., or a *disguised restriction on international trade*, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
> (b) necessary to protect human, animal or plant life or health;
> ...

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284 WTO, United States – Former Trust Territory of the Pacific Islands granted to the United States. See *Decision of 27 July 2007, WT/L/694 (August 1, 2007).*

285 US – Caribbean Basin Economic Recovery Act, Renewal of Waiver, Decision of 27 May 2009,WT/L/753; US – African Growth and Opportunity Act, Decision of 27 May 2009, WT/L/754; US – Andean Trade Preference Act, Renewal of Waiver, Decision of 27 May 2009, WT/ L/755.

286 See, Bartels "Article XX of GATT and the Problem of Extraterritorial Jurisdiction" 2002 *J.W.T* 352 for a brief discussion on GATT Article XX and human rights. See also Sibanda "Human Rights Approach to WTO Trade Policy: Another Medium for the Protection of Human Rights in Africa, and Elsewhere" 2005 *African Journal of Human Rights* 387.

> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
> (e) relating to the products of prison labour;
> ...;
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

There have been several numbers of WTO rulings on Article XX exceptions. In particular, emphasis has been on guarding against Article XX being used as a disguised restriction on international trade, or implemented through measures that are arbitrary or that amount to unjustified discrimination between countries. The Appellate Body in the *United States – Standard for Reformulated and Conventional Gasoline*[287] (hereafter Reformulated Gasoline, Appellate Body Report) succinctly addressed the issue on the relationship between disguised restriction on international trade and unjustified discrimination. According to the Appellate Body, "arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" on international trade may be read side by side. The two concepts or elements impart meaning to one another. "Disguised restriction" includes disguised discrimination in international trade. It further stated that "'disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX". One of the arguments against anti-dumping regulation is that it may amount to a disguised restriction of trade. It is submitted that anti-dumping regulations, including the imposition of duties, may be justified under Article XX (d) of GATT.

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287 *United States – Standard for Reformulated and Conventional Gasoline,* WT/D/9 (adopted 20 May 1996) [hereinafter Reformulated Gasoline, Appellate Body Report].

2.5.3 Reciprocity

The principle of reciprocity is a long-established principle in international law that is closely related to the concept of equality[288] in treatment (and in opportunities). According to Piontek, reciprocity can be expressed as recompense, requital, good faith, mutuality, equity, and terms, which only underline the close affinity of this principle with one of equality.[289] Piontek's views on reciprocity find support from Yusuf, who briefly explains the principle of reciprocity as an indicator of mutuality of expressions constituting the "legal expression of exchange of equivalent advantages between contracting parties".[290]

Reciprocity is a *quid pro quo* concept driven by political economy. It is largely rooted in the desire to limit the extent of the free riding that could result from the unconditional application of the non-discrimination principle, and the easy market access available through GATT/WTO. Countries, by requiring reciprocal trade liberalisation, seek to safeguard their terms of trade from being detrimentally affected. The principle of reciprocity appears in many WTO documents. Article XXVIII*bis of* GATT provides that tariff negotiations should be conducted on a "reciprocal and mutually advantageous basis".

2.5.4 Dispute Settlement

The WTO system enjoins Members to settle their disputes through multilateral procedures established through the DSU, rather than taking unilateral action.[291] Obliging the WTO Members to settle their disputes through multilateral procedures under the DSU ensures security and predictability in multilateral trading,[292] and the prompt settlement of disputes in a manner that will secure a

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288 Piontek *Equality Principles* 84.
289 Piontek *Equality Principles* 84.
290 Yusuf *Legal Aspects of Trade Preferences for Developing Countries* (1982) 9. Yusuf provides an extensive study of trade preferences and developing countries.
291 See DSU, art 3.1.
292 See DSU, art 3.2.

positive solution.[293] Article 3.2 of the DSU states that the rationale for dispute settlement is to "clarify the existing provisions" of the WTO Agreements "in accordance with the customary rules of interpretation of public international law". Hudec reckons that the dispute settlement system constitutes the "centerpiece of the entire WTO enterprise".[294] According to Ruggerio, a former WTO Director-General, dispute settlement is "the central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy".[295] The WTO dispute settlement system provides rules of general application and rules specifically applicable to anti-dumping cases.[296] As correctly stated by Korotana, the DSU constitutes a *lex specialis* and self-contained system for the WTO dispute settlement system.[297]

2.6 Summary

This chapter embarked on a brief historical review of the origins of the WTO, its institutional structure, and basic rules and principles. It has been established that the global attempt to set up a multilateral trade institution dates back to late 1947 with the failed creation of the ITO, whose charter, the Havana Charter, was subsequently given effect to through the GATT of 1947. It was further highlighted that the GATT of 1947 was not conceived as an international organisation for trade, but was intended only as an international agreement on trade. However, it operated de facto as an international organisation with only 23 contracting parties.

The dubious nature of GATT 1947 notwithstanding, we have pointed out that there was a breakthrough in 1994 when the WTO was established in Marrakesh, Morocco. It has been established that by comparison with the

293 See DSU, art 3.7.

294 Hudec "The International Economic Law: The Political Dimension" 1996 U. *Pa. J. Int'l Econ. L* 9 11.

295 See *Understanding the WTO* 55. Note that this book was previously published as *Trading into the Future*.

296 See Ch 4 for a full discussion on the dispute settlement of anti-dumping related cases in the WTO.

297 Korotana 2009 *Estey Journal of International Law and Trade Policy* 199–200 and 205.

GATT, the WTO is to date the most comprehensive multilateral trade regulatory institution and enjoys a large membership. We further established that, unlike GATT 1947, the WTO is not limited to only trade in goods, but also governs trade in services and some trade-related aspects of intellectual property.

In this chapter several rules and principles governing trade relations within the WTO framework were also discussed. Most importantly we looked at trade liberalisation and predictability; the non-discrimination principle; reciprocity; and dispute settlement. The next chapter will discuss the historical development of the GATT/WTO anti-dumping provisions and rules.

CHAPTER THREE: AN OVERVIEW OF THE WTO ANTI-DUMPING REGIME

3.1 Introduction

This chapter is two-pronged. First, it deals with the historical origins and development of the WTO anti-dumping provisions and rules. The basis for the current WTO anti-dumping rules is to be found in the provisions of Article VI of GATT. This article is further elaborated on by the URAA and through the dispute settlement bodies. To avoid repetition in chapter 6 of this study, the basic provisions relating to dumping are not fully discussed in this chapter, but will merely referred to here without detailed articulation or appraisal. We will also outline current developments towards the amendment of the existing WTO anti-dumping framework.

Secondly, this chapter examines the settlement of anti-dumping disputes in the WTO. As indicated in section 2.5.4 above, dispute settlement is the cornerstone of the entire multilateral trading system. Here the chapter introduces briefly the general dispute settlement system under the DSU, which is one of the unique innovations and results of the Uruguay Round, comprising the DSB panels and the Appellate Body, which were designed to regulate the dispute settlement processes.[298] In the context of this study, Chapter 3 particularly examines the

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298 The unique nature of the settlement of disputes in the WTO has given rise to a large number of books, articles, and other writings about the WTO dispute settlement system. See, for instance, Petersmann "The GATT Dispute Settlement System and the Uruguay Round Negotiations on its Reform"; Schoen-Baum "WTO Dispute Settlement" 1998 *I.C.L.Q* 648; Jackson *The World Trading System*; Croley and Jackson "WTO Procedures, Standard of Review, and Deference to National Governments" 1996 *A.J.I.L.* 193; Seastrum and Getlan "The Globalization of International Trade Litigation: AD and CVD Litigation – Which Forum and Which Law?" 2000 *Brooklyn J. Int'l Law* 893; Rantzien, Mavroidis and Nordstroom *Is the Use of the WTO Dispute Settlement System Biased*? (CEPR Discussion Paper Series No. 2340, 2000); Jayagovind "The Dispute Settlement Understanding: A Critique" 2001 Indiana *J. Int'l L* 418; Monnier "The Time to Comply with an Adverse WTO Ruling" 2001 *J.W.T* 825; Stiles "The New Regime: The Victory over Pragmatism" 1995 *J Int'l L & Prac* 3. Cameron and Gray "Principles of International Law in the WTO Dispute Settlement Body" 2001 *ICLQ* 248; Footer "Developing Country Practice in the Matter of WTO Dispute Settlement" 2001 *J.W.T* 54; Zekos "Arbitration as a

processes and procedures, and remedial actions that are available to WTO member countries in cases where another member's anti-dumping laws and practices do not comply with the URAA, or where the laws are being implemented in a manner contrary to the WTO obligations under the URAA. Except where the URAA provides otherwise, the DSU disciplines must be used to address the issue of national anti-dumping laws and practices that do not comply with the URAA.[299] We shall also look at the basic aspects of litigating an anti-dumping complaint before the DSB. In this regard, we examine the issue of participation in the proceedings, the standard of review and onus of proof, and the importance of previous decisions in the matters before the DSB.

3.2 Origins of the GATT/WTO Anti-dumping Regime

3.2.1 The Period 1920s to 1947

The use of anti-dumping measures has been in existence for centuries. A study undertaken by the WTO points out that anti-dumping actions were on the increase during the Great Depression of the 1930s.[300] However, there were no official international standards or systems for regulating anti-dumping actions. As early as the 1920s, a study on dumping was undertaken by the League of Nations[301] as part of the process to establish "a coordinated approach to international trade relations because of upheavals in international markets and a surge in demands for protection against unfair competition".[302] The ill-fated

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Dispute Settlement Mechanism under UNCLOS, the Hamburg Rules, and WTO" 2002 *J. Int'l Arb.* 497.

299 See Sibanda "WTO Anti-dumping Litigation: A Review of Some Procedural and Substantive Issues" 2007 *Codicillus* 55 (discussing the special WTO rules for settling anti-dumping disputes).

300 For information see generally the WTO World Trade Report 2009 http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report09e.pdf.

301 See Viner "Memorandum on Dumping" 3–19; See also Seavy *Dumping since the War: the GATT and the National Laws* 16–22 (analysing the League of Nation's "Final Report, The World Economic Conference of 1927 Geneva Final Report, C.E.I 44. L347"). The 1920 study by the League of Nations resulted in the 1927 report on dumping, commonly referred to as the "Memorandum on the Legislation of Different States for the Prevention of Dumping," which revealed that anti-dumping laws of the 1920s were largely not enforced. See WTO World Trade Report (2009) 74.

302 For more information see generally WTO World Trade Report 2009 http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report09_e.pdf.

Havana Charter contained an elaborate provision on anti-dumping and countervailing duties. In Article 34 of the Havana Charter, Members recognised that dumping "is to be condemned if it causes or threatens material injury to an established industry in a Member country or materially retards the establishment of a domestic industry".

Article 34 provided for substantive anti-dumping issues, including describing when the product is to be considered as dumped; describing when a product is to be considered as sold below its normal value; defining the dumping margin, requiring injury determination before anti-dumping duties are levied on imports, and others. Although the Havana Charter could not be adopted by the Parties, Article 34 set the tone for subsequent GATT/WTO provisions on anti-dumping.

3.2.2 Multilateral Anti-dumping Regime from 1947 to 1994

3.2.2.1 Article VI of GATT 1947

Anti-dumping measures were not officially regulated under international law until the adoption of GATT 1947, after it was concluded that anti-dumping provisions in the GATT were necessary.[303] Thereafter, GATT 1947 institutionalised the imposition of anti-dumping duties on dumped products under Article VI. Interestingly, the above provisions of Article VI of GATT 1947 are a restatement of Article 34 of the Havana Charter.[304] This should come as no surprise because GATT 1947 was created with, among other things, a view to implementing the ideals of the Havana Charter. Some commentators, including Richards, Jackson and Steward, reveal that the United States had much influence in the crafting of Article 34 of the Havana Charter and subsequently Article VI of GATT 1947.[305]

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303 See Finger "The Origins and Evolution of Anti-dumping Regulation" 25.

304 For purposes of comparison, see GATT 1947, Art. VI; and Art 34 of the Havana Charter.

305 In particular, Richard *Political Primacy in Economic Laws* 41 who argues that "Article VI was based on the American Anti-dumping Act [of 1921], partly because the negotiators of the Code tried to avoid conflict with the Act". Hudec *World Trade and the Law of the GATT* 403–406, and Steward *The GATT Uruguay Round* 1390–1409, respectively, point

In terms of Article VI of GATT 1947, the Contracting Parties recognised the harm that can be caused by dumping and resolved that dumping should 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".[306] GATT 1947 acknowledged the possibility of the abuse of anti-dumping measures. Therefore, Article VI further required that anti-dumping duties be levied only when it has been determined that the effect of the dumping of a product is such as to "cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry".[307]

GATT 1947 recognised the harm that dumping can do to the industries of importing countries and, therefore, considered the imposition of anti-dumping duties to be an appropriate measure to prevent dumping or to offset the effects of dumping.[308] However, the anti-dumping system under the original Article VI of GATT 1947, without all the later amendments, was inadequate and could not properly deal with the complex issues in the imposition of duties. For instance, Article VI did not require the determination of injury to the domestic industry before imposing definitive duties. Furthermore, Article VI was too vague and left too much leeway for implementation by investigating authorities, which resulted in it being used in a protectionist manner. By then GATT 1947anti-dumping law was used in a very "immoderate" manner, with little restraint and care.[309]

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out that the United States Anti-dumping Act of 1921, as revised by the Tariff Act of 1930, served as the framework for Article VI of GATT 1947.

306 Similarly, Article 34(1) of the Havana Charter provided, in part, that:

> The Members 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 a Member country or materially retards the establishment of an industry.

307 A similar provision appeared in Art. 34(6) of the ITO Charter.

308 GATT 1947, Art. VI.2.

309 The so-called Group of Experts, established in April 1959 to look into legal issues on anti-dumping and countervailing duties, warned against the "immoderate use of anti-dumping law".

As a result, GATT 1947 members saw the need to effect some major amendments to Article VI. In brief, Article VI by itself allowed GATT members great discretion and leeway in applying anti-dumping measures.

Some of the major amendments to Article VI began with the establishment of the so-called Group of Experts.[310] The Group of Experts was tasked with the study of the legal issues of anti-dumping and countervailing duties, and was mainly concerned with the substantive elements of Article VI. Amendments to this Article included the requirement of a determination of material injury, but did not contain any guidance as to the criteria to be used in determining if such injury existed. Furthermore, the deficiencies in the Article VI anti-dumping regime necessitated ongoing international efforts to introduce a clear and comprehensive anti-dumping code.

The application of Article VI to non-market economies (hereafter NME) was also one of the most difficult and complex issues the GATT Parties had to deal with.[311] Consequently, the 1954–1955 Review Session[312] of the GATT agreed on an interpretative note (hereafter the 1955 Interpretative Note) to deal with the problems associated with applying the provisions of Article VI to NMEs. The 1955 Interpretative Note provided that Parties recognised that "in the case of imports from a country which has a complete or substantially complete monopoly of its trade and all domestic prices are fixed by the State, special difficulties may exist in determining price comparability". [313] Unfortunately, the Interpretative Note did not have the required legal status within the GATT until 1957, when it was brought into effect by a Protocol Amending the Preamble and Parts II and III of the GATT.[314] Consequently, the Interpretative Note became formally binding on GATT Parties. Although the Interpretative Note did not bring about a formal amendment to Article VI of GATT, it influenced the way in which

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310 Ibid.

311 See Ch 7 for the application of anti-dumping measures to products from non-market economies.

312 GATT held Review Sessions annually.

313 WTO Results of the Uruguay Round of Multilateral Negotiations 545–546; GATT BISD 1978–1979 Suppl. Anti-Dumping Code, 71.

314 See GATT, *Analytical Index: Guide to GATT Law and Practice* 255–256.

the latter was to be interpreted and applied. In sum, the Interpretative Note made a significant contribution in the evolution of the GATT anti-dumping rules.

3.2.2.2 Kennedy Round Anti-dumping Code

The first international steps taken to establish a comprehensive anti-dumping code and to introduce anti-dumping regulations emanated from the results of the multilateral trade negotiations held in Geneva, Switzerland, commonly known as the Kennedy Round, which started officially on 4–6 May 1964 and signed on 30 June 1967 by 19[315] Parties including the European Economic Community (hereafter EEC), which was then not a Contracting Party to the GATT.[316] In what Preeg explains as the "first definitive accomplishment in the Kennedy Round",[317] Parties at the Kennedy Round agreed to further define the regulation of dumping contained in Article VI of GATT 1947 by negotiating a code on dumping.

The negotiation resulted in the establishment of the Kennedy Round Anti-dumping Code, officially known as the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade.[318] According to Guyvers and Dumont, the agreement to the Kennedy Round Anti-dumping Code was more because of "diplomatic manipulation than by clear intent".[319] Guyvers and Dumont clearly refer to the problems encountered by the GATT

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315 Note that Winham *International Trade and the Tokyo Round* 60–61 puts the number of signatories at 17. For a chronology of the Kennedy Round see Preeg *Traders and Diplomats* 304–306. For a general discussion on the evolution of the GATT/WTO anti-dumping law, see Anderson *EU Dumping Determination and the WTO Law* (2009) 32–47.

316 Note that in *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972] ECR 1439, 1450 par 16, the European Court of Justice held that "so far as fulfilment of the commitments provided for by GATT is concerned, the Community has replaced the Member States". However, only in 1983 in *Ammministrazione delle Finanze dello Stato v Societa Petrolifera Italiana SpA (SPI) and Michelin Italianna (SAMI)* [1983] EC 801, 829 par 19, did the European Court of Justice explicitly state that the European Community replaced Member States "as regards fulfilment of the commitments laid down in the GATT" retrospectively from 1 July 1968. For a general and critical discussion on the enforceability of WTO law in the EC based on cases decided by the European Court of Justice, see Griller 2000 *JIEL* 441–472.

317 Preeg *Traders and Diplomats* 166.

318 Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT, BISD 245/24 (1968) [Kennedy Round Anti-dumping Code].

319 Guyvers and Dumont *2005 Asian Economic Journal* 252.

Contracting Parties in reaching a mutually acceptable global anti-dumping agreement, particularly the difficult negotiating stance taken by the United States.

The Kennedy Round Anti-dumping Code came into force on 1 July 1968.[320] The need for an anti-dumping code has been attributed to the frequent complaints about the length of time taken by anti-dumping procedures in the United States, the lack of a test for injury determination in Canadian law and practice, and the lack of an open and impartial mechanism for the assessment of dumping in some of the GATT members,[321] among others. The Kennedy Round Anti-dumping Code highlighted a desire by GATT Contracting Parties to regulate anti-dumping measures in earnest and to "provide for equitable and open procedures for full examination of dumping cases",[322] and to "interpret the provisions of Article VI of the General Agreement and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation".[323] Article 14 of the Kennedy Round Anti-dumping Code further required each Contracting Party "[to] take all necessary steps, of a general or particular character, to ensure ... the conformity of its laws, regulations and administrative procedures with provisions of this Agreement".

Consequent to the Kennedy Round Anti-dumping Code, the implementation of anti-dumping measures was improved to include many detailed procedures and criteria for determining dumping,[324] the definition of the notion of material injury, determination of injury to domestic industry before the imposition of definitive duties,[325] the limitation of preliminary measures, and the regulation of the retroactive application of anti-dumping duties.[326] The determination of injury was

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320 Winham *International Trade and the Tokyo Round* 353.

321 Winham *International Trade and the Tokyo Round* 69 & n11. See also Barcelo "Anti-dumping Laws as Barriers to Trade – The United States and the International Code" 1972 *Cornell L. Rev.* 491, 525

322 See the chapeau of the Kennedy Round Anti-dumping Code, para. 3.

323 The chapeau of the Kennedy Round Anti-dumping Code, para. 4.

324 Kennedy Round Anti-dumping Code, Art. 2.

325 Kennedy Round Anti-dumping Code, Art. 3. See Winham *International Trade* 118.

326 Kennedy Round Anti-dumping Code, Art. 11. See generally Bierwagen *GATT Article VI and the Protectionist Bias in Anti-dumping Law.*

one of the critical issues at the Kennedy Round. The Kennedy Round Anti-dumping Code prescribes injury determination procedures that essentially require an investigation authority to compare the various causes of injury to find out which is the most important. The Code required that a determination of injury be made only if the dumped imports are demonstrably the principal cause of material injury.

An important part of the Kennedy Round Anti-dumping Code was Article 2(g), which explicitly stated that Article 2(d) was without prejudice to the 1955 Interpretative Note. This explicit reference to the 1955 Interpretative Note contributed to the development of NME methodology in the GATT anti-dumping regime. Article 2(d) provided for the acknowledgement of the problems in determining normal values of dumped products because of the "particular market situation" which "do not permit a proper comparison". In fact, Article 2(d) itself implicitly acknowledged the existence of other market conditions that did not maintain the normal course of trade such as state-trading economies.[327]

The Kennedy Code led to major revisions and amendments in the anti-dumping systems of Contracting Parties such as Canada that adopted an injury-determination requirement in its legislation.[328] An important development alongside the Kennedy Round Anti-dumping Code was the establishment of a Committee on Anti-dumping Practices in 1969. This was one of the various committees established under GATT 1947, the objects of which included overseeing the implementation of anti-dumping law and looking into the issue of the standardisation of anti-dumping law and practices by national authorities.[329] However, the Kennedy Round Anti-dumping Code could not come into full operation owing to some legal and political factors, mainly in the United States.

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327 However, see Van Bael and Belli *Anti-Dumping and Other Trade Protection Laws of the EC* 93, who argue that Article 2(d) of the Kennedy Round contained no express rule about the determination of normal value for state-trading country exports.

328 See Winham *International Trade and the Tokyo Round* 69.

329 Another important committee was the 1970 Working Party on Acceptance of the 1967 Anti-dumping Code.

Ironically, it was the United States that first proposed the establishment of a common anti-dumping code.

The United States Congress refused to ratify the Code, apparently because the United States administration negotiated and signed the Kennedy Round Anti-dumping Code as an executive agreement without the required express authority of the Congress to do so.[330] This conduct by the administration was seen as by-passing the Congress, which, in 1969, prompted the Congress to pass legislation that authorised the US Tariff Commission to ignore the Kennedy Round Anti-dumping Code. This legislation prohibited the Commission from implementing the Code in so far as it conflicts with the United States law. The USA Congress was against the Code because it was seen as being inconsistent with the United States 1921 anti-dumping legislation. In particular, the Congress was not happy about the Kennedy Code's determination of dumping and injury to domestic industries.[331]

3.2.2.3 Tokyo Round Anti-dumping Code

The Kennedy Round Anti-dumping Code was renegotiated, revised and substantially improved at the Tokyo Round trade negotiations. This Round of trade negotiations began in 1973 and ended in 1979 in Geneva, Switzerland. Originally called the Nixon Round, the Tokyo Round began at a ministerial trade conference in September 1973 in Tokyo, Japan, from which it derived its name.[332] The negotiations produced, among other things, the Tokyo Round Anti-dumping Code,[333] which came into force in 1980 after signature by 25

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330 Winham *International Trade and the Tokyo Round* 131 & 69; Baldwin and Moore "Political Aspects of the Administration of the Trade Remedy Laws" 254–255; Barcelo 1972 *Cornell Law. Rev. 533–534.* For a general discussion and more details on this issue, see Preeg *Traders and Diplomats* 127–128; 166–167; Glennon, Franck and Cassidy *United States Foreign Relations: Documents and Sources* 1–38; GATT – *Helping the World to Grow.*

331 Baldwin and Moore *Trade Remedy Laws* 255; Winham *International Trade and the Tokyo Round* 69, 131 & 353.

332 For an illuminating discussion on the Tokyo Round negotiations, see generally Winham *International Trade and the Tokyo Round;* and Steward *The GATT Uruguay Round* 1435–1461.

333 Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade of 1979, GATT, BSID 26th Supp (1980).

countries. Although the revision of the Code was completed by April 1979, it only gained approval by all negotiating parties in November 1979. According to Winham, the delay in approval was as a result of the LDCs requiring that a determination of dumping against their exports be based on export price to third countries, rather than on normal domestic prices.[334]

The Tokyo Round Anti-dumping Code sought to resolve and provide clear guidance to a host of issues such as the determination of dumping and of injury, and related procedural issues, by amending the Kennedy Round Anti-dumping Code.[335] It was after the Tokyo Round Anti-dumping Code that the definition of less-than-fair-value sales expanded to incorporate both price discrimination and below-cost sales as was once the practice in the United States.[336] The negotiating Parties did not want to agree to a Code that was substantively and materially different from the Kennedy Round Anti-dumping Code, but wanted to improve on the latter and not merely reinvent the wheel.[337] One of the key provisions of the Tokyo Round Anti-dumping Code linked to the Kennedy Round Anti-dumping Code was Article 2(4), which restated the provisions of Article 2(d) of the Kennedy Round Anti-dumping Code dealing with NMEs. Moreover, Article 2(7) of the Tokyo Round Code repeated verbatim Article 2(g) of the Kennedy Round Code. Like the Kennedy Round Anti-dumping Code, the 1955 Interpretative Note was made part of the Tokyo Round Anti-dumping Code.

An important breakthrough in the Tokyo Round Anti-dumping Code was the insertion of the dispute settlement provision. Article 15 of the Code allowed anti-dumping disputes to be submitted to GATT panels. Before the Article 15 dispute settlement provision came into being, anti-dumping disputes were settled under the general provision of Article XXIII: 2 of GATT 1947. Notwithstanding the improvements and some of the novel developments brought about by the Tokyo

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334 Winham *International Trade and the Tokyo Round* 354.

335 See Tokyo Round Anti-dumping Code, Art 3.

336 Prusa and Skeath *Retaliation as an Explanation for the Proliferation of Anti-dumping* (2002) 5.

337 See Beseler and Williams *Anti-Dumping and Anti-Subsidies Law* 66.

Round Anti-dumping Code, the Code remained under constant critical appraisal.[338] Recommendations were made for the improvement of the anti-dumping system, sometimes objectionable, and resulting in controversies among GATT Contracting Parties and their constituencies.[339]

3.2.3 Multilateral Anti-dumping Regime Post-1994

3.2.3.1 Article VI of GATT 1994

The present international legal authority that allows countries to impose anti-dumping measures is contained in the revised Article VI of GATT 1994, read with the URAA. The WTO does not prescribe that Members should adopt anti-dumping laws, but if a Member does so, the law must be in conformity with the WTO's anti-dumping regime, regulations and administrative measures, as set out in Article VI and in the URAA.[340] In identical terms to those employed by Article VI of GATT 1947, Article VI of GATT 1994 sets out basic principles for the nature and content of WTO Members' anti-dumping policies and laws. Article VI of GATT 1994 states that:

> "No Contracting Party shall levy any anti-dumping or *countervailing duty* on the importation of any product of the territory of another Contracting Party unless it determines that the effect of the dumping or *subsidization*, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.[341]

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338 The WTO continues to be under constant review to date. In fact, there is currently an effort underway to amend the URAA.

339 See Palmeter "The Anti-dumping Law: A Legal and Administrative Nontariff Barrier" 83, quoting from a letter by the United States House of Representatives calling the United States to "stand firm on its current anti-dumping negotiating position and reject proposals to amend the Anti-dumping Code of the GATT" in ways that "would weaken US trade law".

340 See URAA, Art 18.4.

341 Emphasis added.

3.2.3.2 Agreement on the Implementation of Article VI of GATT 1994

One of the issues under discussion at the Uruguay Round trade negotiations was the improvement of the GATT Anti-dumping Codes negotiated in the Tokyo and Kennedy Rounds. The result has been a substantial change and modification of the GATT 1947 anti-dumping system. This system has been largely supplanted by rudimentary case law, and does not enjoy much support from the Contracting Parties. The Uruguay Round negotiations culminated, *inter alia,* in the Agreement on the Implementation of Article VI of GATT 1994, herein referred to as the URAA, which, in turn, will be implemented by the ADP Committee.[342] The URAA necessitated substantial changes to national laws in order to make countries meet their WTO obligations under the revised Article VI. It has also led to some advanced progress in the resolution of problems and inconsistencies in the national application of Article VI of GATT 1947.[343]

The URAA has its principal basis in the Tokyo Round Anti-dumping Code[344] and does not deviate substantially in form and in approach from it, except that the URAA is too detailed and specific in speaking to some anti-dumping issues. The URAA fairly elaborates on Article VI of the GATT, and the basic principles that should govern anti-dumping cases. The URAA is divided into three parts and two annexes. Part I covers a range of substantive and procedural matters related to anti-dumping measures.

In addition to the WTO's general rules of dispute settlement, Part II establishes the ADP Committee and sets out special rules for resolving anti-dumping disputes. The final provisions of the URAA are contained in Part III, while Annex I of the URAA details procedures for conducting on-the-spot investigations And Annex II imposes limitations on the use of best information available in cases where interested parties act unreasonably and do not cooperate sufficiently in

342 URAA, Art 16.

343 As to problems experienced in the pre-1995 Article VI of GATT 1947 and its AD Code see Koulen "Some Problems of Interpretation and Implementation of the GATT Anti-dumping Code" 366.

344 See Palmeter "A Commentary on the WTO Anti-dumping Code" 1996 *JWT* 43.

the investigation. The URAA has brought about such remarkable changes and improvements in the area of dumping that the WTO Secretariat has hailed it as a representation of the WTO that balances potentially conflicting interests, namely, the interests of importing countries in imposing anti-dumping measures or functionally similar measures to prevent injury to domestic industries, and the interests of exporters requiring that anti-dumping measures and procedures should not themselves become obstacles to fair trade.[345]

Unlike the GATT anti-dumping codes, the URAA sets out more comprehensive rules governing the use of anti-dumping measures. In order to achieve consistency in national anti-dumping frameworks, the URAA deals in detail with several anti-dumping issues. For instance, the URAA comprehensively deals with issues such as the determination of dumping;[346] the determination of injury and the standard used to determine injury;[347] the procedures involved in initiating anti-dumping investigations;[348] and the nature and extent of anti-dumping duties.[349] In fact, the URAA also clarifies the issue of lower ratios of domestic sales with regard to the determination of domestic market price. According to Article 2, footnote 2 of the URAA, sales that constitute 5% or more of sales of the product in the importing country are now considered sufficient for the purposes of determining domestic market price. The adoption of the de minimis standard, in terms of which anti-dumping proceedings should be terminated if the dumping margin is less than 25% or if the volume of dumped products is less than 3% of the total imports of that dumped product, is also one of the important reforms brought by the Uruguay Round.[350]

Notable also in the URAA is the significantly improved methodology for comparing prizes of goods under investigation to determine the margin of dumping.[351] The URAA further legitimises the practice of cumulating imports

345 *Guide to Uruguay Round Agreements* 81.
346 URAA, Art 2.
347 URAA, Art 3.
348 URAA, Art 5.
349 URAA, Art 9.
350 See URAA, Art 5.8.
351 See URAA, Art.2.

from different countries in order to determine injury to domestic industry.[352] Another important development is that the URAA requires the provision of an independent judicial or administrative review of anti-dumping determinations.[353]

In respect of what is now commonly known as the "sunset review", the URAA requires anti-dumping duties to expire after a period of five years.[354] Under the URAA, there is a surveillance and regulatory system in place to ensure that WTO Members who have adopted anti-dumping laws and regulations or who have made changes to their existing laws and regulations notify the WTO of them.[355] Members should also submit a report on all the preliminary or final anti-dumping measures they have taken, and a list of all anti-dumping measures in force.[356] The dissatisfaction with the URAA was largely evident in the position papers of WTO members during the preparation of the failed Seattle Conference, the core of which, among other things, sought the review and clarification of the URAA.[357] To date several of the WTO members have proposed a review and modification of the URAA. In fact, the Doha Ministerial negotiations were aimed at "clarifying and improving disciplines under the Agreements on Implementation of Article VI",[358] which includes the URAA. Issues that have been earmarked for debate at Doha include establishing clearer definitions in the URAA, the lesser duty rule, the prohibition of zeroing and several procedural matters,[359] including the effectiveness of the rules designed to protect LDCs.[360]

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352 URAA, Art 3.3.

353 URAA, Art 13.

354 Save where a new determination is made that dumping will continue or recur.

355 See URAA, Art 18.5.

356 See URAA, Art 16.4.

357 See the position papers by South Africa (WT/L/317), Columbia (WT/GC/W/315), Korea (WT/GC/W/235/Rev.1), Guatemala (WT/GC/W/330), Kenya (WT/GC/W/200), and Romania (WT/GC/319). Among the proposals in the WTO members' position papers are those of Japan and Chile, which called for the application of anti-dumping measures only against predatory pricing. See the position paper by Japan, WT/GC/W/366, and the position paper by Chile, WT/GC/W/269.

358 Doha Ministerial Declaration *WT/MIN (01)/DEC/W/1*, para. 28.

359 Communication from Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey, *TN/RL/W/6*. See also *Communication from Canada,* TN/RL/W/4.

360 See, for example, the position paper by India, *Communication from India* NN/RL/W/6.

3.2.3.3 Draft Doha Anti-dumping Agreement of 2007

There has been a significant development towards the amendment of the existing WTO anti-dumping framework. On 30 November 2007, the WTO published draft amendments to the URAA[361] to address issues raised in Doha in 2001 which relate, among other things, to the clarification and improvement of the anti-dumping discipline and others. Some of the proposed changes will have serious implications for the discipline of anti-dumping at both international and national level. The proposed clarification and/or improvements to the URAA deal with, for instance, sampling; zeroing; use of exchange rates in currency conversions; the determination of material retardation and the threat thereof; domestic industry interpretations; inclusion of anti-circumvention provisions in the URAA; information verification; deadlines; access to information; and many more.

The adoption of the URAA-proposed provisions is sure to have far-reaching ramifications in the way national jurisdictions frame and apply their anti-dumping laws, and will change the fundamentals of the discipline of anti-dumping in the WTO.[362] The production process for the URAA emerged from at least 150 proposals, and intense debates. However, the text of the URAA has not escaped some scathing criticism, as some exporting countries led by Japan, for example, saw the text as "unbalanced and biased towards the United States' methodologies and practices".[363] It is submitted that controversial issues will need to be addressed. However, the URAA text is overall a good basis for negotiating the new Agreements.

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361 Annex A – Anti-dumping. TN/RL/W/323 http://commerce.nic.in/trade.

362 The process for the production of the URAA emerged from at least 150 proposals, and intense debates.

363 See *Briefing Paper: WTO Doha Rules Group Negotiations on Dumping and Subsidies. New Zealand Ministry of Economic Development.* http://www.med.govt.nz. See also

3.3 Anti-dumping Dispute Settlement in the WTO

3.3.1 Aims and Purposes of the WTO Dispute Settlement System

The WTO's dispute settlement system, pursuant to the DSU, is a direct result of the experiences derived from the GATT 1947 dispute settlement system.[364] In terms of Article 3.4 of the DSU, the aim and object of the WTO dispute settlement system is to achieve "a satisfactory settlement" of disputes between and/or among the WTO Members. Members are therefore obliged to settle their disputes within the WTO dispute settlement framework under the DSU.[365] This quasi-judicial "inter-governmental"[366] system under the DSU generally codifies the evolution of the GATT 1947 dispute settlement system and practice, as was mandated under Articles XXII and XXIII of GATT 1947, except that it has been much improved to deal with all trade disputes in the WTO. The DSU addresses (or attempts to address) the many deficiencies experienced under the GATT 1947 system.[367] Under GATT 1947, there were numerous inconsistencies and ambiguities in decisions and problems in implementing decisions.[368] In the words of Stiles, "panels seemed to be reinventing the wheel and would-be disputants never knew what to expect."[369] The administration of the DSU rules and procedures is the responsibility of the DSB. Accordingly, in terms of Article 2 of the DSU, the DSB has the authority to issue Panel reports and Appellate

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countries like New Zealand that found the text to be an acceptable and effective basis for negotiating a new anti-dumping agreement.

364 Article 3.1 of the DSU states:

> Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

365 See DSU, Art 23.1.

366 Professor N'gon'gola maintains that the provisions of Article 1.1 of the DSU, which apply to "covered agreements", merit the description of the WTO dispute settlement system as an inter-governmental system. See Ng'ongo'la *African Member States* (2009) 4, http://www.tralac.org/cause_data/images/1694/WTO_Book_Ch5_Ngongola_African_Member_States_MBfin_20091116.pdf.

367 See Stiles 1995 *J. Int'l L & Prac* 8 on how the deficiencies and flaws in the GATT 1947 dispute settlement system led to Contracting Parties losing faith and interest in international dispute resolution.

368 Stiles 1995 *J. Int'l L & Prac* 9.

369 Stiles 1995 *J. Int'l L & Prac* 9.

Body reports, oversee the implementation of rulings and recommendations, and authorise appropriate relief measures.

3.3.2 General Application of the DSU

Article 1.1 of the DSU establishes "an integrated dispute settlement system" which applies to all the covered agreements. The scope of the DSU, therefore, is not restricted to the provisions of the GATT 1994. For the purposes of consistency in WTO dispute settlement, the DSU is generally applicable except where otherwise provided for by special or additional rules and procedures on dispute settlement contained in associated agreements.[370] The generality in the application of the DSU is acknowledged in Article 17.1 of the URAA, which provides that "[e]xcept as otherwise provided herein, the dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this agreement". Therefore, the DSU provides a basic framework and binding procedures for the settlement of disputes regarding the imposition of anti-dumping measures consistent with the URAA. The application of the DSU to the URAA was born out of the desire for the consistent resolution of disputes arising from anti-dumping measures.[371]

3.3.3 URAA Dispute Settlement Rules

In 3.3.2 above, we highlighted the overlapping relationship between the DSU and URAA, and the fact that the DSU establishes the general procedural rights and channels for the settlement of disputes in the WTO. The DSB jurisprudence and rules are applicable to associated agreements. Anti-dumping disputes are

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370 DSU, Art 1.2.

371 See WTO *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* or *Part V of the Agreement on Subsidies and Countervailing Measures*, http://www.wto.org/english/docs_e/legal_e41-dadp3.doc.

subject to the DSU, which serves as both the substantive and "procedural anchor of all WTO disputes".[372]

There is, however, some measure of difference regarding such associated agreements. If special or additional dispute settlement rules and procedures exist in the URAA, and differ from the general rules under the DSU, the URAA rules and procedures "shall prevail".[373] This is particularly applicable where the use of the DSU rules and procedures would lead to a violation of the URAA. The Appellate Body in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*[374] (hereafter Guatemala – Mexico Cement, Appellate body Review) states that "it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement cannot be read as complementing each other that the special or additional provisions are to prevail".[375]

3.4 Phases in the Dispute Settlement Process

3.4.1 Consultation and Good Offices, Conciliation and Mediation

Under Article 4 of the DSU, and also under Article 17.1 of the URAA, countries are encouraged to consult each other at all stages of any dispute in order to settle their dispute themselves before it reaches the stage of formal adjudication by a Panel. Obviously, the preference in the WTO is for Member States to seek mutually acceptable solutions to their problems before adjudication, or to give a sympathetic consideration to and afford adequate opportunity for consultation regarding representations made by another Contracting Party to the dispute.[376] In fact, the Appellate Body in *Brazil – Measures Affecting Desiccated*

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372 Rosenthal and Vermylen "The WTO Anti-dumping and Subsidies Agreements: Did the United States Achieve its Objectives during the Uruguay Round?" 2000 *Law & Pol Int'l Buss.* 881.

373 Rosenthal and Vermylen 2000 *Law & Pol Int'l Buss* 881.

374 *Guatemala – Anti Dumping Investigation Regarding Portland Cement from Mexico,* WT/DS60/AB/R (2 Nov. 1998) [hereafter Guatemala – Mexico Cement, Appellate Body Report].

375 *Guatemala – Mexico Cement,* Appellate body Report, para. 65.

376 DSU, Art.4.2 read with Article 24. See Ng'o ngo'la *African Member States* 4.

Coconut[377] (hereafter Brazil – Desiccated Coconut, Panel Report) ruled that the duty to consult in terms of Article 4, in particular Articles 4.2 and 4.6, of the DSU is an absolute obligation on WTO Members, with no exceptions.[378] The Appellate Body in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*[379] (India-Pharmaceuticals, Appellate Body Report) also tried to encourage recourse to consultations.[380]

The Member States are allowed up to 60 days to enter into consultation.[381] The consultation is boosted by the involvement of the WTO Director-General who, in terms of Article 5 of the DSU and at the request of the parties in dispute, is available to offer his/her good offices, can act as a mediator or arbitrator in the parties' dispute, or help them in any other way. Article 5 alternative dispute resolution proceedings take place before the establishment of a panel, as a procedure that promotes negotiated rather than litigated solutions in trade disputes.[382]

3.4.2 Panel Establishment

If consultations do not succeed within 60 days (20 days for urgent situations), as specified in Article 4 of the DSU, or the other party has refused a request for consultation or does not respond to a request for consultation within 10 days, the complaining party can ask the DSB to establish a panel.[383] The DSB has the sole authority to establish an ad hoc panel to consider the dispute,[384] and has

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377 *Brazil – Measures Affecting Desiccated Coconut* WT/DS22 (adopted 20 March 1997) [hereafter Brazil-Desiccated Coconut, Panel Report].

378 *Brazil-Desiccated Coconut*, Panel Report, para. 28. The panel stated that: "In our view, these provisions make clear that Members' duty to consult is absolute."

379 See *Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WT/DS50/AB/R 19 Dec 1997 (adopted 16 Jan 1998) [hereafter India – Pharmaceuticals, Appellate Body Report].

380 See *India – Pharmaceuticals,* Appellate Body Report, para. 94.

381 DSU, Art 4.

382 See Kohana "Dispute Resolution under the World Trade Organization: An overview" 1994 *JWT* 34; N'gon'gola *African Member States* (2009) 12.

383 DSU, Art 6.1. See also URAA, Art 17.5. For more on panel establishment see *Guide to Uruguay Round* 27–28.

384 In cases involving scientific or technical matters, a panel is allowed to request an advisory opinion from an expert group established under the DSU rules. See DSU, Art 13. For

up to 45 days in which to do so.[385] Matters that generally follow after the establishment of a panel include the selection of panel members;[386] establishing the terms of reference;[387] and accepting and considering submissions by a third party having a substantial interest in a matter before the panel.[388] The panel consists of well-qualified governmental and or non-governmental individuals,[389] who are selected on the basis of their experience, independence and diversity of background.[390] The function of the panel, which consists of three panelists, is both fact finding and decision making.[391] Consequently, the panel makes an objective assessment of the dispute and reports its findings to the DSB in order to help the DSB make its recommendations and rulings to settle the dispute in question.[392]

3.4.3 Adoption of a Panel Report

Article16. 4 of the DSU requires the DSB within 60 days of the circulation of a Panel report to adopt such report, unless the report is appealed by one of the parties or the DSB has decided not to adopt the report. The adopted Panel report becomes the DSB ruling or recommendation. Panel reports become final only after they have been adopted by the DSB.[393]

3.4.4 Appellate Review

Any party to a dispute has a right to appeal the issuance of a Panel report to the Appellate Body.[394] An appeal must be lodged before the DSB adopts a Panel

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more on the use of experts see generally, Pauwelyn "The Use of Experts in the WTO Dispute Settlement" 2002 *ICLQ* 325.

385 Note that the responding party can block the establishment of a panel once. However, the establishment of a panel can no longer be blocked when the DSB meets for the second time, unless there is a consensus against appointing the panel.

386 See DSU, Art 8.

387 See DSU, Art 6 & Art 8.

388 See DSU, Art 10.

389 DSU, Art 8.1.

390 DSU, Art 8.2.

391 DSU, Art 11.

392 DSU, Art. 11.

393 See DSU, Art 16.

394 See DSU, Arts 16 & 17.

report, which is within 60 days after the date of circulation of such a report.[395] As with a Panel report, the Appellate Report is automatically adopted by the DSB[396] unless there is negative consensus for non-adoption.[397] The Appellate Body may uphold, reverse or modify a Panel report.[398] Like the Panel reports, Appellate Body reports are only final and binding once they have been adopted by the DSB.[399]

The Appellate Body is made up of seven persons, with only three sitting in any single case, who are appointed for a period of four years.[400] Appellate Body members should be "persons of recognized authority with demonstrable expertise in law, international trade and the subject matter of the WTO agreements generally".[401]

In terms of Article 17.6 of the DSU, the appeal must be based on legal grounds or issues of law covered in a Panel report and the legal interpretations developed by the Panel.[402] Be that as it may, the WTO dispute resolution forums have not been consistent with the provisions of Article 17.6 of the DSU. For example, a precedent was set where the Appellate Body considered and made legal findings on issues not addressed by a Panel.[403]

Whether an issue before the Appellate Body is an issue of law or that a statement by the panel amounts to a legal finding pursuant to Article 17.6 of the

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395 See generally Article 16 of the DSU, read with Article 17; Ng'o ngo'la *African Member States* (2009) at 18.

396 The DSB has to accept or reject the appellate report within 30 days.

397 DSU, Art 17.14.

398 DSU, Art 17.13.

399 See DSU, Art 17.4.

400 DSU, Art.17.1. For a critical insider look at the Appellate Body, see Ehlermann "Experiences from the WTO Appellate Body" 2003 *Texas Int'l L. J.* 455.

401 DSU, Art 17.3.

402 See the affirmation of the provision of Article 17.6 in *EC-Hormones, Appellate Body Report,* para. 132.

403 See, for example, *United States – Reformulated Gasoline,* Appellate Body Report, paras. 13–29. The Appellate Body in *European Communities – Measures Affecting the Importation of Certain Poultry Products* WT/DS69/AB/R (adopted 20 October 1998), [hereafter EC – Poultry Products Review, Appellate Body Report] para. 156 tried to amend its *United States – Reformulated Gasoline* ruling in order to give rise as to the proper scope of appellate review.

DSU is determined on a case-by-case basis. There has generally not been a clear statement or policy for determining and distinguishing in a straightforward manner between issues of law and issues of fact. The only general direction in this matter is that a finding involving the application of a legal rule to a specific fact or set of facts is a finding of law, which can be reviewed by the Appellate Body in terms of Article 17.6 of the DSU.[404]

3.4.4 Implementation of Reports

The implementation of adopted reports is one of the important and preferred results of the WTO dispute settlement system.[405] One of the most distinguished international trade law scholars, Professor John H. Jackson, expressed the opinion that the legal effect of the adoption of a report is an "international law obligation to perform the recommendation" of such report.[406] Accordingly, the DSB oversees and monitors the implementation of a Panel or Appellate Body report.[407] In terms of Article 21.3 of the DSU, the losing party must state its intention of complying with the recommendations of the panel report or appellate report at a DSB meeting held within 30 days of adoption of the report.[408]

It is essential that there should be prompt compliance with the ruling or recommendations of the DSB, unless prompt compliance is impossible.[409] The primary and desired compliance here is the immediate withdrawal of the measure which has been found to be inconsistent with a covered agreement.

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404 See *EC – Hormones,* Appellate Body Report, para. 132. On the determination of issues of fact see, for example, *Decision by the Arbitrators, EC – Bananas III, Recourse to the Arbitration by the European Communities under Article 22.6 of the DSU* [Hereafter EC – Bananas III Arbitration], WT7DS27/ARB/ECU, para. 239; EC – *Hormones*, Appellate Body Report, para. 132.

405 See DSU, Arts 3.7 & 22.1.

406 Jackson "The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of the Legal Obligation" 1997 *AJIL* 60, 62–63.

407 See generally Ng'o ngo'la *African Member States* (2009) 19 21 on implementation of reports with particular focus on the position of LDC and the African Group in respect to implementation issues.

408 For more on report implementation, see Guide *to the Uruguay Round Agreements* 30.

409 DSU, Art 21.3.

Although the implementation of reports depends largely on voluntary compliance, a party that does not implement the report has a lot to lose. In terms of the DSU, a winning party may seek compensation[410] or the authority to suspend concessions previously granted to the losing party[411] or authorisation to retaliate pending full implementation.[412]

3.5 WTO/GATT Remedies and Other Relief Measures

3.5.1 Unilateral Remedies

As a rule, the trading activities of domestic industries and a member country's promotion and protection of industries must be consistent with the relevant WTO rules. From a dumping perspective, the WTO/GATT remedies and relief measures against non-conformity may be approached in two ways: firstly, with reference to violations or actions by individual industries; and secondly, a complaint could be approached from the perspective of law and the practices of the WTO member countries.

When it is found that domestic industries are being injured or threatened with injury by the activities of importing industries, the WTO/GATT permits a range of protective measures. In a case of dumping, authorities in the country of the aggrieved industries may, among other things, impose measures to offset the effects of dumped imports pursuant to the provisions of Article VI of GATT and the URAA. The permissible measures include price undertakings pursuant to Article 8 of the URAA. Price undertakings are generally entered into between the importing industry and authorities in the importing country once the latter has made a preliminary determination of dumping and the consequential injury or threat thereof.[413] An industry that violates a price undertaking may attract to itself the imposition and immediate application of provisional measures by the

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410 DSU, Art 22.1.
411 DSU, Art 22.1.
412 DSU, Arts 22.2, 22.3 and 22.6.
413 See generally URAA, Art 8.

authorities of the importing country. Price undertakings may occur where exporters offer to revise "dumped" prices or to cease exporting the products in question.

Article 15 of the URAA creates an obligation for relief measures to be considered on a special and differential basis when it comes to developing countries. Where the guilty industry is from a developing country or the guilty party is a developing country Member itself, the WTO requires that the imposition of "constructive remedies" other than anti-dumping duties be "explored" as a "special regard" to the "special situation" of the Member.[414] This is particularly applicable if anti-dumping duties affect the essential interests of developing country Members. Constructive remedies have been understood by the WTO Panel in *European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India*[415] (hereafter EC – India Bed Linen, Panel Report) to refer to price undertakings and lesser duties under Article 9 of the URAA.

According to the Panel in the *India Bed Linen*, the obligation imposed by Article 15 of the URAA to "explore" the possibility of a constructive remedy requires an investigating authority to "actively consider, with an open mind, the possibility of such a remedy (constructive remedy) prior to the imposition of an anti-dumping measure that would affect the essential interests of a developing country".[416]

The Panel in the *India – Bed Linen* dispute further stated that it is not sufficient for an investigating authority to passively satisfy the obligation to "explore"

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414 URAA, Art 15.

415 *European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141/R (30 October 2000), [hereafter EC – Indian Bed Linen, Panel Report], para. 6.229.

416 *EC – Indian Bed Linen,* Panel Report, para. 6.233. In *EC – India Bed Linen,* Panel Report, the investigating authority, the European Communities, was found not to have satisfied the obligation in Article 15 of the URAA. According to the Panel, the European Community did not "do anything different ... than it would have done in any other anti-dumping proceedings ... there was no notice or information concerning opportunities for exploration of possibilities of constructive remedies given to the Indian parties, nothing that would demonstrate that the European Communities actively undertook the obligation

possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned.[417] Consequently, the anti-dumping duties are another permissible measure under the URAA. These measures may be provisional or final in order to eliminate the injurious effect of the dumping. In terms of Article 7 of the URAA provisional measures may take the form of either a provisional anti-dumping duty[418] or payment of security in the form of a cash deposit or bond.[419] Definitive measures may take the form of definitive anti-dumping duties.[420]

3.5.2 DSB Relief Measures

When a complaint or dissatisfaction arises about a country's anti-dumping duty regime, recourse to the DSB can be had for appropriate relief. Each member of the WTO has to abide by and adhere to a set of basic principles on anti-dumping measures.[421]

3.5.2.1 Compliance

Article 19 of the DSU specifically addresses the issue of compliance[422] where a measure is inconsistent with a covered agreement. A Panel or the Appellate Body should recommend that a measure inconsistent with a covered agreement

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imposed by Article 15 of the AD Agreement". See *EC – Indian Bed Linen,* Panel Report, para. 6.238.

417 *EC – Indian Bed Linen,* Panel Report, para. 6.238.

418 URAA, Art. 7.2.

419 URAA I*dem.*

420 See generally URAA, Art 9.

421 However, the WTO rules on anti-dumping measures do not attempt to harmonise national laws on dumping. They only regulate such laws to make them compatible with the stated goals of international trade liberalisation and trade promotion. For instance, since there is no specific provision requiring Member States to maintain a handbook, guide or manual explaining local practice with regard to anti-dumping and countervailing measures, the WTO Member States have taken it on themselves to have such guiding documents describing the procedures for initiating the investigation of dumping and subsidy practices and the methodologies involved in calculating dumping. Each member enforces measures differently.

422 The concept of compliance or implementation in the DSU is a technical concept with a specified content, namely: the withdrawal or modification of a measure, or part of a measure, the establishment or application of which constitutes the violation of a provision of a covered agreement.

be brought into conformity or compliance with such agreement. Compliance has always been a usual and preferred remedy of international trade relations even under GATT 1947.

In terms of *GATT 1947 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance,* the aim of the GATT Contracting Parties has always been to secure a positive solution to the dispute, and that a solution that is mutually acceptable to the parties to a dispute must be the preferred one. Otherwise the Parties must endeavour to secure the withdrawal of the measures concerned if these are found to be inconsistent with the GATT.[423] Article 19.1 of the DSU primarily requires a Panel or the Appellate Body to recommend compliance and, where necessary, suggest a way in which a losing party can implement the recommendation. The recommendation, which is legally binding,[424] may be in the form of cessation[425] (withdrawal) or some form of correction of the conduct complained of. However, in the case of non-violation complaints[426] in terms of Article 23:1(b) of GATT, a recommendation for withdrawal would be inappropriate. Non-violation complaints are equity complaints, based on causes unrelated to specific rules within the WTO context. Such complaints call into question the legality of Acts and their compatibility

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423 See GATT 1947 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance GATT Doc. L/409, BISD 26S/210 *et seq* (adopted 28 November 1979).

424 The issue of whether the DSB recommendations pursuant to Article 19.1 of the DSU are binding or not is still subject to debate. We take the position that they are binding since they are part of the decision. Another reason is that the directive of a Panel or the Appellate Body to issue a recommendation is peremptorily couched in Article 19.1. The binding nature of recommendations is also inferred from the fact that the first WTO panel to consider the binding nature of suggestions pursuant to article 19.1 of the DSU, *Guatemala – Anti-dumping Investigations Regarding Portland Cement from Mexico,* WT/DS60/R (19 June 1998), [hereafter Guatemala – Cement from Mexico, Panel Report], par.8, concluded, among other things, that suggestions "are not part of the recommendation, and not binding on the affected Member".

425 See, *United States – Restrictions on Imports of Cotton and Manmade Fibre Underwear,* WT/DS24/R (8 November 1996), [hereafter United Sates – Fibre Underwear, Panel Report].

426 The complaint may be in the form of a violation claim based on the explicit and apparent infringement of, and/or noncompliance with, a principle or rule of the WTO. It may also be in the form of a non-violation nullification and impairment claim as provided for in Article 23:1(b) of GATT. Of the two forms of complaints, the non-violation complaint is the most interesting.

with WTO/GATT.[427] The DSU, therefore, enjoins panels and the Appellate Body to recommend a "mutually satisfactory adjustment"[428] and not withdrawal.[429]

Some of the recommendations made regarding anti-dumping practices include the revocation (withdrawal) of anti-dumping duties and the reimbursement (correction) of the anti-dumping duties paid or deposited.[430] It has been observed by Reitz, and correctly so, that the principal remedial objective of the DSB is the cessation or termination or correction of conduct in violation of the WTO rule.[431]

The cessation or correction of the conduct in violation or complained of as the paramount remedial objective of the DSB was confirmed in the *United States – Anti Dumping Measures on Certain Hot-rolled Product from Japan* (United States – Hot Rolled Steel Arbitration, Appellate Body Report).[432] The correction

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427 GATT, Article 23.1(b) applies to measures *whether or not in conflict* with GATT. That is, Article 23.1(b) is applicable to measures in violation ['*whether ... .in conflict*'] or not in violation *[whether ... not in conflict]*. The term "non-violation" appears to be a misnomer. For a thorough discussion of non-violation nullification and impairment, see Cho "GATT Non-violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?" 1998 *Harvard Int'l Law J* 311. There is a litany of GATT/WTO cases on non-violation claims. See for example, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (31 March 1998), [hereafter Japan – Kodak/Fuji Film, Panel Report]; *EEC – Payments and Subsidies Paid to Processors of Oilseeds and Related Animal-Feed Proteins,* BISD 37S/86 [hereafter ECC – Oilseeds, Panel Report]; *The Australian Subsidy on Ammonium Sulphate*, BISD II/188 (April 3, 1950), [hereafter Australian Ammonium Sulphate, Panel Report]; *Treatment by Germany of Import of Sardines*, BSID 1S/53 (October 31, 1952), [hereafter German Sardines, Panel Report].

428 DSU, Art 26.1(b).

429 This can be explained by the fact that non-violation complaints suggest that a member is in full compliance with WTO/GATT. In addition, therefore, to require such member to withdraw a measure or Act, which is in full compliance with the WTO/GATT rules, would amount to an unimaginable and strange intrusion upon national sovereignty.

430 See *United States – Anti-dumping Duties on Grey Portland Cement and Cement Clinker from Mexico*, ADP/82 (9 July 1992, unadopted), [hereafter United States – Mexico Portland Cement] para. 6.2. See also, *United States – Imposition of Anti-dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, ADP/47 (20 August 1990, unadopted), [hereafter United States – Stainless Steel from Sweden].

431 Reitz "Enforcement of the General Agreement on Tariffs and Trade" 1996 *U. Pa J Int'l Eco. L* 555. However, Reitz is quick to point out that the weakness in pure compliance is that the aggrieved party may have suffered injury during the period of violation for which no restoration or damages are imposed on the offending party.

432 *United States – Anti-dumping Measures on Certain Hot-Rolled Products from Japan*, Appellate Body Report, WT/DS/184/AB/R (adopted 23 August 2001) [hereafter United States – Hot Rolled Steel, Appellate Body Report], par.28, quoting *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather: Arbitration Under*

or termination of offending measures helps to restore the good relationship that formerly existed between the parties.[433]

In the parlance of ordinary contract law, these recommendations are akin to an interdict or an order of specific performance.[434] Once a recommendation is made, it is required that a country promptly and immediately[435] fully implement the recommendations of the DSB so as to bring the measure complained of into conformity with the WTO rule and agreement in question.[436] If immediate and prompt compliance is "impracticable", a country should undertake to render compliance within such "reasonable period of time" as is granted.[437]

3.5.2.2 Retaliation

The suspension of concessions or other benefits to the party whose measures are inconsistent with its WTO obligations, commonly referred to as "retaliation", is a last resort relief measure under the DSU system.[438] In terms of Article 22.8 of the DSU, retaliation is a temporary measure pending an acceptable implementation of the DSB recommendation(s), or pending acceptable corrective measures. Article 22.4 of the DSU requires that retaliation be equivalent to the level of the nullification or impairment suffered by the complaining Member. Retaliation usually takes the form of punitive 100 per cent tariffs on selected products.

Should the parties disagree on the level of proposed retaliation pursuant to Article 22.4 of the DSU, the appropriate level of retaliation will be determined

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Article 21.3(c) of the DSU, Award of the Arbitrator, WT/DS155/10 (August 31 2001), [hereafter Argentina – Hides and Leather Arbitration, Panel Report] paras 40–41.

433 See DSU, Art 22.1.

434 Reitz 1996 *U Pa J Int'l Eco. L* 588.

435 See DSU, Art 21.1.

436 DSU, Art 21.3.

437 For the interpretation of the phrases "reasonable time" and "reasonable period", see *United States – Hot Rolled Steel,* Appellate Body Report, paras. 84–85; *United States – Anti Dumping Measures on Certain Hot-Rolled Products from Japan*, Award of the Arbitrator, WT/DS184/13 (adopted 19 February 2002) [hereafter United States – Hot Rolled Steel Arbitration, Panel Report], paras. 24 - 26.

438 See Korotana 2009 *Estey Journal of International Law and Trade Policy* 197.

through arbitration. There are a few additional steps that may be followed before the DSB can authorise retaliation. Firstly, the WTO Panel or the Appellate Body should adjudge the measures under complaint to be inconsistent with WTO obligations, and the judgment should then be adopted by the DSB. Thereafter, the defaulting party will, in terms of Article 21.3 of the DSU, be given a "reasonable period of time" to implement the proposed WTO-consistent measures. If a defaulting party fails to implement the compliance order of the DSB within a reasonable period or to take the implementation measures to satisfactorily discharge the order, the prevailing Party may approach the DSB for the authorisation of retaliatory measures or the imposition of counter-measures.[439] However, if the defaulting party has made some effort to comply and the measures it has introduced are disputed by the complaining party, a panel may be set up under Article 21.5 of the DSU to determine the adequacy of the proposed implementation measures. The setting up of an Article 21.5 panel was made general practice by the Appellate Body in *United States – Import Measures on Certain Products from the European Communities*[440] (hereafter US – EC Products Measures, Appellate Body Report), when it held that an Article 21.5 determination of the adequacy of the implementation measures is a prerequisite when undertaking retaliation.[441]

A further panel, an arbitral panel, may be established under Article 22.6 of the DSU to examine the objected proposed implementation. Thereafter, and if the arbitral panel found the proposed measures not to be adequate and satisfactory, the DSB would grant permission to retaliate, and may set the appropriate level of retaliation. In terms of Article 22 of the DSU, retaliation measures may be against the same sector or across sectors. Under same-sector retaliation, the retaliation is imposed in the same sector as the dispute[442]

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439 DSU, art.22.2 read specifically with art. 22.6. See Valles and McGiven "The right to retaliate under the WTO Agreement" 2000 *JWT* 62 (critically appraising the right to retaliate and its ambiguities).

440 *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R (11 December 2000), [Hereafter US – EC Products Measures, Appellate Body Report].

441 *US-EC Product Measures*, Appellate Body Report, para. 126–127.

442 DSU, Art 22.3(a).

or in different sectors of the same covered agreement[443] if same-sector retaliation pursuant to Article 22.3(a) is considered by the complaining Member impracticable or ineffective.[444]

In cross-sector retaliation, retaliation is imposed in other sectors or other agreements if same-sector retaliation is impracticable or ineffective and the seriousness of the circumstances warrants such retaliation.[445] Taking retaliatory measures in different sectors is permitted subject to the WTO Member having taken into account the importance of trade in that sector and the "broader economic consequences" of such action,[446] and having furnished the DSB with reasons for requesting such measures.[447] The request is also to be furnished to the relevant Councils or sectoral bodies.[448]

Article 22.4 of the DSU imports proportionality in trade retaliations by requiring that the level of retaliation should be equivalent to the level of nullification or impairment of the benefits.[449] The requirement of equivalency is designed to impart restraint by WTO Members when seeking authorisation to suspend concessions or other obligations, particularly of the LDCs. The manner for establishing equivalency has been set by the arbitral panel in the *EC – Bananas III* dispute. According to the Arbitrator in this case, equivalence can only be established after comparing the monetary value of the envisaged retaliation and the impairment suffered by the complaining member.[450]

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443 DSU, Art 22.3(b). For example, the dispute is in the textile sector and retaliatory measures are taken in the agricultural sector.

444 The issue of whether Article 22.3(b) of the DSU gives the complaining Member the sole prerogative of deciding if it is not practicable or effective for same-sector retaliation or retaliation in a different sector was dealt with by the arbitrator in *EC-Bananas III*, Panel report, par 3.10. In this case the arbitrator held that the language of Articles 22.3(b) and (c) gave some discretion to the complaining Member to make such a decision.

445 DSU, Art 22.3(c). For a discussion of same-sector retaliation and cross-sector retaliations, see generally Dillon "The World Trade Organization: A New Legal Order for World Trade?" 1995 *Mich JIL* 387.

446 DSU, Art 22.3(d).

447 DSU, Art 22.3(e).

448 DSU *Idem.*

449 See Palmeter and Mavrodis "The WTO Legal System: Sources of Law" 1998 *AJIL* 409, who consider Article 22.4 of the DSU as requiring "the proportionality standard which is required by international law under the International Court of Justice system".

450 See *EC – Bananas III Arbitration, Panel Report,* paras.4.1 and 4.2, explaining the concept of equivalence.

In the early years of the existence of the WTO, retaliation was a preferred course of action by the United States[451] and the European Union. This may be attributed to its somewhat despotic practice of fostering implementation through threats, which unfortunately cannot be fully utilised by small and developing countries.[452] The cases in point are the much publicised disputes regarding the banana and beef regimes maintained by the EU. Experience gained from these disputes teaches us that, compared with compliance orders which restore the equilibrium of the international economy in terms of the parties' prior arrangements, the problem with retaliation is that it may result in free trade threatening to bring about tit for tat and indiscriminate retaliatory actions between states. The banana and beef disputes threatened the stability of the international trade regime and the disputants also threatened to undermine the WTO disputes settlement institutions, with the complaining party sometimes imposing cross-sector tariff sanctions on European goods, prior to official WTO approval. In both the *EC – Hormones Beef* and the *EC – Bananas* disputes, the Appellate Body formally authorised retaliation in favour of the complainants.

In the *EC – Bananas* dispute, the Appellate Body ruled against the EU, holding that the EU banana import regime was inconsistent with WTO obligations, and

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451 In fact, the United States has long been one of the effective users of retaliation under section 301 of the Tariff Act of 1974 [19 USC § 2411]. Section 301 is used to provide relief to US exporters in situations where foreign governments are not adhering to trade agreements or have taken measures that unfairly or unreasonably hinder the sales of United States businesses or investment in those countries. It also applies to measures that deny the United States benefits under a trade agreement. Another retaliatory provision is contained in section 182 of the Tariff Act of 1974 – sometimes called "special 301", created by the Omnibus Trade Act of 1988, in terms of which trade sanctions may be imposed if designated countries do not enact and enforce laws protecting intellectual property rights to the United States's satisfaction. For more on the United States's trade retaliation law and its controversial points, see Silverman "Multilateral Resolution over Retaliation: Adjudicating the Use of Section 301 Before the WTO" 1996 U *Pa J Int'l Econ. L* 233. See generally Bayard and Elliott *Reciprocity and Retaliation in US Trade Policy*.

452 Korotana 2009 *Estey Journal of International Law and Trade Policy* 197, argues that retaliation in the form of the withdrawal of commitments by a smaller state against a developed state may not have the desired impact on the economy of the developed state as was the case in the *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS 285 dispute. This has led to a call for collective retaliatory sanctions to achieve maximum impact, which unfortunately is not prescribed under Article 22 of the DSU. According to Korotana, any idea of introducing collective retaliation in the DSB is "repugnant to the ideals of the WTO" and "a step backward and inherently amounts to a non-tariff barrier to international trade". See Korotana 2009 *Estey Journal of International Law and Trade Policy* 1205.

recommended the implementation of a WTO-consistent banana regime. The EU's subsequent implementation measures were challenged by the United States as mere cosmetic and superficial changes, while continuing to discriminate against United States businesses and Latin American producers. As a result of the unsatisfactory nature of the EU's implementation measures, the United States retaliated by imposing tariffs that were to be levied annually: up to 100 per cent ad valorem duties on a list of EU merchandise with an annual trade value of US$191.4 million.[453] The United States retaliation list included cross-sector items such as handbags, bed linen, uncoated felt paper and electrothermic coffee and tea makers.[454]

Controversial retaliatory measures were also taken in the beef hormones dispute, which was one of the long-standing and acrimonious trade disputes over the EU's decision to ban hormone-treated meat, dating back to the early 1980s.[455] In August 1997, the WTO Dispute Settlement Panel released its report agreeing with the United States that the ban violated several provisions of the SPS Agreement. The EU appealed the ruling and, in February 1998, the WTO Appellate Body found that the EU ban did contravene the EU's obligations under the SPS Agreement, but left open the option for the EU to conduct a risk assessment of hormone-treated meat. The dispute went to arbitration and the arbitration panel ruled subsequently that 15 months from the date of the decision, namely 13 May 1999, would be a reasonable period of time for the EU to conduct its assessment. By 13 May 1999, the EU had not completed its scientific review as mandated by the arbitral panel and decided it would not consider removing the ban before conducting an additional review.

The failure of the EU to abide by the deadline opened the way for the United States to retaliate by imposing trade sanctions against US imports of EU

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453 The United States claimed US$520 million per year.

454 See "USTR List of EU Tariff Products for Retaliation in EU Banana Dispute" http://www.useu.be/issues/bananas412.htm1.

455 Council Directives 81/602 (July 1981), 88/146 (7 March 1988), 88/299 (17 May 1988).

products starting in July 1999[456] after it and Canada had obtained a formal WTO authorisation to suspend tariff concessions and retaliate against trade from the EU. The United States sanctions were set at 100 per cent ad valorem duties on a list of EU merchandise[457] with an annual trade value of US$116.8 million, and the Canadian sanctions were set at 100 per cent ad valorem duties on a list of EU merchandise with an annual trade value of CNN$11.3 million.[458] The Canadian retaliation list included cucumbers and gherkins.[459]

The retaliatory measures taken by the United States did not result in the end of the tug-of-war between the United States and the EU regarding the beef ban, as the EU continued the ban in several ongoing reviews in 2000, 2002 and 2007.[460] In October 2003, the EU press release claimed that the EU had conducted scientific reviews which constituted "a thorough risk assessment based on current scientific knowledge"[461] and had thus fulfilled the EU's WTO obligations.

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456 For more on the United States' retaliatory measures, see USDA, Foreign Agriculture Service, *Historic Overview and Chronology of EU's Hormone Ban*, GAIN Report E23206, Nov. 7, 2003, http://www.fas.usda.gov/gainfiles/200311/145986773.pdf. (accessed on 12 December 2003)

457 The list of products included beef and pork products, goose pâté, Roquefort cheese, truffles, onions, carrots, preserved tomatoes, soups, yarn, Dijon mustard, juices, chicory, toasted breads, French chocolate, and jams, as well as agricultural-based by-products, such as glue and wool grease. The list, which did not include the United Kingdom because it indicated support for lifting the ban, targeted Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Ireland, Luxembourg, the Netherlands, Portugal, Spain, and Sweden. See 64 *Federal Register* 40638, 27 July 1999.

458 See Appellate Body Report, EC – Beef Hormones. The United States and Canada claimed US$202 million and CN$75 million respectively. See also Charmody 2002 *JIEL* 319–321, which provides a breakdown of retaliatory measures authorised in the *EC – Beef Hormones* disputes (and the banana dispute)

459 For more information, see generally WTO, "European Communities – Measures Concerning Meat and Meat Products (Hormones)," WT/DS26/21, 15 July 1999, http://www.wtocenter.org.tw/SmartKMS/fileviewer?id=65564. (accessed on 30 July 1999). See also Murray "Foi Grass? Making Economic Sense of the 1999 US Tariffs on Gourmet European Goods" 1999 *J of Intl' Leg Stud* 825.

460 The 2007 review was conducted by the European Food Safety Authority (EFSA), which was created in January 2002 as part of a comprehensive programme to improve EU food safety and ensure consumer protection and confidence, providing scientific advice and communication on food-borne risks. For more on the reviews conducted see EFSA, *Opinion of the Scientific Panel on Contaminants in the Food Chain On a Request from the European Commission Related to Hormone Residues in Bovine Meat and Meat Products*, EFSA-Q-2005-048, June 12, 2007, http://www.efsa.europa.eu/EFSA/efsa_locale-1178620753812_1178622336805.htm. (accessed on 15 March 2008)

461 Delegation of the European Commission to the USA, "EU complies with WTO ruling on Hormone Beef, Calls on US and Canada to Lift Trade Sanctions". Press Release EU/NR 61/03, October 15, 2003, http://www.eurunion.org/eu/ (accessed on 20 January 2004).

Also in 2003, the EU issued a new directive and revised its ban to permanently include estradiol-17β and provisionally include the five other hormones. The EU claimed that its actions replacing its original ban with a provisional ban complied with its WTO obligations under Article 5.7 of the SPS Agreement. Stating that there was no longer a legal basis for the United States to impose trade sanctions against the European Union,[462] the EU continued to initiate counteractions against the United States (and Canada).

The beef hormone dispute has escalated over the years. In 2005, the EU initiated new WTO dispute settlement proceedings against the United States and Canada. In 2008, a final panel report found fault on the part of all the three parties regarding various substantive and procedural aspects of the dispute. In particular, the panel found that the EU had not presented sufficient scientific evidence to justify the import ban, including the EU's 2003 risk assessment report. On the other hand, the panel faulted the United States and Canada for maintaining their imposed trade sanctions, and both parties had procedural violations under the DSU because of the unilateral actions they had taken. Canada and the United States were unhappy with the panel ruling and subsequently filed appeals, citing procedural errors and disagreements with the panel findings. In October 2008, the WTO Appellate Body issued a mixed ruling that allows for continued imposition of trade sanctions on the EU by the United States and Canada, but also allows the EU to continue its ban on imports of hormone-treated beef.

3.5.2.3 Compensation

If the defaulting party is not able to comply with a Panel or the Appellate Body's recommendations or adjustment order within a reasonable period, it may negotiate to offer a "mutually acceptable compensation" to the aggrieved

462 For more information see EC, "EU Complies with WTO ruling on Hormone Beef and Calls on USA and Canada to Lift Trade Sanctions", 15 October 2003, http://trade.ec.europa.eu/doclib/docs/2004/april/tradoc_113909.pdf (accessed on 22 January 2004).

party.[463] However, compensation is not a solution preferred by the WTO. Article 22.1 of the DSU states that neither compensation nor suspension of concessions or other obligations is preferred to full implementation of a recommendation, in order to bring a measure into conformity with the agreement in question. There are several identifiable weaknesses in the compensation system. Firstly, monetary compensation may not be very effective, particularly when the offender is a poor country. Furthermore, there may be consequences that cannot be offset easily and that may linger for some time. Secondly, in terms of Article 22 of the DSU, compensation is "voluntary", and thus may be avoided by the losing party. Ng'ongo'la is of the view that compensation is not worth pursuing for countries lacking the capacity or ability to exploit concessions.[464] In particular, and correctly so, Ng'ongo'la points to the lack of clarity in terms of the form and rationale for such compensation under the DSU. [465]

3.6 Settlement of Anti-dumping Disputes

3.6.1 Parties to the Disputes

3.6.1.1 Governments

In terms of Article 6.1 of the DSU, only governments have the *locus standi* to litigate anti-dumping issues before the DSB institutions as applicants or respondents. This requirement can be explained by the fact that governments are the primary subjects under the WTO regime.

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[463] DSU, Art 22.2.
[464] N'gon'gola *African Member States* 24.

3.6.1.2 Third Parties

When there is a dispute before the DSB any other Member of the WTO with a "substantial interest in the matter"[466] may be given an opportunity as a "third party" to be heard by the panel, and to make any recommendation to the panel.[467] However, third-party participation is limited. Third parties, for instance, have the right to receive only the first written submission of the parties to the dispute, and to attend the first substantive meeting of such parties.[468]

3.6.1.3 Private Parties

Private parties have no *locus standi* at DSB proceedings. Neither the URAA nor the DSU expressly allow direct access to the WTO dispute settlement procedures by private individuals. The interests of private individuals are represented and their cause argued before the DSB by their governments. The approach is for private parties to lobby their governments to launch a formal complaint to the WTO on their behalf. However, private parties may be indirectly involved in at least two ways in anti-dumping proceedings. Firstly, industry representatives may play a role in the proceedings as part of this country's WTO delegation. This is permissible since the WTO Members have the right to compose their own delegation. Secondly, private individuals or industry representatives may play a role through *amicus curiae* briefs. Note, however, that the *amicus curiae* approach by private individuals and/or industry representatives is generally uncertain in the WTO, and has been a subject of several conflicting decisions by the panels and the Appellate Body.[469]

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465 N'gon'gola *African Member States* 24.

466 See generally DSU, Art 10. See Sibanda 2007 *Codicillus* 57. For an interesting discussion on third-party rights and standing see, Yenkong "Third Party Rights and the Concept of Legal Interest in the World Trade Organization Dispute Settlement: Extending Participatory Rights to Enforcement Rights" 2004 *JWT* 57.

467 It is left up to the individual Member to decide for itself whether it has a "substantial interest" in the matter.

468 See, however, *EC – Bananas III, Arbitration Report* where a third-party developing country with a major interest in the outcome of the dispute was allowed to attend the entire first and second substantive meetings of the panel with the parties to the dispute.

The issue of private parties' participation before the DSB institutions through *amicus curiae* briefs came before the Appellate Body review case in *United States – Import Prohibition of Certain Shrimp and Shrimp Products.*[470] The *Shrimp-Turtles* dispute initiated by Malaysia, India, Thailand and Pakistan against the United States, involved environmental regulation on the part of the United States through the Marine Mammals Protection Act of 1972, which required commercial shrimp trawlers operating in sea turtle habitat to use turtle excluder devices that would allow turtles to escape from the net before drowning. Moreover, this legislation banned the importation of shrimp harvested contrary to the MMPA regulation or harvested by methods harmful to certain sea turtle species.

In the *Shrimp – Turtles* dispute, the Appellate Body took the unprecedented step of receiving unsolicited *amicus curiae* briefs from non-governmental organisations (hereafter NGOs) that included environmentalists and other interested parties.[471] In this case, the Appellate Body rejected the assertion by the Panel[472] that it would be incompatible with the DSU provisions to accept unsolicited *amicus curiae* briefs.[473] The Appellate Body held that a Panel has the discretionary authority either to accept and consider any information and advice given to it even those given by a private party whether requested by a Panel or not.[474] This was the beginning of a series of decisions whereby the Appellate Body asserted that it has a discretionary authority in terms of Article 13 read with Article 17.9 of the DSU and Article 16.1 of the Working Procedures for Appellate Review[475] to accept and consider or solicit *amicus* briefs. In terms of Article 13 of the DSU, the DSB can seek information and technical advice

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469 See Sibanda 2007 *Codicillus* 58.

470 *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R (12 Oct. 1998), [hereafter Shrimp-Turtles, Appellate Body Report].

471 *Shrimp-Turtles, Appellate Body Report,* para. 202 – 209.

472 *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/R (1998), [hereafter Shrimp-Turtles, Panel Report].

473 *Shrimp-Turtles,* Appellate Body Report, para. 7.8.

474 *Shrimp-Turtles,* Appellate Body Report, para. 108.

475 *Working Procedures of the Appellate Body,* WT/AB/WP/1 (adopted 15 February 1996) as amended.

from any individual or body which the DSB deems appropriate or from any relevant source.

Notable cases that followed the Appellate Body ruling in *Shrimp – Turtles*, and that attracted considerable criticism from the General Council, were the *European Communities – Measures Affecting Asbestos-containing Products,*[476] and the *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,*[477] and *Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland* disputes. In the *British Steel* dispute, *the* Appellate Body stated that although pursuant to the DSU and the Working Procedures for Appellate Review, it has no explicit legal obligation to accept and consider *amicus* briefs, it does have the legal authority to decide if it can accept and consider any useful information.[478] The Appellate Body reiterated its *British Steel amicus* briefs position in the *Asbestos* dispute. In the *Asbestos* case the Appellate Body went further by adopting rules on procedures for accepting *amicus* briefs and published these rules on the WTO website. According to the General Council, the adoption of the rules on *amicus* procedures was beyond the limited authority of the Appellate Body. The General Council was of the opinion that the issue of non-governmental participation in dispute settlement was supposed to be settled by the WTO Members, who form the executive authority of the WTO.

The *Thailand-Steel* dispute was the first dispute in which the issue of *amicus curiae* briefs in anti-dumping disputes arose before the Appellate Body. In this case, the Appellate Body received an unsolicited *amicus curiae* brief and rejected it on the basis that it did not find it "relevant to our task".[479] Although it did not fully elaborate its reasons for rejecting the brief, it seems that the Appellate Body position remains the same as in other cases, which is that

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476 *European Communities – Measures Affecting Asbestos-Containing Products,* WT/DS135/8 (12 March 2001), [hereafter EC-Asbestos, panel Report].

477 *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (10 May 2000), [hereafter United States –British Steel, Appellate Body Report].

478 *British Steel*, Appellate Body Report, para. 39.

individuals and organisations that are non-WTO members have no legal right to make submissions to or to be heard by the Appellate Body.

3.6.2 Terms of Reference

The terms of reference (hereafter TORs) are the legal basis for the establishment of a panel and the adjudication of the issues. Unless the parties agree otherwise or propose otherwise pursuant to Article 6.2 of the DSU, the standard TOR are as provided in Article 7.1 of the DSU.[480] Article 6.2, however, permits a complaining party to propose special TORs. The importance of the TORs was emphasised by the Appellate Body in the *EC – Bananas* dispute when it held that it is incumbent upon a panel to examine the request for the establishment of the panel very carefully and to ensure its compliance with both the letter and spirit of Article 6.2 of the DSU. The Appellate Body further held that a panel request must be sufficiently precise because it often forms the TOR of the panel pursuant to Article 7 of the DSU, and that it also informs the complaining party and third parties of the legal basis of the complaint.

Thus, TORs are important as they help in identifying the jurisdiction of panels, and crystallising matters to be entertained by panels.[481] The Appellate Body in *Brazil – Measures Affecting Desiccated Coconut*[482] (hereafter Brazil – Desiccated Coconut, Appellate Body Report) stated that the "matter" referred to a panel for consideration shall consist of the specific claims stated by the parties to the dispute in the relevant documents. A matter which includes the claims constituting that matter does not fall within a panel's TOR unless such claims are identified in the documents referred to or contained in the TOR.[483]

Generally, the panels may not deal with matters not referred to or contained in the TORs.[484] The only exception would be where such other matter is related to

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479 *Thailand – Steel,* Appellate Body Report, para. 74.
480 See Sibanda 2007 *Codicillus* 60
481 Sibanda 2007 *Codicillus* 61.
482 *Brazil – Measures Affecting Desiccated Coconut,* WT/DS22/AB/R (adopted 20 March 1997) [hereafter Brazil – Coconut ,Appellate Body Report].
483 *Brazil – Coconut, Appellate Body Report,* paras. 22–23.
484 See *EC – Bananas, Appellate Body Report,* para.143.

the specific matter at issue. For example, in *Mexico – Anti-dumping Investigation of High Fructose Corn Syrup from the United States*[485] (hereafter Mexico – High Fructose Corn Syrup, Panel Report), a claim regarding the duration of a provisional measure was determined by the Panel as relating to the definitive anti-dumping duty at issue, although the provisional measure was not included in the TOR.

Parties also have to confine themselves to matters and evidence in the administrative records of national authorities. The URAA contains no specific TOR provisions. In view of this, and in cases where parties have not agreed to a special TOR, Article 7.1 of the DSU is applicable. The panel shall "examine, in the light of the relevant provision in the URAA, the matter referred to the DSB ... in the document ... and make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for (in the URAA)".[486]

3.6.3 Claims and Measures to be Challenged

Article 3.3 of the DSU calls for the prompt and speedy settlement of disputes when a Member is of the view that any benefits accruing to it directly or indirectly under the covered agreement are being impaired by measures taken by another Member. If such a case is brought before the DSB, in terms of Article 4.4 of the DSU, a complaining party is required to clearly identify the measures or matters at issue, and indicate the legal basis for the complaint.[487] In the context of anti-dumping disputes, Article 17.3 of the URAA read with Article 17.4, specifies three separate and distinct measures or "matters" that are generally referred to the DSB or that can be challenged before the DSB.[488] These are price undertakings, provisional measures and definitive anti-dumping duties. The concept of "matter" was explained or defined by the Appellate Body in *Guatemala – Mexico Cement* dispute as consisting of the "measure" at issue,

485 *Mexico – Anti-dumping Investigation of High Fructose Corn Syrup from the United States*, WT/DS132/R (adopted 24 Feb 2000), [Mexico – High Fructose Corn Syrup, Panel Report].

486 DSU, Art 7.1.

487 Sibanda 2007 *Codicillus* 61.

and the claims that challenge the measure at issue.[489] In *United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*[490] (US – Japan Steel, Appellate Body Report), the Appellate Body reaffirmed the Panel's decision in the Panel Report in US – *DRAMS*, and gave the term "measure" a broader meaning for the purposes of DSB challenges in connection with the URAA. According to the Appellate Body, Article 17.4 of the URAA should not be construed as setting out limitations on anti-dumping measures that can be challenged before the DSB panels and the Appellate Body.[491] A "measure" would, in addition to measures articulated in Article 17.4 of the URAA, include "[i]n principle, any act or omission attributable to a WTO Member that can be a measure of that Member for purposes of dispute settlement proceedings".[492] Therefore, instruments – whether binding or non-binding – legislation, administrative policy or "anything else", containing rules or norms pertaining to anti-dumping may be challengeable.[493]

3.6.4 URAA Standard of Review

As noted by Ehlermann and Lockhart, the standard of review is important to the review of legislation and administrative decisions.[494] Having a well-defined standard of review, or being provided with guidelines on how to go about reviewing legislation or administrative decisions, augurs well for the

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488 Should be read with Article 3.3 of the DSU.

489 *Guatemala – Mexico Cement*, Panel Report, para. 72.

490 *United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (adopted 15 Dec. 2003) [*US – Japan* Steel, Appellate Body Report].

491 See *US – Japan Steel,* Appellate Body Report para. 83.

492 *US – Japan Steel,* Appellate Body Report para. 81.

493 *US – Japan Steel,* Appellate Body Report. paras. 82–83. In this regard, the Appellate Body, at para. 82 footnote 80, quoted extensively from previous decisions: US – *Superfund,* Panel Report; US – *Malt Beverages,* Panel Report; *EEC – Parts and Components,* Panel Report; Thailand – *Cigarettes,* Panel Report; US – *Tobacco,* Panel Report; Argentina – *Textiles and Apparel,* Panel Report; Canada – *Aircraft,* Panel Report; Turkey – *Textiles,* Panel Report; *US – FSC*; Panel Report; US – *Section 301 Trade Act,* Panel Report; *US – 1916 Act (EC),* Panel Report; *US – 1916 Act (Japan),* Panel Report; *US – Hot-Rolled Steel,* Panel Report; *US – Export Restraints,* Panel Report; *US – FSC (21.5 – EC),* Panel Report; and *Chile – Price Band System,* Panel Report,. See also *US – Carbon Steel,* Appellate Body Report, paras 156 and 157. See further *US – 1916 Act,* Appellate Body Report, footnotes 34 and 35 to paras 60 and 61, respectively.

494 Ehlermann and Lockhart 2004 *JIEL* 492.

requirements in Article 3.2 of the DSU, which regards the DSB as a central element in providing "security and predictability" in international trade. Although there are many definitions of "standard" of review, in this instance I refer to standard of review in a narrow and procedural sense.[495] Article 11 of the DSU sets forth a generally appropriate standard of review to be applied by Panels, except in the case of disputes brought under the URAA.[496] This requires each Panel to make an objective assessment of the matter before it, including an assessment of the facts of the case and the applicability of and conformity with the relevant covered agreement. Furthermore, a Panel must make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreement.[497] Central to Article 11 is that irrespective of whether the Panel makes factual, legal or mixed findings on the application of the law to the facts, such finding shall be as a result of an objective assessment. The review standard set in Article 11 of the DSU for panels applies to all but the URAA. A unique and special standard of review for anti-dumping disputes is set in Article 17.6 of the URAA, which differs from the standard set in Article 11 of the DSU.

Two important issues should be observed from the provisions of Article 17.6 of the URAA. Firstly, Article 17.6(i) of the URAA enjoins the WTO panels to have regard in their review for national investigations, processes and decisions, and not to try to act as a substitute for national proceedings, or to review the findings of the national authorities *de novo.* Moreover, Article 17.6(ii) of the URAA encourages the panels to strive to identify all the possible permissible interpretations of the relevant provision of the URAA, and to uphold the anti-dumping measure by national authorities on the grounds of any such permissible interpretation,[498] if any. In this instance Article 17.6, read with Article

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495 Oesch 2003 *JIEL* 637–639 provides for the definition of "standard of review" in both a narrow and a broad sense, aimed at substantive treaty rules and procedural techniques developed by panels and the Appellate Body.

496 This was acknowledged by the Appellate Body as a standing position in *Argentina – Safeguard Measures on Import Footwear*, WT/DS121/AB/R (adopted 12 January 2000), [hereafter Argentina – Footwear, and Appellate Body Report].

497 See EC – Hormones, Appellate Body Report, para. 116.

498 For a determination of permissible interpretations by the panels see, *EC – Bed Linen, Panel Report,* para. 6.87, reversed in *EC – Bed Lined, Appellate Body Report,* para. 84.

17.5 of the URAA, can be said to buttress the practice and requirement for deference to national authorities in deciding on anti-dumping measures. Secondly, substantively the URAA standard of review is two-pronged. The first part is for the panel to determine whether the national authorities established the facts in a proper manner. The second part is to determine whether the evaluation of these facts by national authorities was unbiased and objective. If the answer to both the first and the second part is positive, the panel should not overturn the evaluation by national authorities.

3.6.5 The Burden of Proof

The traditional doctrine used in many judicial systems to apportion the burden of proof is that "he who avers must prove". The panels of the GATT 1947 followed a different approach in this regard and generally placed the burden on the party whose anti-dumping measures and policies were being challenged.[499] Consequently, the mere assertion of a claim by a party was sufficient. The WTO has, however, discarded the GATT 1947 approach, and follows traditional doctrine in terms of which a party that asserts the affirmative of a particular claim or defence has to establish a prima facie case for his/her claim or defence. In *United States – Measure affecting Imports of Woven Wool Shirts and Blouses from India,*[500] the Appellate Body found it difficult to depart from this traditional approach. In particular, the Appellate Body emphasised that it is "a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions that the burden of proof rests upon the party whether complaining or defending, who asserts the affirmation of a particular claim or defence", up to the point where the burden shifts to the other party because the

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499 See, *United Sates- Imposition of Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada,* DS7/R, B.S.I.D 38S/30 (adopted 11 July 1991), [hereafter United States-Canadian Pork], and par.4.

500 *United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (adopted 23 May 1997), [hereafter US - Indian Wool Shirts, Appellate Body].

former adduced evidence sufficient to raise a presumption that what is claimed is true.[501]

In brief, the Appellate Body generally invokes a shifting burden of proof that places an initial burden of establishing a prima facie case on the complaining party, which burden would then shift to the defending party, which would have to "counter or refute the claimed inconsistency"[502] with the covered agreement, once the prima facie case had been sufficiently established. The establishment of a prima facie case is aided by Article 3.8 of the DSU, in terms of which an infringement of the WTO obligations constitutes a prima facie case. The question of who bears the final burden of persuasion seems to be left to a case-by-case determination by panels, as is the question of the amount and nature of evidence required to satisfy the doctrine that he who avers must prove.[503] There is, however, a slight modification with regard to the incidence of the burden of proof where the case involves a non-violation complaint. In terms of Article 26(1)(a) of the DSU, the complaining party in non-violation complaints must present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement. This modification of the onus of proof also applied in GATT 1947. It was particularly provided for in the 1979 DSU,[504] which saddled the complainant with the onus to provide the DSB with a detailed justification of its claim.[505]

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501 *US - Indian Wool Shirts,* Appellate Body Report para. 16.

502 *EC-Beef Hormones,* Appellate Body Report, para. 98.

503 *United States – Indian Wool Shirts,* Panel Report, paras 11–15, and par.14. For more on the burden of proof see generally Pauwelyn "Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?" 1998 *Journal of International Economic Law 227.*

504 See clause 5 of the 1979 Dispute Settlement Understanding: Annex headed "Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII: 2)". See also *United States – Restrictions on the Importation of Sugar and Sugar-containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions,* 37 Supp BISD 288 (1990) [hereafter United States – Sugar Containing Products, Panel Report].

505 See Sibanda 2007 *Codicillus* 64–66. It should be noted that there was a kind of absolution from the instance position advocated by the panel in *United States – Sections 301–310 of the Trade Act of 1974*, WT/DS152/R (adopted 27 Jan. 2000), [hereafter US – Sections 301–310, Panel Report]. According to the panel, in the case of uncertainty because "evidence and arguments remain in equipoise", the benefit of the doubt must be given to the defending party. See *US – Sections 301–310,* Panel Report, and para. 7.14

3.6.6 The Importance of Previous Decisions

Under the GATT 1947 dispute settlement system, adopted panel reports only bound the parties to the dispute. The reports – and their reasoning and conclusions – were not legally binding on subsequent panels. The GATT panels did not apply the system of precedent in decision making; for example, in the European *Economic Community-Restrictions on Imports of Dessert Apples*[506] dispute (hereafter EEC – Dessert Apples, Panel Report) the Panel considered itself not legally bound by all the details and legal reasoning of the previous panel report.[507] The application of *stare decisis* by the DSB panels and Appellate Body remains unclear. The current position seems to be that DSB reports do not create a precedent or "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.[508]

In the *India – Pharmaceuticals* dispute, the Appellate Body reiterated its previous stance[509] that "Panels are not [legally] bound by previous decisions of panels or the Appellate Body even if the subject matter is the same".[510] Therefore, an anti-dumping dispute before the DSB may not be determined on the basis of previous decisions of the DSB, even though the matter is the same. Such decisions may only be taken into account because they create a "legitimate expectation" among WTO Members in similar cases, and are merely relevant references of persuasive value, and are not dispositive.[511] The WTO

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506 For example, in *European Economic Community - Restrictions on Imports of Dessert Apples,* B.I.S.D.36s/93 (adopted 22 June 1989) [hereafter ECC- Dessert Apples, Panel Report].

507 *ECC- Dessert Apples,* Panel Report, para. 12.1.

508 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969).

509 Such as in *Japan- Taxes on Alcoholic Beverages*, WT/DS8/AB/R 4 Oct 1996 (adopted 1 Nov 1996), [hereafter, Japan- Beverages, Appellate Body Report]. See also *Canada – Import Restrictions on Ice Cream and Yogurt* (1985) 36 Supp. BISD 68, 85. [hereafter Canada – Ice Cream and Yogurt, Panel Report].

510 *India-Pharmaceutical,* Appellate Body Report, para. 7.30.

511 Sibanda 2007 *Codicillus* 67.

position in this regard is similar to that of the GATT 1947 Panels, which favoured a "clean slate"[512] case-by-case approach to dispute settlement. It is, however, becoming a practice for the DSB to consider previous decisions, even unadopted reports, in subsequent dispute settlement proceedings despite the case-by-case approach followed by the WTO. The WTO Panels have gone as far as to consider previous unadopted reports to be useful and relevant.[513] In this regard, the Appellate Body in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*[514] (Argentina –Footwear, Appellate Body Report) made it clear that a distinction must be drawn between deriving useful guidance from an unadopted report and relying upon an unadopted report.

3.6.7 Adoption of Reports

The DSB is much like a court of international trade, with a unique adoption of decisions, compared with the system under GATT 1947. The GATT 1947 dispute settlement system, which was codified after the 1979 Tokyo Round of trade negotiations, employed a power-oriented, diplomatic approach.[515] Under the GATT 1947 system, decisions could only be adopted if there was a positive consensus between all the Parties involved, including the parties to the dispute. As a result, and for obvious reasons, a losing party could block the adoption of a Panel report.[516] The DSB is quasi-judicial in nature; that is, it is a legalistic and rule-based dispute settlement system with appeal rights.[517] Although the WTO practices decision making by consensus, as under GATT 1947, the consensus system under the WTO is almost automatic, subject to review on questions of

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512 Cameron and Gray "Principles of International law in the WTO Dispute settlement" 2001 *ICLQ* 275.

513 See *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R [hereafter Argentina – Footwear, Panel Report].

514 *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R [Argentina – Footwear, Appellate Body Report], par.44.

515 Codified as the *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* (adopted 28 Nov 1979). See GATT Doc. L/407, GATT BISD 26th Supp 210 (1980).

516 See Hoekman and Kostecki *Political Economy of the World Trading System* 75.

517 See Shell "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization" 1995 *Duke L. J.* 832.

law by the Appellate Body. The current rule is that the adoption of reports can only be blocked by a negative consensus or reverse consensus.[518]

3.7 Summary

This chapter established that the concept of "dumping" has a long history; it also gave considerable attention to the GATT/WTO negotiations. It was recorded that dumping was recognised as an international problem in 1947 through the provisions of Article VI. I have noted that the provisions of Article VI resemble those of Article 34 of the Havana Charter, and that, interestingly, the provisions have been reproduced by the WTO under its new Article VI of GATT. Article VI provides for the institutionalisation of anti-dumping in the GATT/WTO by encouraging the creation of model anti-dumping rules and procedures for national legislation. Subsequently, anti-dumping measures should only be implemented if they cause, or threaten to cause, injury to the industry of the importing country.

In this chapter it was also noted that the provisions of Article VI were considered too vague and were, therefore, expanded in anti-dumping agreements that emanated from the Kennedy Round, the Tokyo Round and the Uruguay Round trade negotiations. More specifically, it was established that the Kennedy Round Anti-dumping Code was the first to produce rules on anti-dumping duties. Unfortunately, this Code had many limitations including, but not limited to, being ratified by too few countries, excluding the United States, and lack of detail and clarity on many of the issues, such as the procedure and criteria for determining dumping. Be that as it may, it was highlighted that the Kennedy Round Code was substantially revised during the Tokyo Round negotiations, the results of which are now commonly known as the Tokyo Round Anti-dumping Code.

The Chapter also briefly dealt with the WTO anti-dumping agreement, the URAA, which seeks to provide WTO Members with clearer guidance on anti-

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[518] DSU, Art 17.14. Reverse or negative consensus is required in the following instances in order to prevent action been taken: establishing a panel (DSU, Art 1); circulating and

dumping laws and practice. The URAA establishes new and refined rules on how anti-dumping duties are to be imposed; the general rules on how injury and dumping are to be determined; and some special rules for the resolution of dumping disputes. However, there is still dissatisfaction among WTO Members with the URAA's very complex and sometimes ambiguous rules. It is for that reason that, in 2007, some changes to the URAA were proposed by Member States.

This chapter also dealt with dispute settlement in the WTO, and it specifically addressed issues and rules related to the adjudication and litigation of anti-dumping disputes in the WTO, and the critical role played by the DSB in resolving trade disputes, particularly in the context of anti-dumping disputes. Firstly, I indicated and demonstrated that the order of compliance is the preferred enforcement mechanism in cases of a Member's non-compliance with its WTO obligations. Other measures, such as retaliatory measures, more often than not only serve to fuel trade disputes. Secondly, the procedural and substantive details of litigating anti-dumping disputes in the WTO were also discussed. Most importantly, we dealt with the lack of *locus standi* for private individuals in WTO litigation, the incidence of the burden of proof, the standard of review in anti-dumping disputes, the manner in which decisions are reached by the Panels and the Appellate Body, and the role played by previous decisions in dispute settlement.

The next chapter will deal with the institutional and the legislative background of the South African anti-dumping framework.

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adopting a panel report (DSU, Art 16.4); circulating and adopting an appellate body report (DSU, Art 174); and authorising the suspension of concessions (DSU, Art 22.6).

CHAPTER FOUR: LEGISLATIVE AND INSTITUTIONAL BACKGROUND TO THE SOUTH AFRICAN ANTI-DUMPING REGIME

4.1 Introduction

This chapter gives a brief legislative background to the evolution of anti-dumping law in South Africa from 1914 to 2004, and the institutions that are charged with implementing the South African anti-dumping system. The legislation that forms the primary focus of this chapter is the Customs Tariff Act of 1914, the Customs and Excise Act of 1964, the BTTA and the ITAA. Further, the anti-dumping regulatory institution to which we devote most attention is the ITAC. This chapter will, however, also give an account of the ITAC's forerunner, the BOTT. In addition to the legislative and regulatory frameworks that are specific to dumping and anti-dumping, this chapter will give a brief overview of other laws that are relevant, but not specifically related, to anti-dumping law and practice, such as the Constitution of 1996.

4.2 Union of South Africa Anti-dumping Legislation

4.2.1 The Customs Tariff Act, 1914

The legislation governing South African anti-dumping measures dates back to the Customs Tariff Act of 1914,[519] although anti-dumping measures were proposed in pre-Union South Africa as early as 1906.[520] The Customs Tariff Act

519 It has been erroneously reported by Steinhauer *South Africa,* that South Africa had no trade remedies in law prior to 1996. But see Sibanda 2001 *CILSA* 242. For a very interesting account of the anti-dumping regulation in South Africa, including the pre-Union days, see Plant "The Anti-dumping Regulations of the South African Tariff" 1931 *Economica* 63.

520 According to Plant, as early as January 1906, the Natal Commissioners unanimously recommended the adoption of the Canadian Anti-dumping Clause. Similarly, in 1908 the Cape Commission also recommended the Canadian anti-dumping clause model. See Plant 1931 *Economica* 68–69.

of 1914 contained a provision on trade remedies, including anti-dumping measures, subsidies and countervailing measures,[521] which were administered by the Customs Department (later renamed the South African Revenue Service [SARS]). The Customs Tariff Act, modelled on the Canadian law,[522] made South Africa one of the first 23 founding members of GATT 1947 and the fourth to enact anti-dumping legislation after Canada,[523] New Zealand[524] and Australia.[525] In 1908, France could have been the fourth country to have anti-dumping law modelled on the Canadian law of 1904, but it was rejected by the French government owing to the difficulty in the proposed determination of normal value.[526]

The Customs Tariff Act was largely based on the findings of the 1910 Cullinan Commission, which was tasked by the government of the Union of South Africa with investigating the feasibility and desirability of establishing local industry.[527] The Customs Tariff Act vested in the Governor-General of the Union of South Africa discretionary powers to impose *formula* duties, which acted as anti-dumping duties, on goods that were dumped in the Union territories. This was a

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521 See Customs Tariff Act, s 8.

522 Plant 1931 *Economica* 69.

523 Canada: An Act to Amend the Customs Tariffs Act of 1897, S.C. 1904, C 11, S. 19. The Canadian *Act to Amend the Customs Tariff Act* of 1897 was passed in 1904, and is generally regarded as the first modern anti-dumping law. See Viner *Anti-dumping* 193. The 1921 Canadian amendment of anti-dumping law became the caterpillar of anti-dumping legislation in other jurisdictions. For example, the New Zealand legislation of 1921, the Newfoundland legislation of 1921, the United Kingdom legislation of 1921, and the United States legislation of 1921 were all modelled on or similar to the 1921 Canadian Law. See Viner *Anti-dumping* 219; 231–234, and Barcelo 1991 *The World Economy* 314. See also Deardorff and Stern 2005 *The World Economy 633.*

524 New Zealand: *Agricultural Implement Manufacturer, Importation and Sale Act* of 1905.

525 Australia: *Industries Preservation Act* of 1906.

526 See Viner *Anti-Dumping* 274. Note however, that Niels 2000 *Journal of Economic Survey* 468 places the United States in fourth position as the country that enacted anti-dumping legislation through the now jettisoned Anti-dumping Act of 1916, which was part of the Revenue Act of 1916. It is submitted that Niels overlooked the South African legislation of 1914. Note that the United States' Anti-dumping Act of 1916 was peculiar to modern anti-dumping law as we know it since it was essentially a criminal statute with criminal punishment including fines and possible imprisonment. It is for this reason that Irwin 2005 *The World Economy* 653 argues that the United States' anti-dumping law as currently known really began with the now repealed Anti-dumping Act of 1921. For a critical comparison between the 1916 and the 1921 Act see Irwin 2005 *The World Economy* 653–654.

527 See Smit *et al Economics: A South African Perspective* 490.

novel measure designed to protect national industries from unfairly priced imports.[528]

The South African anti-dumping regime underwent gradual reforms from 1914. In 1922, the Customs Tariff Act was redrafted and amended by the Customs and Excise Duties (Amendment) Act.[529] Accordingly, for the first time since 1914, the South African anti-dumping regime made reference to injury and causation elements. The Act, as redrafted, vested in the Governor-General the power to impose anti-dumping duties if imported goods were being sold in the Union at less than the wholesale price in the country of manufacture and if, because of such a sale, a Union industry was being threatened.

In the Union of South Africa, the first major and comprehensive regulation of anti-dumping duties was imposed by sections 82 to 87 of the Customs Act of 1944.[530] The Customs Act empowered the Minister of Finance or any Minister of State delegated by the Minister of Finance (or any Minister of State assigned by the Governor-General to administer the Act) to impose anti-dumping duties on goods imported into the Union at a lower price, or in circumstances detrimental to industries, or to firms within the Union or when the imposition of the dumping duties would be in the "public interest".[531]

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528 Section 8 of the Customs Tariff Act provided that:

> In the case of goods imported into the Union of a class or kind made or produced in the Union, if the export or actual selling price to an importer in the Union is less than the current value of the same goods when sold...then special duty (or anti-dumping duty) equal to the difference between the said selling price of the goods for the export price and the true current value thereof for home consumption shall be imposed.

529 Customs and Excise Duties (Amendment) Act 35 of 1922. Further amendments through the Customs and Excise Duties (Amendment) Act 23 of 1923 were later wholly amended by the Customs and Excise Duties (Amendment) Act 36 of 1925.

530 Customs Act 34 of 1944.

531 See s 82(1). The Customs Tariff Act was apparently put to good use. A study conducted by GATT in 1958 shows that of the 37 anti-dumping decrees in force in all GATT member countries, 21 of those were in South Africa.

4.3 Republic of South Africa Anti-Dumping Legislation

4.3.1 Customs and Excise Act, 1964

In the 1960s, the South African anti-dumping system was further regulated by the Customs and Excise Act of 1964.[532] Sections 55 to 57A of this Act made provision, *inter alia*, for anti-dumping measures and remedies. Accordingly, the anti-dumping measures were applied as protection against disruptive competition, which was sanctioned through the imposition of formula duties.

The Customs and Excise Act made provision for at least five types of anti-dumping duties, namely, ordinary duties, bounty duties, freight duties, exchange duties and sales duties. The ordinary anti-dumping duties were, in terms of section 55(5)(a), applicable when goods were exported into South Africa at a free-on-board price less than the domestic value. Free-on-board price was the price charged by the exporter plus all the costs and charges relevant to the sale in question and to placing such goods on board a ship or any vehicle for exportation. The domestic value of imported goods was the market price at which such good or similar goods were freely offered for sale for consumption in the exporting territory, including any royalty, cost of packaging and all other expenses related to shipment and/or dispatch in the exporting territory.

The bounty duties applied when goods which were granted a bounty – either by way of a subsidy, rebate or bonus by the exporting country or the country in which they were manufactured or produced – were exported or likely to be exported into South Africa.[533] The exchange duties related to the importers' currency depreciation. Such duties could be imposed on goods imported from a territory with a depreciated currency in relation to the South African currency. In addition, there was some kind of functional similarity between freight duties and

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532 Particularly Chapter Six. The Customs and Excise Act is currently under review for possible amendments. However, the amendments will have little direct effect on the investigation of dumping practices and the imposition of anti-dumping measures.

533 Customs and Excise Act, s 55(5)(b),

sales duties. Thus, sales duties applied to dumping as it is generally known today, that is, the offering of goods for sale in South Africa at a price less than their domestic value in the ordinary course of trade.[534] Moreover, the sale should have resulted in material injury to industries within South Africa. Freight duties could then be imposed by the Minister against imported goods sold in South Africa at a price lower than that at which they were sold domestically, whenever the Minister was satisfied that it was in the public interest to do so.[535]

4.3.2 Board on Tariffs and Trade Act

The provisions of the Customs and Excise Acts governed anti-dumping measures until the enactment of the BTTA in 1986. The implementation problems identified in the Customs and Excise Act led to the decision to place the administration of the anti-dumping regime under the BTTA of 1986. The main aim was to introduce a law which would allow a more effective use of anti-dumping measures and properly deal with unfair competition.[536] The BTTA also had several shortcomings relating to procedural and substantive issues, however, and in 1992 it was amended by the Board of Trade and Industry (Amendment) Act of 1992.[537]

From a trade liberalisation perspective, the records of the South African Parliamentary debates show that South Africa regarded the amendments as not designed to introduce a highly protectionist legislation, but rather a fair protection framework for South African industries against unfair and injurious external competition following the reopening of the country's markets to international trade.[538]

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534 Customs and Excise Act, s 55(5)(c).

535 Though no guideline existed as to when "public interest" circumstances existed , it would seem that the Minister would act if such imported goods presented a threat of material injury to industries within South Africa.

536 See Hansard *Deel 32*, *Debatte van Parliament* 4001 -09.

537 By the Board on Tariffs and Trade (Amendment) Act 60 of 1992.

538 See Hansard *Deel 32*, *Debatte van Parliament* 4801.

The amendments were, among other things, aimed at clearly defining dumping and also extended the jurisdiction of the BOTT's anti-dumping measures to the SACU member territories. Further amendments were introduced in 1995[539] and in 1997[540] in an attempt to make the BTTA more compliant and consistent with the GATT and the URAA. In spite of both the 1995 and the 1997 Amendment Acts, the South African legislation still did not fully conform to the WTO regime. The 1995 Amendment Act failed, for instance, to produce the procedural framework and/or regulations needed for the conduct of anti-dumping investigations. The 1997 Amendment tried to close the lacuna by giving the Ministry of Trade and Industry the power to put in place trade regulations.

4.3.3 International Trade Administration Act, 2002

In 2003, the BTTA and the Import and Export Control Act 45 of 1963 were wholly repealed through the promulgation of the ITAA as South Africa's new legal framework for trade regulation,[541] which also operates on a SACU-wide basis.[542] The ITAA was promulgated on 22 January 2003 and came into force on 1 June 2003.[543] The ITAA, among other things, introduced an anti-dumping system that prima facie reflected compliance with the URAA and the changes in WTO anti-dumping law. The ITAA is not a self-contained legislation, and merely provides that the ITAC conduct anti-dumping investigation on request, and contains provisions on the treatment of confidential information: the definition of dumping, normal value and export price with minimal details. Anti-dumping provisions are briefly set out in the ITAA and extensively elaborated on in the accompanying anti-dumping regulations which were promulgated on 14 November 2003.[544] The South African anti-dumping regulations, together with the ITAA, were formally notified to the WTO's Committee on Anti-dumping

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539 By the Board on Tariffs and Trade (Amendment) Act, 39 of 1995.

540 By the Board on Tariffs and Trade (Amendment) Act 16 of 1997.

541 See *Notice 123 in Government Gazette No* 24287 of 21 January 2003.

542 See Notice 123 in Government *Gazette* No 24287 of 21 January 2003. See also Nagawaga *Anti-dumping Law* 206.

543 See Proclamation R9 of 2003 in *Government Gazette* No 24801 of 21 February 2003.

544 The 2004 ADR are in the process of being amended. The draft amended ADR were published for public comment on 10 November 2006.

Practices in January 2004 and later successfully defended before WTO members.[545]

The current anti-dumping regulations were preceded by the anti-dumping guidelines of 1992,[546] 1994[547] and 1995,[548] which, although used by the courts such as in the Supreme Court of Appeal,[549] had no legal standing as they were never promulgated into legislative instruments. The regulations complement the ITAA as they contain additional information, guidelines and criteria relevant to anti-dumping administration. Notable are provisions containing more information on confidential information, party representations and submissions;[550] substantive issues such as the determination of injury, of dumping[551] and review of anti-dumping determinations.[552]

The enactment of the ITAA came against the backdrop of lessons learnt in 1992 from the anti-dumping regimes of other jurisdictions, such as Australia, the EU, Korea, and New Zealand, following a visit by one BOTT member and the Director in the Trade Remedies Division to these jurisdictions.[553] The BOTT members also obtained training by way of courses and workshops presented by the Rules Division of the WTO, the United States Department of Commerce[554] and from other relevant service providers.[555] The training by the Rules Division of the WTO should have been the most important training for the BOTT

545 On notification to the WTO in 2004, see the WTO document G/ADP/N/1/ZAF.

546 Board *Guide to the Policy and Procedure with regard to Action against Unfair International Trade Practices: Dumping, Subsidies and other Forms of Disruptive Competition* (1992).

547 Board *Guide to the Policy and Procedure with regard to Action against Unfair International Trade Practices: Dumping, Subsidies and other Forms of Disruptive Exports* (1994).

548 Board *Guide to the Policy and Procedure with regard to Action against Unfair International Trade Practices: Dumping and Subsidised Exports* (1995).

549 See particularly the case of *BOTT v Brenco*.

550 See the ADR ss 2–6.

551 See the ADR ss 7–39.

552 See the ADR ss 40–46.

553 See Matona *GATT, Dumping and Anti-dumping* 58.

554 It is reported by Brink *Theoretical Framework for South African Anti-dumping Law* 722 that the United States presented anti-dumping courses in South Africa in 1996 and 1998.

555 Anti-dumping courses where presented by experienced scholars and lawyers from different countries including Belgium, the Netherlands, and the United States. See Brink *Theoretical Framework for South African Anti-dumping Law* 692 and 722–723.

members, and one would assume that its purpose was to capacitate the members on WTO-compliant administration of trade remedies, and to learn best practices in the area.

4.3.4 Other Relevant Law

4.3.4.1 The Constitution

4.3.4.1.1 General Remarks

The role and the place of international law[556] in South Africa can be determined by looking at several key provisions of the Constitution. It should be noted that the key provisions of the Constitution relevant to this thesis are sections 39, 231, 232 and 239.[557] As indicated in Chapter 1.1, the provisions of the Constitution of 1996 on international law are critical to the understanding, interpretation and application of the ITAA and the ADR, despite the fact that the WTO law was never enacted into national law in accordance with the express provisions of the Interim Constitution. Besides, the construction of provisions of the ITAA (and ADR), which entrust the ITAC with administrative powers to administer trade remedies, may raise constitutional issues. This position was recently echoed by the Constitutional Court.[558]

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556 In this thesis international law is to be understood as a combination of treaties and customs that regulate the conduct of states. In particular, reference is made to the main sources of international law, namely: customary international law, treaties and conventions, and decisions of the DSB panels and the Appellate Body.

557 We do not embark on an extensive and in-depth study of the place of public international law in South Africa, as such study is beyond the scope of this thesis. The place and status of public international law in South Africa is well known. For an in-depth study on the constitutional reception of international law in South Africa, see generally Olivier *International Law in South African Municipal Law*. See also Olivier "Interpretation of the Constitutional Provisions Relating to International Law" 2003 *Potchefstroom Elec. L.J* 1; Dugard *International Law* 47–80.

558 In *Itac* v *Scaw* par.43 n 40, quoting several cases including *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32, Case No CCT 40/09, 14 October 2009, as yet unreported, at paras 42–43; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at par.31; *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at par.23; and *National Education Health and Allied*

The importance of the Constitution in this regard lies in the fact that some of the provisions of the South African anti-dumping law may have constitutional implications. Furthermore, the South African anti-dumping law was enacted and/or has been amended to be compliant with the URAA. Therefore, the URAA is international law which has implications for South Africa as a member of the WTO. It is submitted that any discussion on the role and place of WTO law in South Africa should take into account the fact that South Africa has been a member of the global movement on international trade for more than 60 years. The place and role of international law in South Africa has also been addressed in several leading cases of the Constitutional Court,[559] and it has also been alluded to by the SCA in two critical cases dealing with dumping and anti-dumping matters.[560] Unlike the Interim Constitution, the Constitution of 1996 now allows the possibility of the direct application of the URAA. The problem, however, is whether WTO Agreements should be treated under the new or the old constitutional regime.

4.3.4.1.2 Why WTO Law should have Application in South Africa as International Law

Current studies in South Africa and legal opinions are in agreement that the GATT and WTO law are binding on South Africa at an international level. However, there seems to be no consensus on whether WTO law is directly applicable in the domestic law or not. Moreover, there does not seem to be any real consensus on whether GATT/WTO law can be used by citizens in South African courts. Some prominent South African international law scholars, including Professors Schlemmer,[561] Dugard and Erasmus, insist that the WTO law is not part of the South African municipal law and thus cannot be used by

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Workers Union v University of Cape Town and Others [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 1–5.

559 See, for example, *S v Makwanyane and Another* 1995 6 BCLR 793 (CC); *Government of the Republic of South Africa v Grootboom* 2000(11) BCLR 1169(CC), 2001 (1) SA 46 (CC).

560 In *Progress Office Machines v SARS* and *BOTT v Brenco* cases.

561 Schlemmer 2004 *SAYIL* 134–135.

citizens in South African courts, nor can it have direct application in the municipal law.[562] In her arguments against the application of WTO law in municipal law, Professor Schlemmer refers to parliamentary debates on the approval and ratification of the WTO Agreements. According to Prof Schlemmer, the debates were silent on legislation enacting the WTO Agreements.[563] This revisionist approach by South African commentators in respect of giving effect to WTO law in municipal law can be explained by the argument that "international norms do not and should not be directly effective domestically, and that the political branches, rather than the courts, should determine the domestic status of international legal obligations". [564]

It is submitted, however, that the assertion that currently WTO law has no application in South African municipal law, although it may be based on sound reasons, is doubtful and difficult to sustain given some developments in South African anti-dumping law and practice.[565] From the internationalist perspective, it is submitted that South African courts or tribunals applying South African law must give domestic effect to WTO norms and rulings. The following are the reasons for this submission:

First, the assertion that GATT/WTO law has no legal effect in South Africa or that it never had any legal effect in South Africa seems to be based on an erroneous opinion by the Chief State Law Advisor in 1992. At the time, the Chief State Law Advisor expressed an opinion that the GATT had never been applied, either provisionally or definitively, by South Africa. The relevant part of the opinion reads:

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562 See Dugard *International Law* 47–80; Schlemmer 2004 *SAYIL* 134–135.

563 Schlemmer 2004 *SAYIL* 134 n 57.

564 Dundorff "Less than Zero: The Effects of giving Domestic Effect to WTO Law" 2008 *Loyola University Chicago International Law Review* 281, and fn 9 quoting a few revisionists including Movsesian "Judging International Judgments" 2007 *Va. J. Intl' L. 65*; Bradley "The Federal Judicial Power and the International Legal Order" 2006 *Sup. CT. Rev.* 59; and Ku "International Delegations and the New World Court Order" 2006 *Wash L. Rev.* 1.

> The application of GATT by South Africa was ... made contingent upon subsequent regulations ... No such regulations were ever made: consequently no date for the application of GATT has been determined and in our opinion it has never formed part of the domestic law and thus its provisions cannot be invoked before national courts by the subjects ... .[566]

As correctly argued by Eisenberg, the Chief State Law Advisor's opinion is not entirely correct and may be misleading. The GATT's provisions were binding on the Republic under international law pursuant to section 3 of the Geneva General Agreement on Tariffs and Trade Act of 1948 (hereafter GATT Act). Under Proclamation 119 of 1948,[567] the Governor-General declared that the GATT would come into effect from 13 June 1948, in accordance with the requirements of section 3 of the GATT Act. The GATT would then apply provisionally in relation to the territories listed therein.[568] Thus, GATT law can be said to have been soft international law in South Africa.

Second, the assertion seems to have emerged from the confusion of two separate, but interdependent issues, namely, whether WTO law is international law in municipal law, as contemplated in the Constitution, and whether South Africans and other parties may invoke the provisions of the WTO before national courts. The latter relates to the question whether WTO law is directly or indirectly applicable in South Africa. Hence, at the least it should be maintained that WTO law is soft international law in South African municipal law.

Third, South Africa had to accept all the multilateral rules as a condition of membership of the WTO. By signing the WTO Agreement, South Africa gave essential legitimacy to the need to comply with WTO obligations when it ratified the WTO Agreement. It is, however, rather disappointing that the Supreme Court of Appeal in the *Progress Office Machines* case was in haste to declare

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565 The position taken in this thesis is that WTO law is international law in the South African municipal law. It is submitted that holding otherwise is devoid of logic and sustainable reasons in the light of the practice by ITAC and the courts.

566 Quoted by Eisenberg 1993 *SAYIL* 132.

567 *Proclamation 119 of 1948 Government Gazette* 3982 of 7 June 1948.

568 Namely, Australia, Belgium, Canada, China, Cuba, Czechoslovakia, France, Luxembourg, the Netherlands, UK and Ireland. See Eisenberg 1993 *SAYIL* 133.

that the lack of enactment into municipal law means that no rights can be derived by private parties from these WTO agreements.[569] It is submitted that the decision is partly incorrect. The ratification of the WTO Agreement by South Africa, like the ratification of any international agreement, raises a legitimate expectation that the standard set by that agreement would be followed or be promoted. The utility of international agreements should thus not be based on the necessity of legislative incorporation only. This approach, which has been given a high level of attention after the decision of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh*[570] (hereafter Teoh), has been accepted as a good approach in some jurisdictions like England.[571] In *Teoh* the court held that ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act. The court in in this case referred to the New Zealand Court of Appeal in *Tavita v Minister for Immigration,*[572] per Cook P, which stated that ratification should not be used merely as "window dressing". I also submit that ratification of the WTO Agreement by South Africa should not be merely "platitudinous" or "ineffectual" and must not be employed as a mere strategic measure to show South Africa's intention to comply with WTO obligations.

Fourth, the ITAA was enacted with the explicit purpose of making South Africa compliant with her WTO obligations. In fact, almost every document of the ITAC acknowledges that the ITAA and related regulations are intended to implement the URAA obligation. For example, clause 1 of the Sunset Review Questionnaire clearly states that the "South African legislation, which puts into

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569 *Progress Office Machines v SARS*, paras 6 and 7.

570 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 283. [hereafter *Teoh].* However, it is interesting to note that the *Teoh* decision was not well received in Australia. After the handing down of *Teoh*, for instance, the Australian Attorney General and the Minister for Foreign Affairs delivered a joint ministerial statement rejecting the High Court's reasoning. See generally, Churches "The Incorporation of International Treaties: The Australian Experience". Paper delivered to the International Association of Constitutional Law, Cape Town Roundtable, and Constitutionalism after Transition, April 2006, at 4–8.

571 See *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi* [2001] Q.B. 667 at 690ff per Lord Newman, stating that: "I take it to be firmly established that treaty obligations assumed by the executive are capable of giving rise to legitimate expectations which the executive will not under municipal law be at liberty to disregard."

effect the provisions of the World Trade Organization dealing with dumped and subsidised exports is contained in section 16 of the International Trade Administration Act, 2002 (the ITA Act/ITAA)". In addition, Clause 4 of the Sunset Review Questionnaire further states that "South Africa is bound by this agreement and the Commission is committed to act in accordance with the Anti-dumping Agreement within the framework of South African law". This, it is submitted, amounts to the incorporation of the URAA in the South African municipal law by reference, and thus the URAA is open to direct application even by private parties.[573] It is submitted that such reference may not be treated differently from other cases of incorporation by reference.[574]

Fifth, the URAA is always explicitly referred to in the ITAC reports. The current standard presentation of the ITAC reports is to have an introductory paragraph referring to WTO law. The relevant paragraph states as follows:

> This investigation is conducted in accordance with the International Trade Administration Act, 2002, (the ITA Act), the World Trade Organisation Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (the Anti-Dumping Agreement) and the International Trade Administration Commission of South Africa Anti-Dumping Regulations (ADR).

Sixth, section 33(1) and (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Moreover, that everyone whose rights have been affected by administrative action has the right to be given written reasons. Section 33(3) requires Parliament to enact national legislation to give effect to the rights referred to in sections 33(1) and (2). One of the relevant pieces of legislation in this regard is

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572 *Tavita v Minister for Immigration* [1994] 2 NZLR 257 at 266

573 See The Constitutional Court in SCAW par.25 acknowledging that ITAA and the ADRs make WTO law binding on South Africa in international law. However, see Schlemmer 2004 *SAYIL* 135, who is of the view that reference of the URAA in the ITAA and ADRs amounts to rewriting the WTO Agreements into national legislation, and not incorporation by reference. It is submitted that Schlemmer's understanding of incorporation by reference is too rigid and may not be desirable in modern international law.

574 See Ohlhoff and Schloemann "Transcending the Nation State? Private Parties and Enforcement of International Trade Law" 2001 *Max Planck University Yearbook* 710–712.

the Promotion of Administrative Justice Act (PAJA) of 2003.[575] Any failure by the ITAC to dispense administrative justice fairly in its anti-dumping proceedings would amount to a "breach of a constitutional duty" and the ITAC decision (or non-decision) would be "vulnerable to legal challenge."[576] Although not explicitly stated in the Constitution, the Constitution attracts the right of procedural fairness if an administrator or an administrative authority like the ITAC departs from the standard raised by a ratified treaty or convention. It is submitted that this approach, which was adopted by the Australian court in Teoh[577] to give a treaty indirect application in Australian domestic law prior to their implementation through legislation, is the right approach to be considered for application in South Africa.

Seventh, South African courts acknowledge WTO law as constituting an important *"corpus* of law in the municipal law sphere".[578] The SCA in the *BOTT v Brenco* case, for example, acknowledged that the WTO provides an international practice that cannot be lightly dismissed. While pointing out that at the time the investigating authority was not obliged as a matter of law to comply with the Tokyo Round Anti-dumping Code and the URAA, the court emphasised that that international practice is of some assistance in assessing the fairness of the practices of the South African investigating authority in conducting anti-dumping investigations. It is submitted that the decision in *BOTT v Brenco* supports the proposition that the non-self execution of an international agreement does not necessarily deprive it of its recognition and application in South Africa.

In the *Progress Office Machines v SARS* case, the SCA had to deal with the question of the status of WTO agreements in South Africa. The court clarified the position that WTO agreements cannot be relied upon under South African

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575 Promotion of Administrative Justice Act 3 of 2000 [hereafter PAJA]. The other legislation is the Promotion of Access to Information Act 2 of 2000 [hereafter PAIA].

576 See *Steenkamp NO v Provincial Tender Board, EC* [2006] 1 All SA 478 (SCA) par 24.

577 See Churches *The Incorporation of International Agreements: The Australian Experience* discussing the controversy that followed the *Teoh* decision.

578 See Dugard *International Law* 435.

law. The Court based its position on the premise that, generally, international law does not have direct effect under the Constitution of 1996, unless it is enacted into law by national legislation pursuant to sections 231 through 233 of the Constitution. The court, however, held that the passing of the ITAA and the promulgation of the ADR were "indicative of an intention to give effect to the provisions of the [WTO] treaties binding on the Republic in international law".[579]

The Court's approach in the *Progress Office Machines v SARS* case mirrors the decisions of Australian courts, which it is submitted, is the most plausible approach to the question of the link between WTO law and national law from the South African perspective. The Australian Federal Court in *Atlas Air Australia Pty (Ltd) v Anti-dumping Authority* sought to clarify the legal relationship between that country's Customs Act of 1901 and GATT anti-dumping rules, and held that in the circumstances the GATT Anti-dumping Code was "not part of domestic law" and there was no link between the Code and Australian law in light of the fact that there was no explicit mention of the GATT in the Customs Act.[580] However, the Court was quick to caution that its ruling in that regard should not be interpreted to mean that the GATT Anti-dumping Code "can be disregarded by Australian Courts".[581] The Constitutional Court in the *SCAW* case made a critical pronouncement regarding WTO law as "international law". Unlike the European Court of Justice[582] which regards WTO law as an endangerment to the autonomy of the European Community because of its pervasiveness, the Court was quick to acknowledge the constitutional implications of not considering the WTO-related issue in question.[583] It is submitted that the *SCAW* case represents a clear position by the Constitutional

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579 *Progress Office Machines* par 6.

580 However, note that s 10(b) of the Anti-dumping Authority Act of 1988 enjoins the Australian anti-dumping authorities to have regard to "Australia's obligations under the General Agreement on Tariffs and Trade. See generally Feaver *1997 Australian Journal of Public Administration* 66–77.

581 *Atlas Air Australia Pty (Ltd) v Anti-dumping Authority* (1991) 99 ALR 29, 40. The Court further indicated that Australian common law principles state that the courts may have regard to "a relevant international treaty" to resolve problems in interpretation. See *Atlas Air Australia,* 41.

582 See discussion in Chapter 4.3.3.1 for the few European Court of Justice (ECJ) cases referred to in there.

583 See *SCAW* par.43–45.

Court that WTO law relevant to a particular trade issue before South African courts must not be disregarded without full consideration of the implications thereof.

The position of South African courts on the direct application of WTO law has also been an issue in other jurisdictions. The EU, for example, deals with the issue with great caution and scepticism. According to Bronkers, the ECJ has consistently denied "direct effect" to WTO law and rules. One of the reasons for this denial Bronkers states, "is that the scope of the WTO agreements is so pervasive that by granting direct effect the European courts would endanger the autonomy of the EC and assign the role of final arbiter over EC regulation to the WTO".[584] In the case of *IKEA v Commissioners of Customs & Excise,*[585] for example, the European Court of Justice (ECJ) explicitly declined to review the EC anti-dumping duty imposed pursuant to Council Regulation 2398/98 (28 November 1997). The contention was that Council Regulation 2398/98 was invalid because it violated the URAA. This decision was not unexpected following earlier cases of International *Fruit Company,* [586] *Biret International v Commission*[587] and *Van Parys.*[588]

The ECJ in the *International Fruit Company* case held that the provisions of GATT 1947 do not have direct legal effect in the Community. In *Biret International v Commission* case, the ECJ left open the question whether the WTO decision has a direct effect on the Community's legal order. The case was about a petition by a French company for compensatory damages from the Community for violating the SPS Agreement. The claim in the case centred on

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584 Bronckers "From 'Direct Effect' to 'Muted Dialogue': Recent Developments in the European Courts" 2008 *JIEL* 887. In fact, WTO Agreement, for example, has not been enacted as part of EU laws in any of the EU official Directives. The EU Schedule *of Commitments* specifically states that "the rights and obligations arising from GATS, including the schedule of commitments, shall have no self-executing effect and thus confer no rights directly to individuals, natural persons or juridical persons".

585 See Bronkers 2008 JIEL 889 quoting European court of Justice (ECJ) case C-351/04 *IKEA v Commissioners of Customs & Excise* (2007) ECR I-7723.

586 Case C-21-24/73, *International Fruit Company* [1972] ECR 1219.

587 Case C-94/02P, *Biret International v Commissioner* [2003] ECR 1-10497.

588 Case C-377/02, *Van Parys* [2005] ECR I-1465.

the direct effect WTO obligations have in the national jurisdictions of WTO Members. I agree with the view of Eekhout that WTO obligations should have a direct legal effect in national jurisdictions, particularly when the violation is established by the DSB.[589]

The view of the ECJ in the *Biret International v Commission* case was, however, contradicted by the decision in the *Van Parys* case, in which the ECJ held that the decisions of the DSB did not have direct effect in the EU legal system.[590] The case follows the legal action taken by Van Parys asking for import licences granted by Belgium authorities to be nullified because the EC regulations on which they were based were incompatible with WTO law, particularly with the Appellate Report in the EC Bananas dispute which found that the EC's banana import regime was incompatible with certain provisions of the GATT.

The United States Constitution generally establishes a rather direct effect of international treaties based on the monist concept. Article VI:2 of the United States Constitution states that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding". There has been some reluctance by the courts to give direct effect to decisions of international tribunals informed by the relevant treaties to which the United States is a party. Consequently, an executive order had to be issued asking the American Courts to give effect to the decision of an international tribunal. An example is the decision in the *Medellin* v *Drekte* case,[591] following which President George W

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589 See Eeckhout "The Domestic Legal Status of the WTO Agreement: Interconnecting legal Systems" 1997 *Com.Mkt. L. Rev.* 53. See also Griller "Juridical Enforceability of WTO Law in the European Union" 2000 *J. Int'l Econ. L.* 450–454.

590 Case C-377/02, *Van Parys* [2005] ECR I-1465 par 41. The ECJ has resorted to employing subtle ways rather than direct effect to give domestic law effect to WTO law and other international agreements such as treaty-consistent interpretation, and judicial dialogue with international tribunals.

591 *Medellin v Drekte* 371 F.3d 270 (2004).

Bush had to issue an executive order asking the American courts to give effect to the decision of the International Court of Justice (hereafter ICJ).[592]

Article V1:2 of the United States Constitution has not been made applicable to WTO law. The law enacted in 8 December 1994 by the US Congress to give effect to the obligations assumed by the US under the Uruguay agreement, the Uruguay Round Agreements Act,[593] states that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect".[594] Moreover, that nothing in this Act shall be understood as amending or modifying any law of the United States, unless specifically provided for in the Act.[595] This is affirmed in one of the background document to the the Act, the "Statement of Administrative Action", which states that "[t]he Trade Agreements negotiated are not self-executing and accordingly do not have independent effect under US law. US domestic law is given primacy in the event of any conflict between it and international law.[596] Consequently, most courts applying US law have refused to give domestic effect to WTO law and WTO dispute reports.[597]

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592 Memorandum of President George W Bush, 28 Feb 2006, App. to Pet. for Cert. 187a. In *Medellin v Drekte the* court of criminal appeals of Texas held that neither the International Court of Justice (ICJ) decision in the case *Concerning Avena and Other Mexican Nationals* (Mex v US) 2004 I.C.J 12 (hereinafter Avena) and the President's memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filling of successive habeas petitions, and that the Avena judgment is not directly enforceable as domestic law in state courts. In Avena, the ICJ ruled that Texas' failure to advise Petitioner of his right to consular services resulted in a violation of both Mexico's and the Petitioner's rights under the Vienna Convention on Consular Relations, and that application of the procedural default doctrine to deny a United States court the ability to reconsider the Petitioner's conviction and sentence in light of that decision would itself violate the Convention.

593 Uruguay Round Agreements Act, 19 U.S.C. § 3501 (1994), s102(a)(1).

594 Quoted in Dundorff 2008 *Loyola University Chicago International Law Review* 283. See sections 3(a) and 3(f) of the Act.

595 Uruguay Round Agreements Act, 19 U.S.C. § 3501 (1994), s102(a)(2).

596 See Barnett "The United States Court of International Trade in the Middle - International Tribunals: An Overview" 2011 *Tul. J. Int'l & Comp. L.* 421. For more background discussions regarding the effect of treaties and international agreements in domestic law in the U.S, see Jackson "*Status of Treaties in Domestic Legal Systems: A Policy Analysis*" 1992 AM. J. INT'L L. 310 (1992); Brand "*Direct Effect of International Economic Law in the United States and the European Union*" *1996* 17 NW. J. INT'L L. & BUS. 556.

597 See Dundorff 2008 *Loyola University Chicago International Law Review* 286 fn29 quoting the case of *Timken Co. v. United States,* 354 F.3d 1334 (Fed. Cir. 2004) as one of these

According to Dundorff, however, the NAFTA tribunal[598] applying US law and sitting in effect as US courts had given effect to WTO law and WTO dispute reports. This split in approaches has necessitated the rethinking of the position regarding the domestic effect of WTO norms in the US[599] Interestingly, Trachtman points to the practice of giving direct effect to WTO law in domestic courts, in the form of the right of only the federal government to bring a lawsuit to challenge domestic law as being inconsistent with the WTO agreements.[600]

Furthermore, a feature that is not contained in the South African international trade law is that US legislation precludes private individuals from having cause of action or defence under any of the Uruguay Round Agreements, nor may any person other than the United States "challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State, on the ground that such action or inaction is inconsistent with such agreement", any law of the United States, unless specifically provided for in the Act.[601]

In Africa, Nigeria, for example, follows a strict revisionist approach very similar to the United States. Section 12(1) of the Constitution of the Federal Republic of Nigeria of 1999 provides that "[n]o treaty between the Federation and any other country shall have the force of law except to the extent to which such treaty has been enacted into law by the National Assembly". This trite law on treaty law in

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cases. See generally Dundorff 2008 *Loyola University Chicago International Law Review* 286 – 292.

598 *In the Matter of: Carbon and Certain Alloy Steel Wire Rod from Canada: 2nd Administrative Review,* USA-CDA-2006-1904-04 (N. Am. Free Trade Agreement Binat'l Panel 2007), quoted in Dundorff 2008 *Loyola University Chicago International Law Review 295 fn* 80. See generally Dundorff 2008 *Loyola University Chicago International Law Review* 292 – 296.

599 Dundorff 2008 *Loyola University Chicago International Law Review* 280. See generally Dundorff 2008 *Loyola University Chicago International Law Review* 295–309 discussing potential costs and benefits of giving domestic effect to WTO law and reports.

600 Trachtman "Bananas, Direct Effect and Compliance" 1999 *EJIL* 675. Strangely though, the federal government does not accord direct effect to its GATT obligations. See Trachtman 1999 *EJIL* 657.

601 Uruguay Round Agreements Act, 19 U.S.C. § 3501 (1994), s 102(c)(1).

Nigeria was confirmed in the case of *Abacha v Fawehinmi*[602] where the court held that "[a]n International treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly. Before its enactment into law by the National Assembly, it has no such force of law as to make its provisions justiciable in our Courts". It would seem that Nigerian courts do not even consider WTO law of influential importance and integral part of Nigerian practice from the best practice point of view. Consequently, individuals in Nigeria cannot derive any rights or obligations from WTO Agreements.

Eight, admittedly the Constitution of 1996 replaced the Interim Constitution. However, it is submitted that the constitutional framework change was more than a mere replacement of the Interim Constitution. The Interim Constitution provided a framework for the elaboration of the new Constitution of 1996, which cannot be lightly dismissed.[603] Furthermore, the Constitution of 1996 was never totally free of the 1993 constitutional dispensation. For example, the 34 constitutional principles developed under the Interim Constitution are binding on the Constitution of 1996. In the light of the parallel standing of the constitutional dispensation in South Africa, and with an effort to avoid a vacuum or a constitutional crisis, it is submitted that one can have regard to the provisions of the Constitution of 1996 when determining the applicability of the WTO Agreement even though it was ratified under the Interim Constitution. It is not recommended here that the Constitution of 1996 be applied with retrospective effect. However, it is acknowledged that sections 231 to 233 of the Constitution

602 *Abacha v Fawehinmi* (2000) 6 NWLR Part 660, at 288.

603 A case in point is the certification of the Constitution of 1996, which the Constitutional Court could not approve because the text did not comply with the 34 Constitutional Principles set under the Interim Constitution. The Court in the *Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) case, par.14, held specifically that: "The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles." For more on the certification of the Constitution of 1996 see, Rickard "The Certification of the Constitution of South Africa" in Andrews and Ellman (Eds), *The Post-apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 267. See also Dugard *International Law* 55.

of 1996 do not preclude the determination of the applicability in South Africa of international agreements and treaties agreed to or ratified before 1996.

4.3.4.1.3 Relevant Constitutional Provisions

(a) Section 231 of the Constitution

International law is received and applied in national legal order in different ways as may be provided for by different national legislation and constitutions. South Africa follows a qualified dualist approach[604] in the recognition, incorporation, and application of international treaties pursuant to section 231 of the Constitution of 1996.[605] As opposed to the monist[606] approach, the dualists see international law and municipal law as two completely different systems of law. Therefore, a rule of international law can never become part of the municipal law per se.[607] According to a dualist approach, a perfect international treaty would only be effective at an international level. For an international treaty to be applied in a contracting state, the provision of such a treaty must be adopted into a national provision or such a treaty should be introduced at the municipal level through a recognised legal mechanism. Thus, dualists are of the view that the rules of international law are part of national law only if included expressly or deliberately into national law.

Section 231(2) deals with the binding nature of international law by stating that:

> [a]n international agreement[608] binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

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604 Devenish *A Commentary on the South African* Constitution(1998) 324.

605 See generally Dugard *International Law* 58 - 61. See also Woolman *et al Constitutional Law* 30:9

606 Under the Monists approach rules of international law are part of national law unless excluded. International law and municipal law are regarded as manifestations of a single conception of law.

607 See Shaw *International Law* 122.

608 Note that the term "international agreement" is in this text is used synonymously with "treaty" unless the context indicates otherwise.

Section 231(3) of the Constitution of 1996 provides as follows:

> An international agreement of a technical nature, administrative or executive nature, or an agreement which does not require ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

Section 231(4) of the Constitution of 1996 provides as follows:

> Any international agreement becomes law in the Republic when it is enacted into law by national legislation, but self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Section 231(5) of the Constitution states that South Africa is bound by international agreements which were binding on her at the time the Constitution took effect. Sections 231(2) and 231(4) can be simply referred to as the nationalisation or domestication of international law, because they primarily state that only those treaties and conventions specifically transformed into domestic law by Parliament become part of South African domestic law. In this regard, international law will be applied as an international regulation, and therefore part of internal and not international law. As correctly pointed out by Dugard, the transformation into domestic law may be through principal methods, namely, treaty incorporation through an Act of Parliament; by inclusion as a schedule to a statute; or by way of an enabling Act of Parliament giving the executive the power to bring a treaty into effect in domestic law by means of a proclamation or notice in the *Government Gazette*.[609]

The relationship between international law and municipal law, in a manner expounded in section 231 of the Constitution, has long been settled by the courts. For an example, in 1965, the SCA in *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* held that:

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609 Dugard *International Law* 61.

> [It is] trite law ... that in this country the conclusion of a treaty, convention or agreement by the South African government with any other government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our law except by legislative process. ... In the absence of any enactment giving [its] relevant provisions the force of law, [it] cannot affect the rights of the subject.[610]

It is submitted that approval of a treaty by resolution in both the National Assembly and the National Council of Provinces constitutes the fourth principal method in addition to the three identified by Dugard.[611] The submission is justified based on the fact that section 231(2) clearly does not specifically require that the two houses sit together as "Parliament" during the approval process. Moreover, it makes no sense regarding an international law as non-binding on South Africa as part of domestic law unless incorporated pursuant to section 231(4),[612] because such treaty which is binding on South Africa on the international plane creates a responsibility among signatory states to respect the treaty as binding and to execute it in good faith.[613]

The second part of section 231(4) introduces the concept of self-executing treaties into South African law. Pursuant to section 231(4), self-executing treaties are automatically binding on the Republic. In other words, such a treaty is binding *ex proprio vigore* or on its own. If the agreement is not as a whole self-executing to be treated as automatically applicable law in South Africa, recourse should be had to section 231(4) of the Constitution. The continuing

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610 *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A).

611 This submission in no way stands for the proposition that a resolution of ratification is sufficient for the incorporation of treaties into municipal law. It does, however, acknowledge that there are fewer formal treaties that may be transformed into South African law.

612 In fact it would seem that there is an internal conflict between section 231(2) and section 231(4), which can only be remedied by interpretation which reads – in the legislative incorporation of an international agreement requirement of subsection 4 into subsection 2 or treating the two as independent provisions.

613 See Articles 26 and 27 of the United Nation's Vienna Convention on the Law of Treaties of 1969. However, see *Azapo v President of the Republic of South Africa* 1996 (4) SA 671 (CC) par.28.

problem at both the international and domestic levels is the problem of when is a treaty or the provisions of a treaty self-executing?

According to Leary, the understanding of the concept of self-executing treaty provision only "consciously entered into international legal concern in the 1950s" following the United States case of *Fujii v California*.[614] This despite the fact that the problem of the identification of a self-executing treaty was at issue at the international level as early as the 1928 advisory opinion of the Permanent Court of International Justice in the *Jurisdiction of the Courts of Danzig*[615] and in cases like *Foster & Elam v Nielson*,[616] in which the United States Supreme Court dealt with the direct effect of self-executing treaties. What is clear is that the meaning and the understanding of the concept of self-executing treaty is still problematic to date. To begin with, the concept of self-executing treaty means something different to the automatic incorporation of treaties. Furthermore, the criteria for determining whether the treaty or the provision of the treaty is self-executing may differ from one country to the other. For example, a treaty provision may be regarded as self-executing in one jurisdiction but not in another.[617]

The South African Constitution is silent on the exact meaning of the concept of self-executing. Dugard is of the view that the introduction of this concept of self-executing treaties is bound to create problems in South Africa. Moreover, the Constitution does not prescribe when a treaty is self-executing, nor does it give a general guideline as to which treaties will be considered self-executing.[618] It is submitted that the supplementary reading of the subsections of section 231 of the South African Constitution indicates that the concept is prima facie given a

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614 Leary *International Labour Conventions and National Law* 21–22, quoting the case of *Fiji v California* 38 Cal.2d 718, 242 P.2d 617 (1952).The *Fiji* case related to the human rights provisions of the UN Charter.

615 *Jurisdiction of the Courts of Danzig* – Advisory Opinion, P.C.I.J., Ser. No.15, March 31, 1928 quoted by Leary *International Labour Conventions and National Law* 21–22.

616 *Foster & Elam v Neilson* 27 US 253, 314 (1829).

617 See Leary *International Labour Conventions and National Law* 39.

618 Dugard *International Law* 62.

simplistic understanding of a treaty that lends itself to judicial or administrative application without further statutory implementation.

The best approach advocated by Dugard to determine whether a treaty is self-executing or not is to make such a determination on a case-by-case basis.[619] Section 231(3) of the Constitution refers to "an international agreement of a technical, administrative or executive nature". But what exactly does that mean or what is the precise meaning of these terms? The South African courts are yet to authoritatively rule on the meaning of these terms within the treaty context. Dugard is of the view that the approach adopted by the state international law advisers to section 231(3) may be of assistance to courts. The state international law advisors understand section 231(3) to be referring to agreements of a routine nature, which flow from the daily activities of government departments.[620]

(b) Section 232 of the Constitution

Writing in 1963, Fawcett observed that the practice in the commonwealth countries is that the generally accepted rules of international law will be applied by national courts "in proper cases as *lex fori*; that is to say, the courts adopt and apply these rules directly, making no distinction between them and municipal law ...".[621] Indeed, this common law doctrine of the relationship between customary international law and municipal law finds application in South Africa and has long been expressly acknowledged by the courts.[622] In

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619 See Dugard *International Law* 62. For the application and determination of the self-executing nature of treaties in selected jurisdictions, see generally Leary *International Labour Conventions and National Law*. See also Olivier "Exploring the Doctrine of Self-execution as Enforcement Mechanism of International Obligations" 2002 *SAYIL* 99.

620 See Dugard International Law 61 quoting Olivier "Informal International Agreements under the 1996 Constitution" 1997 *SAYIL* 64 and Botha "Treaty making in South Africa: A Reassessment" 2000 *SAYIL* 75–78.

621 Fawcett *International Law* 73–74. See generally, Shaw *International Law* 129–140 discussing, with reference to eighteenth century cases, the common law doctrine regarding the application of international customary law. Shaw also provides a very informative discussion on how different countries, including South Africa, deal with the issue of the status of public international law in their jurisdictions.

622 See *Pan American World Airways Inc. v SA Insurance Co. Ltd* 1965 (3) SA 150 (A).

fact, the courts have always assumed that the rules and principles of customary international law could be applied as if they were part of South African law.[623] The assumed relationship between customary international law and municipal law has now been constitutionalised in two provisions of the 1996 Constitution. Consequently, the position of customary international law in South Africa is now better than before. First, customary international law is no longer subject to subordinate legislation. Second, customary international law is not required to have universal application before its reception in South Africa.[624] In terms of section 232 of the Constitution, read with section 233, "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". Customary international law may thus be treated as similarly binding as common law in South Africa, or as law in the Republic, to the extent that it does not conflict with the Constitution or with an Act of Parliament. According to Devine, "[i]t does not matter what kind of international customary law is under consideration, whether it be universal, general, local or particular. All kinds are in principle incorporated. There is no distinction as to the types of international law".[625] The provision in section 232 should not be understood to mean that customary international law is less significant as law in South Africa. In fact, customary international law is accorded the respect and promotion it deserves in the country.

Reference to section 232 of the Constitution of 1996 in relation to WTO law may appear unwarranted to those who view international trade law under the WTO as *lex specialis,* and as a self-contained system of rules. It is submitted, however, that the WTO rules may not be treated in clinical isolation from the general international law discipline.[626] In fact, the DSB always has regard to customary international law when interpreting and applying WTO Agreements,

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623 See *Maynard v The Field Cornet of Pretoria* (1894).

624 See Dugard 1997 *EJIL* 80.

625 Quoted by Tshosa "The Status of International Law in Namibian National Law: A Critical Appraisal of the Constitutional Strategy" 2010 *Namibian Law Journal* 14.

626 See Pauwelyn "The Role of Public International Law in the WTO: How Far Can We Go? 2001 *Am. J Int'l L* 535. See also Sibanda "A Human Rights Approach to World Trade Organization Trade Policy: Another Medium for the Promotion of Human Rights in Africa"

including the application of the Vienna Convention on the Law of Treaties[627] (VCLT) as a guide for interpretation.[628] After all, WTO law is just a branch of public international law, which should be understood within the broader corpus of international law. [629]

(c) Section 233 of the Constitution

Section 233 of the Constitution of 1996 constitutionalised the common law presumption of statutory interpretation by stating that every court in South Africa interpreting legislation that has a bearing on the Bill of Rights, such as the ITAA, must "prefer any reasonable interpretation ... consistent with international law over any alternative interpretation that is inconsistent with international law".[630] In the South African anti-dumping law and practice context, this principle of treaty-consistent interpretation, which is readily applied in many jurisdictions in other areas of international law,[631] has been explicitly acknowledged by the Constitutional Court. In the case of SCAW dealing with sunset reviews, the Constitutional Court has, for example, confirmed this position by stating that the courts are "required by the Constitution to interpret domestic legislation governing the duration of anti-dumping duties consistently with these international obligations" created by the URAA.[632]

2005 *African Human Rights Journal* 387, discussing WTO rules in the context of human rights.

627 Vienna Convention on the Law of Treaties UN Doc. A/ Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).

628 See generally Cameron and Gray "Principles of International Law in the WTO Dispute Settlement Body" 2001 (50) *ICLQ* 248.

629 See Pauwelyn 2001 *Am. J Int'l L* 538–550.

630 See *Kaunda and Others v President of the RSA and Others* (2) 2005 (4) SA 235(CC) par.33, and *S v Baloyi* 2000 (1) SA 245(CC) par.13. It is submitted that section 233 of the Constitution as an interpretive aid prima facie renders s 39(1)(b) superfluous, or vice versa, as Woolman, Roux, Klaaren, Stein, Chaskalson, and Bishop *Constitutional Law* 32:182–183.

631 For example, the United States Supreme Court recognised the principle of treaty-consistent interpretation in its 1804 case, *Murray v Schooner "Charming Betsy"* 6 US (2 Cranch) 64, 118. However, the Unites States courts have shown some reluctance in employing the same approach when it comes to WTO law. For example *NSK Ltd v U.S* 510 F3d 1375 (US Fed. Cir. 2007). See generally, Bronckers 2008 JIEL 888 quoting Davies "Connecting or Compartmentalising the WTO and the United States Legal system? The Role of the Charming Betsy Canon" 2007 *JIEL* 117.

(d) Section 39 of the Constitution

The use of international law as a unique and especially valuable interpretive norm is now enshrined in the Constitution of South Africa. Section 39(1)(b) of the Constitution states that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law." Accordingly, the consideration of international law is mandatory.[633] In respect to foreign law, section 39(1)(c) merely provides that a court, tribunal or forum "may consider foreign law". In the words of Woolman *et al*, foreign law in South Africa is "persuasively normative while international law may well be prescriptively normative".[634]

The reliance on international law and foreign law was extensively dealt with by Chaskalson P in the case of *S v Makwanyane and Another,* which was decided under the 1993 Interim Constitution. According to the court, the international and foreign authorities are of value in South Africa. Moreover, foreign authorities may show how a particular vexed issue has been dealt with by the courts of other jurisdictions.[635] Chaskalson P described the role of international law as follows:

> [P]ublic international law would include non-binding as well as biding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework The role of international law in South African health law and policy-making within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour

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632 *SCAW* par.*43 quoting* s 233 of the Constitution, and par.80.
633 See *Sanderson v Attorney-General, Eastern Cape* 1997(2) SA 38 (CC) at par.26.
634 Woolman, Roux, Klaaren, Stein, Chaskalson and Bishop *Constitutional Law* 32:173.
635 See *Makwanyane* at par.34.

> Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].[636]

In the *Grootboom* case, Yacoob J said:

> The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.[637]

It is very clear that South Africa's current constitutional dispensation provides a clear example of an express obligation to consider international law in human rights cases as important interpretive tools. However, the courts would not hesitate to declare themselves as not bound to "guidance" from international human rights cases, if the recognition of rights within the South African constitution extended beyond that recognised by international law.[638]

It is submitted that when interpreting the ITAA and the ADR provisions that impact on the rights in the Bill of Rights, the ITAC and the courts must consider WTO anti-dumping law and jurisprudence as international law. Section 39(1)(b) makes it compulsory for the ITAC and the courts to make their rulings having had due regard to comparable international instruments, which in the context of this study is WTO anti-dumping law. On the other hand, section 39(1)(c) makes reference to foreign anti-dumping law as a comparative persuasive source, particularly when the issue in question has been dealt with by courts in exemplary jurisdictions and when the South African anti-dumping provision in question was explicitly modelled on a similar provision in another jurisdiction.[639]

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636 Makwanyane at par.35.

637 *Grootboom* at par.26.

638 *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (3) BCLR 355 (CC).

639 See, for example, Kriegler J in *S v Mamabolo (E TV, Business Day and Freedom of Expression Institute intervening)* 2001(3) SA 409 (CC) par.133 on the usefulness of reference to exemplary jurisdictions.

4.3.4.2 Promotion of Administrative Justice Act of 2003

The ITAC is a public body performing administrative functions and it is, therefore, as correctly pointed out by Justice Moseneke in the *Scaw*[640] case, required to promote and give effect to the parties' constitutionally enshrined rights to administrative justice when it considers anti-dumping cases. According to the Court in *Sebenza Forwarding and Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another,* "the distinction between executive and administrative action came down to a distinction between the implementation of legislation, which is administrative action, and the formulation of policy".[641] The primary administrative justice legislation is the PAJA. This Act, which came into operation on 30 November 2000,[642] gives effect to section 33(3) of the Constitution of 1996.[643] As held by the Constitutional Court in *Minister of Health and Another v New Clicks SA (Pty) Ltd and Another,* section 33 of the Constitution of 1996 and the PAJA coexist and are supplementary. The latter is exhaustive of the rights to administrative justice.[644] The provisions of the PAJA have far-reaching implications for the functions and activities of the ITAC, particularly in relation to dumping charges; representations to be made by interested parties in anti-dumping investigations;

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640 *Scaw* par.44.

641 *Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another* 2006 (2) SA 52 (C) par.22, quoting with approval the case of *President of the Republic of South Africa and Others v South African Rugby Union and Others.* Note, however, that the Constitutional Court's decision in *Minister of Health and Another v New Clicks SA (Pty) Ltd and Other (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae) 2006 (1) BCLR (CC)* set an ambiguous precedent on determining administrative actions. The question before the Court was whether the making of regulations by the Minister empowered by legislation amounted to administrative action in terms of PAJA. In a divided decision, five judges held that ministerial regulation-making was administrative action as defined in PAJA (at 120–135 & 439–480), five other judges held that it was not necessary to decide the issue (at 671), and one judge held that, in the circumstance of the case, the making of the regulations amounted to administrative action (at 580–610).

642 See *Government Gazette* No 21806 of 30 November 2000.

643 According to the Law Reform Commission of Western Australia, PAJA constitutes a more sweeping reform of administrative law and the judicial review of administrative action than any other reform proposed in countries such as Canada, England and New Zealand. See *Law Reform Commission of Western Australia – Report on Judicial Review of Administrative Decisions* 20.

644 *Minister of Health and Another v New Clicks SA* par.*95.*

and the review of anti-dumping determinations. The most relevant provision of the PAJA in relation to the ITAC is section 3(2)(b), which provides:

> (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-
> (i) Adequate notice of the nature and purpose of the proposed administrative action;
> (ii) A reasonable opportunity to make representations;
> (iii) A clear statement of the administrative action;
> (iv) Adequate notice of review or internal appeal, where applicable; and
> (v) Adequate notice of the right to request reasons in terms of section 5.

The courts have emphasised that the provisions of section 3(2)(b) of the PAJA "constitute the core elements of procedural fairness",[645] and may be departed from by the ITAC only pursuant to the provisions of section 3(4) of the PAJA.[646] The nature of the administrative decisions normally taken by the ITAC may also require the publication of the intended definitive anti-dumping measures in order to allow interested members of the public to make representations. Such a decision is an administrative action affecting the public and thus the ITAC may be required to comply with the provisions of section 4(1) of the PAJA before the definitive anti-dumping measures are imposed.[647]

The PAJA provides also for circumstances under which the actions of the ITAC as an administrative body may be reviewed by the courts upon application by any interested party.[648] Section 6(2) of the PAJA provides circumstances and broad grounds under which the courts or tribunals may review administrative

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645 See *Trend Finance (Pty) Ltd and Another v Commissioner for SARS and another* [2005] 4 All SA 657 (C) par.77–78.

646 See, for example, *City of Johannesburg v Rand Properties (Pty) Ltd and Others* [2007] 2 All SA 459 (SCA) par.63 on allowing the administrator to depart from the requirements of giving the affected party a reasonable opportunity to be heard pursuant to section 3(2)(b)(ii) of PAJA.

647 See, for example, *Chairperson's Association v Minister of Arts and Culture and Others* [2007] 2 All SA 582 (SCA) par.45–46 per Farlam J holding that "adequate consultation must take place" in administrative actions affecting the public.

648 See PAJA s 6(1).

actions.[649] As succinctly put by Jones J, in *Maleka v Health Professions Council of SA and Another,*[650] the "intention of the PAJA is to give wide, not restricted, protection against unfair administrative action, which implies greater, not more restricted, jurisdiction".[651] For example, in terms of section 6(2), administrative determination/action may be reviewed if the administrator (i) was not authorised to take such a decision;[652] (ii) exercised delegated power that was not authorised by an empowering Act;[653] (iii) acted with bias or was reasonably suspected of bias in the circumstances of a particular case;[654] (iv) failed to comply with a mandatory and material procedure or condition prescribed by an empowering legislation;[655] (v) acted in a manner that was procedurally unfair;[656] and/or (vi) was materially influenced by an error of law.[657]

Brink describes section 6(2)(f)(ii)(cc) of the PAJA as a "tucked-away provision" on reviews based on substantive errors, and maintains that it is uncertain to

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649 The grounds in s 6(2) of PAJA are broader than the grounds of review of proceedings of inferior court decisions stated in s 24 of the Supreme Court Act 59 of 1959. The following are the grounds of review under s 24 of the Supreme Court Act, namely, absence of jurisdiction; interest in the cause, bias, malice or corruption on the part of the presiding officer; gross irregularity in the proceedings; and the admission of inadmissible evidence or the rejection of admissible or competent evidence.

650 *Maleka v Health Professions Council of SA and Another* [2005] 4 SA 72 (E).

651 *Maleka v Health Professions Council of SA and Another* par.13.

652 See *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and Another* [2007] 1 All SA 638 (C) par.467I, holding that PAJA in this regard should be interpreted purposefully rather than narrowly.

653 *Darson Construction (Pty) Ltd v City of Cape Town and Another* [2007] 1 All SA 393 (C) par.402D.

654 See PAJA s 6(2)(a). See also *Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others* [2005] 4 All SA 487 (SCA) par.19.

655 PAJA s 6(2)(b).

656 PAJA s 6(2) (c).

657 PAJA s 6(2)(d). For more information on the grounds of review under s 6 of PAJA see the following cases: *Dunn v Minister of Defence and Others* 2006 (2) SA 107 (T) par.40; *Trend Finance (Pty) Ltd and another v Commissioner for SARS and Another* par.73 – procedural fairness; *Jicima 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C) par.12 – error of law; *Seoding Primary School and Others v MEC of Education, Northern Cape and Others* [2006] 1 All SA 154 (NC) paras 5.3.1–13, and 16 – decisions taken in bad faith or for ulterior purposes; *Lazarides v Chairman of the Firearms Appeal Board and Others* [2006] 1 All SA 396 (T) decision taken because of the unauthorised or unwarranted dictates of another person or body. However, the court did not specifically refer to section 6(2)(e)(iv) of PAJA; *Radio Pretoria (geregistreer ooreenkomstig artikel 21 van Maatskappywet van SA van 1973 soos gewysig) v Voorsitter van die Onafhanklike Kommunikasie-owerheid van SA en 'n ander* [2006] All SA 143 (T) at 147H – I – for rationality in terms of section 6(2)(f)(ii); *Vumazonke v MEC for Social Development, Eastern Cape, and three similar cases* 2005 (6) SA 229 (SE) par.39 – for failure to take a

what extent an aggrieved party may rely on section 6(2)(f)(ii)(cc). Brink further proposes as a solution that the aggrieved party request reasons in terms of section 33(2) of the Constitution of 1996 and section 5 of the PAJA.[658]

Brink is correct in part. It is, however, submitted that Brink's proposed solution splits administrative law into two separate streams, since it suggests recourse either under section 33 of the Constitution of 1996 or under the PAJA, contrary to the decision of the Court in the *Pharmaceuticals* case. Also, Brink's proposal is not supported by the decision of the Constitutional Court in *Minister of Health and Another v New Clicks SA (Pty) Ltd and Another,* in terms of which the Court held that the law cannot be allowed to diverge into two separate streams of administrative law jurisprudence. According to the Constitutional Court in *Minister of Health and Another v New Clicks SA (Pty) Ltd,* a litigant cannot avoid the provision of the PAJA by going behind it in the manner Brink suggested, and seeking to rely on section 33(1) of the Constitution or the common law. Such an approach, as the Court stated, would defeat the purpose of the Constitution in requiring that the rights contained in section 33 be given effect by means of national legislation.[659]

4.3.4.3 Promotion of Access to Information Act of 2000

The PAIA was enacted to give effect to section 32(1) of the Constitution of 1996,[660] which guarantees everyone the right of access to information held by the state, and to foster the culture of transparency and accountability in private and public bodies.[661] As an organ of State, the ITAC has an obligation to provide everyone with access to information in its possession, except where it may lawfully refuse to allow such access to information pursuant to sections 36

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decision; *Compass Waste Services (Pty) Ltd v Northern Cape Tender Board and others* [2005] 4 All SA 425 (NC) par.16 – for reasonableness.

658 Brink *Theoretical Framework for South African Anti-dumping Law* 709.

659 *Minister of Health and Another v New Clicks* par.95.

660 See PAIA s 9(a)(i).

661 See *Claasen v Information Officer of South Africa Airways (Pty) Ltd* [*2006*] SCA 163 (SA) par.1.

and 37 of the PAIA.[662] Section 36(2)(b), for instance, allows the ITAC to refuse a request for information on the ground that the disclosure would be prejudicial to the commercial interests of a third party, and section 37(1)(a) allows the ITAC to refuse a request for information if the disclosure of such information might open it up to an action based on breach of confidence.[663]

4.3.4.4 SACU Agreement of 2002

The 2002 SACU Agreement has important implications for the anti-dumping regime within the customs union, which Member countries must consider. In particular, Article 14 of the 2002 SACU Agreement reads:

> 1. Member States shall establish specialized, independent and dedicated National Bodies or designate institutions which shall be entrusted with receiving requests for tariff changes and *other related SACU issues*. The National Bodies will carry out preliminary investigations and recommend any tariff changes necessary to the Tariff Board.
> 2. The National Bodies will study, investigate and determine the impact of tariffs within respective Member States and periodically propose such changes as may be deemed necessary and make recommendations to the Commission through the Secretariat. The National Bodies shall adhere to similar procedures in all Member States.
> 3. SACU will assist Member States with the establishment of common procedures and technical capacity to ensure effective, efficient and transparent functioning of National Bodies.[664]

Clearly, Article 14 of the Agreement calls for Members to "establish specialised, independent and dedicated National Bodies or designate institutions" to carry out "preliminary investigations and recommend any tariff changes necessary to the Tariff Board". One may be tempted to dismiss the reference to Article 14 on the basis that it appears to be relating primarily to tariff matters such as the

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662 In terms of s 9(b)(i) of PAIA, the right to access to information held by the state organ subject to reasonable limitations which are aimed at protecting privacy, commercial confidentiality and effective, efficient and good governance.

663 See *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* [2006] 1 All SA 352 (SCA) interpreting and applying sections 36 and 37 of PAIA.

664 Emphasis added.

complex and nuanced issue of revenue-sharing formula[665]; tariff change issues; and "the impact of tariffs within respective Member States". However, it should be noted that Article 14.1 of the 2002 SACU Agreement refers to "other related SACU issues". It does not refer to "other related tariffs issues". It is submitted that anti-dumping remedies are "related SACU issues", and it is for this reason that Article 14, read with Article 20, is regarded as relevant in respect of tariffs imposed as a result of dumping practices.

Some of the functions of the ITAC stemming from the provisions of the 2002 SACU Agreement include the investigation and evaluation of applications relating to the amendment of customs duties, import and export controls, and the administration of anti-dumping, and other contingency trade measures. The ITAC will continue to act in these matters until the establishment of the SACU Tariff Board, as discussed in 5.4.2 infra.[666]

4.4 Pre-2003 Anti-dumping Regulatory Institutions

4.4.1 The Board of Trade and Industry

The legislation regulating anti-dumping and countervailing duties was previously administered mainly through certain Boards. The Board of Trade and Industry (BTI) was formed in 1921 and reconstituted in 1922 as a permanent tariff advisory body. It was restructured in 1923, at which time its advisory functions were expanded to include taking over responsibility for administering anti-dumping remedies from the then Customs Department, which later became SARS. Other functions included dealing with international trade and

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665 SACU revenue-sharing approaches may be divided into the following components: Excise component based on GDP: about 85% of the funds distributed by GDP; Development component: 15% of the funds redistributed to poorer member states by some inverse measure; Customs component: customs distributed by intra-SACU trade. For more on the SACU revenue-sharing regime, its rationale and processes, see generally, Edwards and Lawrence 2008 *SACU Tariff Policies* www.hks.harvard.edu/var/ezp_site/storage/tckeditor/file/pdfs

666 At the time of finalising this study the SACU Tariff Board had not yet been established. The 1996 SACU Agreement made it the sole responsibility of South Africa to set anti-dumping duties for the region.

international relations and trade agreements; the removal of tariff anomalies, technical knowledge of South African industry; managing the effect of fiscal policy on commerce and industry, promoting the competitiveness of undertakings in the Republic and in the common customs area of SACU; the promotion of small business undertakings and any other matter which the Minister and the BTI deemed necessary to achieve the BTI's objectives.[667]

4.4.2 Board on Tariffs and Trade

The Board on Tariffs and Trade (BTT) was a statutory body within the Department of Trade and Industry (DTI).[668] It was assisted in its duties by the Directorate of Dumping Investigations (DDI), which was established in 1992 within the DTI.[669] In September 1986, the BTT replaced the BTI[670] as the main regulatory and investigative body for trade practices; however, it was itself reconstituted on 6 May 1992.[671] The BTT played an important and pivotal role in the shaping of South African trade regime strategies and regulation, as well as in the promotion of economic development in the Republic and in the common customs area of the SACU.

As stated earlier, the BTT took over the functions of the BTI. The magnitude of these functions meant that different directorates of the BTT were over-stretched, which had a negative impact on the efficiency and efficacy of the BTT. As a result, in 1992 these functions and objects were trimmed down, with more emphasis being placed on dumping and subsidies investigations and "disruptive competition" functions[672] and on advising the government on the levying of customs and excise duties in terms of the Customs Act.[673]

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667 See generally, BTT Annual Report. 1988, Report No 2773.

668 The Department of Trade and Industry (DTI) is the government department principally responsible for the country's industrial policy and strategy.

669 See the BTT (Amendment) Act 107 of 1992, and the Customs and Excise Amendment Act 61 of 1992.

670 The BTT was established in terms s 2 of the BTTA.

671 BTT (Amendment) Act of 1992, s 7. See also, BTT Report N. 3314 (1992).

4.4.3 Supplementary Institutions

There were other supplementary institutions that contributed to the administration of the BTTA, including the Commissioner of Customs and Excise (the Customs Commissioner), the Minister of Trade and Industry and the Minister of Finance. In response to a request by the BTT, it was the function of the Customs Commissioner to impose provisional duties in respect of dumped or subsidised goods.[674] On the other hand, the Ministry of Trade and Industry served as a controlling body for the BTT and had the power to direct the BTT to investigate any matter that affected trade and industry in South Africa or in the SACU area. The Minister of Finance, meanwhile, was responsible for imposing definitive (final) duties at the request of the Minister of Trade and Industry,[675] as well as for making final determinations on importer undertakings and on whether or not duties should be withdrawn or reduced.[676]

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672 By substitution by the BTT Amendment Act of 1992, s 4. The BOTT, by order of the Minister of Trade and Industry, may investigate any matter affecting trade and industry in South Africa.

673 The relevant part of section 4 of BTTA provides:

> (1) For the purposes of achieving its objects and subject to the provisions in any other law contained, the Board may-
> (i) Of its own accord investigate dumping, subsidized export or disruptive competition in or to the Republic and, if authorized thereto by an agreement, in or to the common customs area of the Southern African Customs Union;
> (ii) Of its own accord investigate the development of industries in the Republic and, if authorized thereto by an agreement, in the common customs area of the Southern African Customs Union by levying of customs and excise duties;
> (iii) By order of the Minister investigate any other matter which affects or may affect the trade and industry of the Republic and, if authorized thereto by an agreement, the common customs area of the Southern African Customs Union; and
> (b) Report and make recommendations to the Minister in respect of any investigation referred to in paragraph (a).

674 See Customs and Excise Act, s 57A.

675 See BTTA, ss 55(1) and 56A (1).

676 See BTTA, ss 56(2) and 56A (2).

4.5 Post-2003 Anti-dumping Regulatory Institutions

4.5.1 The International Trade Administration Commission

The International Trade Administration Commission (ITAC) was established as an independent super agency with the powers to administer South Africa's unitary anti-dumping regime. The ITAC is subject only to the Constitution and the law and any Trade Policy Statement or Directive or Notice issued by the Minister of Trade and Industry. The ITAC came into operation on 1 June 2003 and its role is to establish an efficient and effective system for the administration of trade, including import and export control. The ITAC is headed by a full-time Chief Commissioner, assisted by a full-time Deputy Chief Commissioner, and at least two but not more than 10 other part-time commissioners who are required to have appropriate qualifications in accounting, agriculture, commerce, industry, public affairs or law. The ITAC is supported by administrative staff and teams of investigators organised in different divisions of which one is responsible for trade remedies. The latter are responsible for both the determination of dumping and the subsequent injury analysis,[677] and are officially clustered as the Directorate of Trade Remedies I and II.

The functions and role of the ITAC are further elaborated in the ADR,[678] which ADR sets out detailed rules and principles on anti-dumping law and practice. Under the 1996 SACU Agreement, the implementation of anti-dumping measures in SACU countries was the sole responsibility of the South African national tariff body. This practice was continued under the 2002 SACU Agreement. In terms of Article 14 of the 2002 SACU Agreement, the ITAC also had to act as an authority for other SACU members for an interim period, from 1 July 2004 to 1 July 2005, or until the SACU members set up their own national bodies, which according to the agreements reached by SACU Member States at the 18th SACU Council meeting held in Maseru, Lesotho in April 2009,

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677 See generally *Kommerskollegium*/ Sweden National Board of Trade Report, *The Use of Anti-dumping in Brazil, China, India and South Africa* 57.

should have been operational by April 2011.[679] Practically, the ITAC was tasked with, among other things, the function of investigating and evaluating alleged dumping in or into the Republic or the Common Customs Area[680] (CCA) at the request of the national body of SACU Member States,[681] and to make any recommendations directly to the body to be known as the SACU Tariff Board.[682]

4.5.2 SACU Tariff Board

In 2002, South Africa signed the 2002 SACU Agreement, which was to come into effect in 2004. This Agreement established an independent Administrative Secretariat to oversee SACU and several independent institutions including a Council of Ministers, a Customs Union Commission, Technical Liaison Committees, a SACU Tribunal and a SACU Tariff Board.[683] The SACU Tariff Board,[684] which at the time of writing was not yet established, will have some implications for the anti-dumping practice and regime of SACU. First, its establishment will, among other things, affect the manner in which decisions are made by national bodies. Second, its establishment may bring into question the

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678 Note that the Draft amended ADRs were published for public comment on 10 November 2006.

679 At the time of the submission of this study, no SACU Member had established the national body pursuant to the 2002 SACU Agreement. However, following the SACU Summit of Heads of State and Government hosted by South Africa in Pretoria from 15–16 July 2010, the Botswana Ministry of Trade and Industry indicated its intention to become the first SACU Member to establish a national tariff body that will be responsible for investigating and evaluating applications with regard to alleged dumping or subsidised exports into the country. See Mbongeni Mguni Botswana Pioneers SACU Tariff Body" Vol 27, July 2010 MmegiOnlinehttp://www.mmegi.bw/index.php?sid=4&aid=3778&dir=2010/July/Tuesday27 . In terms of the Communique' of Heads of State and Government, adopted on Friday, 16 July 2010 in Pretoria, South Africa, at the Summit, relevant national Ministers were directed to develop strategies, amongst others, dealing with challenges experienced in the development of "the necessary policies and procedures to conclude the establishment of institutions". See Communique' – The Heads of State and Government meeting of the Member States of the Southern African Customs Union (SACU) http://www.sacu.int/docs/pr/2010/pr0716.pdf, par 7(b).

680 The Common Customs Area (CCA) consists of combined territories of SACU Member States. See ITAA s 1(2).

681 ITAA s 16(1) (a) read with s 31(6).

682 See ITAA s 16(3).

683 2002 SACU Agreement, Art. 7. See also Ruppel "SACU 100: Reflections on the World's Oldest Customs Union" 2010 *Namibia Law Journal* 121, 122.

684 In terms of s 1(g) of the ITAA Bill the definition SACU Tariff Board in ITAA is to be amended to refer to the Board established by Article 7 of the SACU Agreement.

competence of legal national institutions of Member States to conduct judicial review of SACU related matters, such as anti-dumping rulings as discussed in Chapter 6.2.7 *infra*, for example.

The SACU Tariff Board is intended to replace the ITAC as a body that sets and adjusts the common external tariffs, which by definition includes anti-dumping duties,[685] for SACU members. As noted in 4.5.1 above, the ITAC is currently responsible for investigating and evaluating alleged dumping in the SACU area at the request of individual member states. Once established, the SACU Tariff Board will act as a supra-national institution staffed by experts from the SACU member countries in almost similar fashion to NAFTA, and will take certain roles away from national authorities such as the ITAC.[686]

In the context of anti-dumping, the SACU Tariff Board will operate as follows: the national body, for example the ITAC, will be responsible for carrying out preliminary investigations[687] and thereafter making its anti-dumping recommendations to the SACU Tariff Board for approval or rejection.[688] The SACU Tariff Board will then make its own recommendations after a careful consideration of recommendations by the ITAC, and send it to the Council of Ministers[689] (CoM) to make a final decision on the imposition of duties, if any, which will then have to be implemented by the ITAC. The CoM may, in turn, and if necessary, further refer the matter to the ad hoc Tribunal before implementation by the ITAC.[690]

The CoM is the supreme policy and decision-making body in all SACU matters. It consists of at least one Minister from the Ministry of Finance or Ministry of

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685 This is in terms of the definition of "customs tariff" in Article 1.2 of Annex on the Tariff Board, which at the time of the submission of this thesis was still being negotiated by SACU member countries.

686 For more on the role and functions of the Board, see 3 of Annex on the Tariff Board.

687 See 2002 SACU Agreement, Article 14.

688 See BTTA, s 17.

689 The SACU Council of Ministers (CoM) consists of at least one trade minister from each member state.

690 See 2002 SACU Agreement, Art 13.4.

Trade of each Member State and is responsible for the overall policy direction and functioning of SACU institutions, including the formulation of policy mandates, procedures and guidelines for these institutions. The CoM has important responsibilities in the institutional framework of SACU, including the appointment of an Executive Secretary of SACU, the appointment of members of the SACU Tariff Board, the determination of the terms of reference, policy mandates, procedures and regulations of the Tariff Board,[691] and the approval of the budgets of the Secretariat, the Tariff Board, and the Tribunal. It also has to oversee the implementation of SACU policies and approve customs tariffs, rebates, refunds or drawbacks and trade-related remedies on the recommendation of the Tariff Board. Additional powers of the CoM include the authority to create additional Technical Liaison Committees[692] and other additional institutions and to determine and alter their terms of reference. In terms of *Rules of Procedure of the Council of Ministers of the Southern African Customs Union,* Rule 9(a) read with Article 17 of the SACU Agreement, CoM decisions will be reached by consensus.[693] Article 17 of the SACU Agreement states that "[e]xcept as otherwise provided in this Agreement, decisions of the institutions of SACU shall be made by consensus". As argued by Erasmus, Article 17 of the SACU Agreement is very "elementary" and does not give guidance on how consensus may be reached.[694] But clearly, the procedural aspect of reaching this consensus does not include a majority vote. It is submitted that decision making in the CoM is akin to negative consensus

691 See 2002 SACU Agreement, Art 11.

692 See 2002 SACU Agreement, Art 12.

693 Dressler *Consensus through Conversation* defines consensus as a "cooperative process in which all group members develop and agree to support a decision in the best interest of the whole. In consensus, the input of every participant is carefully considered and there is a good faith effort to address all legitimate concerns". Morin and Gold "Consensus-seeking, Distrust and Rhetorical Entrapment: The WTO Decision on Access to Medicines" *European Journal of International Relations* 2010 *EJIR* 563, 577 follow Habermasian literature and conceptualise consensus-seeking as a

> ... process that brings interested parties into a common deliberation with the objective of reaching an agreement that is rational from a subjective perspective and normatively valid from an intersubjective perspective. The objective is neither a mere agreement resulting from a majority vote nor a compromise resulting from bargaining.

What is common in the two definitions is that consensus decision making requires the buy-in of all parties involved in the matter.

694 See generally Erasmus *Decision-making in Regional Organisations*, paper presented at the TRALAC Annual Conference, 16–17 September 2010.

decision making which applied in the GATT 1947 panels. In this regard reaching consensus could fail or be influenced by a mere negative vote by the member whose national body decision has been challenged.[695]

According to Erasmus,[696] and correctly so, powers vested in the CoM to make final decisions by consensus[697] amount to a right of veto for members. Unfortunately, consensus decision making inherently favours the status quo and often makes it difficult to achieve change. The establishment of the CoM, as the multilateral authority capable of reaching a final SACU decision, will tamper with the sovereign powers of the member states to implement trade remedies. The member countries cannot adopt anti-dumping decisions on their own without the approval of the Tariff Board and the CoM. Since the SACU Tariff Board is yet to be established, the ITAC will, in practice, forward its recommendations directly to the CoM and continue to act as the regional trade remedies administration body.[698]

4.5.3 SACU Tribunal

Although not yet established, the 2002 SACU Agreement makes provision for an ad hoc Tribunal,[699] which will, pursuant to Article 12 of the 2002 SACU Agreement, adjudicate on any issue concerning the application or interpretation of the Agreement or any dispute arising there under at the request of the CoM. The SACU Tribunal introduces alternative dispute resolution within the SACU in a form of judicial review. Accordingly, the task of the Tribunal would be the

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695 See Ehlermann and Ehring "Decision-making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?" 2005 *JIEL* 51–75 discussing consensus decision making in the WTO.

696 Erasmus *New SACU Institutions* 5.

697 See Rules of Procedure of the Council of Ministers of the Southern African Customs Union (SACU), Rule 9(a) read with Article 17 of the SACU Agreement. Article 17 states that "[e]xcept as otherwise provided in this Agreement, decisions of the institutions of SACU shall be made by consensus".

698 See section 6.2.8 for further discussions on SACU Tribunal reviews.

699 SACU *ad hoc* Tribunal will be composed of three members except as otherwise determined by CoM. See 2002 SACU Agreement, Art 13.2.

settling of any disputes on unfair trade practices[700] and giving legal opinion on cases referred from the Tariff Board.

It is important to note that, in the event of any dispute or difference arising between Member States in relation to or arising out of the SACU Agreement, including its interpretation, the parties shall in the first instance meet and consult in an attempt to settle such dispute or difference before referring the matter to the Tribunal.[701] In this regard it is submitted that the 2002 SACU Agreement mirrors Article 4 of the DSU, which encourages WTO members to consult each other in order to settle their dispute amicably before it reaches the stages of formal arbitration by a Tribunal. The SACU Tribunal will decide by majority vote and its decisions will be final and binding.[702] The decision-making power of the Tribunal is slightly different to that of the CoM, and similar to that of the WTO dispute settlement bodies, in that no decision can be prevented by negative consensus or be subject to veto powers. Article 13.3 of the 2002 SACU Agreement expressly provides that the Tribunal will make decisions through majority votes, and such decisions will be final and binding.[703]

4.5.4 Department of Trade and Industry

The ITAC also imposes definitive anti-dumping duties in the form of a final recommendation to the Minister of Trade and Industry.[704] What happens is that the ITAC will conduct its investigations and make appropriate determinations. On the basis of these investigations and determinations, the ITAC makes recommendations to the Minister of Trade and Industry, who upon making a decision, requests the Minister of Finance to implement it.

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700 Kirk and Stern "The New Southern African Customs Union Agreement" 2005 (62) *South African Journal of Economics* 167, 177.

701 See 2002 SACU Agreement, Art 13.6.

702 See 2002 SACU Agreement, Art 13.3.

703 In terms of Article 13.8 of the SACU Agreement, the Tribunal has the power to determine its own rules of procedure. However, no such rules of procedure existed at the time of writing.

704 See ADR, s 47.

4.5.5 South African Revenue Service

In almost similar manner as under the pre-2003 system, several supplementary institutions play a role in the anti-dumping process, including the South African Revenue Service (SARS). The ITAC handles applications for anti-dumping investigations[705] and hearings,[706] makes preliminary findings, and imposes provisional measures in the form of a request to the SARS Commissioner.[707]

4.6 Summary

This chapter set out the historical background and evolution of anti-dumping law in South Africa. Legislative enactments starting with the Customs Tariff Act of 1914 to the current Act, the ITAA, were examined. Subsequently, the legal foundation of the Customs Tariff Act for anti-dumping measures underwent a series of amendments until completely repealed by the ITAA. Most notable of these amendments were the 1995 and the 1997 amendments. It was also found that the law started to take a comprehensive shape, in conformity with the GATT and the URAA, with the enactment of the ITAA, which is now South Africa's primary trade regulation and remedies framework. WTO law, it is argued, should be treated as international law in South Africa. Moreover, the jurisprudence of the DSB on dumping and anti-dumping should have direct application in South Africa.

This chapter also indicated that since 1992 the functions of the South African trade authorities have been trimmed down into specific directorates, including a directorate dealing with trade remedies such as anti-dumping investigations. Most interestingly, it highlighted that the ITAC also operates as an anti-dumping authority for the other SACU members in close cooperation with the SACU Tariff Board, the latter being SACU's supra-national body. Overall, it was made evident that the functions and the operational aspects of the ITAC, and its

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705 See ADR, ss 3, 7 & 28.
706 See ADR, s 5.
707 See ITAA s 30(5)(a); ADR, ss 33, 39(4),

supplementary institutions are not much different from those of its forerunner, the BOTT.

Another issue of importance discussed in this chapter is the interface of WTO law and South African municipal law. Some commentators are of the view that WTO law has no direct application in South Africa, because of the failure of Parliament to enact legislation incorporating WTO law. Moreover, revisionist commentators argue that the incorporation of WTO pursuant to the Constitution of 1996 is trite law, and therefore incorporation is necessary before such WTO law or norms can even have an indirect effect on municipal law in terms of section 231. It is submitted that there are reasons to conclude that WTO law is *ipso facto* part of South African municipal law, notwithstanding the fact that there is no domestic act triggering the municipal effects of the treaty.

In the next chapter, which is one of the core chapters of the thesis, the comparative and juridical study of South African anti-dumping law and its compliance with WTO rules is undertaken. In particular, the next chapter will conduct a comparative analysis of the procedural aspects of South African anti-dumping investigations and proceedings specifically with regard to the initiation, investigation and prosecution of anti-dumping complaints, and to determine their consistency with the WTO.

CHAPTER FIVE: INITIATION OF ANTI-DUMPING COMPLAINTS, INVESTIGATION AND PROSECUTION

5.1 Introduction

This chapter deals primarily with the procedural aspects of the initiation, investigation and prosecution of anti-dumping complaints. Procedural aspects of anti-dumping investigations are important in that it is through them that one can determine if parties enjoy the due process of the law. In addition, there are some pre-initiation and post-initiation procedural issues that the investigating authorities need to address in order to be WTO consistent. These include various due process obligations in favour of interested parties within the ambit of Articles 6 and 12 of the URAA in respect of the investigation and of the contents of the final/provisional determination, respectively.

The chapter will also deal with the various relief measures that can be taken by authorities and/or by parties under investigation, and that may influence the nature and course of the proceedings. Notable here are the constructive remedies such as price undertakings and the cessation of dumping activities. The South African anti-dumping system is a unitary system, with both the procedural and the substantive aspects of anti-dumping cases being dealt with by the ITAC.

5.2 Anti-dumping Complaints and Prosecutions

5.2.1 Initiation and Prosecution of Proceedings

5.2.1.1 Written Petition

In terms of Article 5.2 of the URAA, an anti-dumping proceeding must preferably start with the official submission of a written complaint by the domestic industry to the importing Member authorities that injurious dumping is taking place.

Several issues must be listed as part of the requirement for the contents of the application, including evidence of dumping and injury and the causal link between the imports and the injury.

A simple assertion is not sufficient. Article 5.2(i)–(v) of the URAA specifically requires, to the extent reasonably available to the applicant, the application to contain the following information: (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant; (ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question; (iii) information on prices at which the product in question is sold; and (iv) information on the evolution of the volume of the allegedly dumped imports, their effect on the prices of the domestic like product and their impact on the domestic industry.

Article 5.3 obliges authorities of the importing Member States to examine, before initiation, the accuracy and the adequacy of the evidence in the application. The problem with this obligation is that the provisions of Article 5.3 do not indicate the nature of this examination and how it should be undertaken. However, the panel in *Thailand – H-Beams* held that "the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary or final determination of dumping, injury, and causation, made after investigation".[708]

Another pre-initiation procedure, which it is submitted is based largely on comity between nations, is the requirement pursuant to Article 5 of the URAA that, before initiation, the importing Member authorities must notify the government of the exporting Member of the envisaged investigation. The benefit of the notification, according to the WTO Panel, is the promotion of transparency and certainty among WTO Members. Moreover, it can also provide a written record

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[708] See *Thailand – H-Beams*, Panel Report, paras. 7.89–7.90.

upon which an importing Member could rely in the event of a subsequent claim of inconsistency with Article 5.5 of the URAA.[709]

The South African anti-dumping regime seems to follow exactly the requirements as set by the URAA in this regard. In terms of section 3.1 of the ADR, investigations of alleged dumping practices shall be initiated by a "properly documented" written petition to the ITAC by, or on behalf of, the SACU industry, based on a prescribed questionnaire.[710] Section 3.1 of the ADR, as it relates to investigations on behalf of the SACU industry, seems to be also in line with Article 14 of the URAA. Article 14 allows a WTO member to file a petition with the authorities of another country alleging that imports into South Africa from a third country are being dumped, and are causing material injury in the petitioning country. If such a petition is filed with the ITAC by any of the SACU members who should also be a member of the WTO, the ITAC may seek approval from the WTO Council for Trade in Goods to initiate anti-dumping investigations.

5.2.1.2 Industry Standing

Article 5.4 of the URAA requires importing authorities to determine, before initiation, on the basis of an examination, the degree of support for, or opposition to, the fact that the application has been made by, or on behalf of, the domestic industry. The GATT Panel in *US – Seamless Stainless Steel* dispute, considering the provision of Article 5.1, highlighted the use of the word "shall" in Article 5 as setting a peremptory duty to properly determine standing before initiation, and that this is "an essential procedural requirement" the infringement of which cannot be "cured retrospectively".[711]

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709 *Thailand – H-Beams*, Panel Report, paras 7.89–9.90.

710 See section 5.2.2.1 of this thesis.

711 *GATT Panel Report, United States – Imposition of Anti-dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, 20 August 1990, ADP/47 [Hereafter US – Seamless Stainless Steel, Panel Report].

The Appellate Body, in *US – Offset Act (Byrd Amendment)* dispute, clearly stated that Article 5.4 requires only that anti-dumping authorities "determine" that support has been "expressed" by a sufficient number of domestic producers, and that the motive for such support is irrelevant.[712] In terms of Articles 4 and 5.4 of the URAA, an application for investigation is considered to have been made "by or on behalf of the domestic industry" only if it is supported by those domestic producers or workers who account for at least 25 per cent of the total production of the domestic like product; and more than 50 per cent of the total production of the domestic like product produced by that portion of the domestic industry expressing either support for or opposition to the application.

The URAA is expected to introduce a change in the meaning of the term "domestic industry" which is also considered in the proposed new South African anti-dumping legislation. According to Article 5.4 of the URAA, for the purposes of establishing standing the term "domestic industry" must be interpreted as referring to the domestic producers as a whole of the like product. The South African anti-dumping law contains a similar provision as the URAA with respect to standing.

In terms of section 7.3 of the ADR an application shall be regarded as brought by or on behalf of the SACU industry if at least 25 per cent of the SACU producers by domestic volume support the application; and of those producers that express an opinion on the application, at least 50 per cent by domestic production volume support such application. In terms of both the ADR and the URAA, two denominators must be considered to determine standing, namely (i) the part of the domestic industry either supporting or opposing the application, and (ii) the total production of the like product.

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712 *US – Offset Act (Byrd Amendment)*, WT/DS217/AB/R, WTDS234/AB/R, par.283 [hereafter

Table 5.1: Format for indicating industry standing in anti-dumping applications

Industry standing (Total domestic production of like goods for the 12 months preceding the lodging of the application)			
Manufacturer	**Production volume – support application**	**Production volume – oppose application**	**Production volume – neutral**
Your company			
Other manufacturer 1. 2.			
Total SACU	A	B	C

In practice, the ITAC has not always conducted itself as bound by the numerical representation of domestic industry. In certain cases the ITAC would ask for additional information irrespective of the fact that at least 25 per cent of the domestic industry supported the petition for an anti-dumping investigation.[713] The ITAC has also been prepared to continue with its investigation despite the fact that the petitioner represented only 20 per cent of the total domestic production,[714] and where the SACU industry consisted of one producer.[715] The ITAC has on an occasion terminated its investigations on the grounds of insufficient support of the investigation because of the withdrawal of support by one of the manufacturers who originally supported it.[716]

It is submitted that although the inconsistency by the ITAC in this regard, particularly the termination of the investigation, is not an affront to the URAA, it is similarly not a desirable approach to building the best jurisprudence on anti-dumping. Unless the support of the withdrawn manufacturer was indispensable to the conclusion of the investigation, ITAC could have, pursuant to article 4.1(i) of the URAA, excluded such manufacturer from the determination of the domestic industry support, as the latter was also the importer of the allegedly dumped product. It is further submitted that, ideally, the exclusion of the numerical threshold in Article 4.1 of the URAA would, in part, be the solution to

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US – Offset Act [Byrd Amendment, Appellate Body Report].

713 See for example *Poultry – US, BOTT Report No 4065; and Poultry – US,* BOTT Report No 4088.

714 See Ceramic *Tiles – Italy,* BOTT Report No 4192.

715 See *Sunset Review – Final Determination – China, India,* ITAC Report No 69, where the only producer was PFG Building Glass (Pty) Ltd.

716 See for example *Wooden Doors – Indonesia,* BOTT Report No 4119.

the challenge of determining domestic industry. In this regard the issue would be dealt with on a case-by-case basis. This would render justifiable the consideration by the ITAC of a petition even by one domestic manufacturer representing the domestic industry, if the manufacturer in the circumstances of the case presents sufficient evidence to support the petition and the commencement of the investigation. However, the numerical threshold to determine standing seems to be a very important determinant under the WTO rules, and it is couched in peremptory terms in the URAA. For instance, Article 5.4 of the URAA states that "no investigation *shall* be initiated when domestic producers expressly supporting the application account for less than 25% of total production of the like product produced by the domestic industry". [717]

If the URAA amendments come into effect, the ITAC can no longer continue with the investigation as it did in the *Ceramic Tiles – Italy*[718] case where the petitioner(s) were less than 20 per cent of the total domestic industry. In respect of the termination of the investigation as a result of the decrease in interested parties during the process of investigation as the ITAC did in the *Wooden Doors – Indonesia* case,[719] the issue becomes a matter of interpretation. The draft Article 5.4 does not expressly require the termination of investigations, and it is submitted that the correct interpretation is that Article 5.4 would not apply and cannot be used as an authority to support the ITAC's approach of terminating investigations. It is submitted that the South African anti-dumping law in respect of the definition of domestic industry, and of industry standing, conforms to the URAA requirements. Perhaps it should be noted that nothing in the URAA precludes South Africa from adopting a different provision as to who must request an anti-dumping investigation. It is therefore submitted that since dumping practices have direct and indirect ramifications for employees, the PADR should contain an explicit provision in the form of section 31*bis* allowing registered trade unions representing workers who are adversely affected by dumping to submit an application for anti-dumping investigations, on behalf of

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717 *Emphasis added.*

718 See Ceramic *Tiles – Italy,* BOTT Report No 4192.

719 See for example *Wooden Doors – Indonesia*, BOTT Report No 4119.

these employees as interested parties, notwithstanding the provision of section 31.

It is further submitted that such a provision would require the definition of "interested parties" in the ADR to be amended to include legitimate and registered trade unions and trade union federations along with members of the SACU industry.

5.2.1.3 Evidence of Dumping

As with Article 5.2 of the URAA, section 3 of the ITAA requires that, in order to be considered sufficient for the initiation of dumping investigations on behalf of the SACU industry, a petition must be accompanied by evidence of dumping beneficial to the exported product in question; material injury or the threat of such material injury or evidence of retardation of the establishment of a new domestic industry; and evidence of a link between the alleged unfair practice which is said to constitute dumping and the alleged injury, threat thereof or retardation.[720] Also important is other information necessary to support the petition, including the details of the volume and value of production of like product or product similar to the allegedly dumped product, identification of the industry on whose behalf the petition is made, information on prices at which the "dumped" product is sold when destined for consumption in the exporting country or country of origin or sale to third countries, and so forth.

In practice, information on the evidence of dumping will be provided in the questionnaires. For example, the ITAC Sunset Review Questionnaires specifically require the provision of the information needed for a proper comparison of export prices and normal values.

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720 Less consequential and minor changes to Art. 5.2 of the URAA have been suggested in the DAA. It is submitted that these changes do not materially affect Art. 5.2 of the URAA and therefore need not be dealt with in this part of the study.

5.2.1.4 Notice to Interested Parties

In practice, should the ITAC be of the view that there is sufficient evidence before it to "justify" its initiation of dumping proceedings it will make its intention to proceed known by a general notice in the *Government Gazette.*[721] This allows an interested party or parties affected by the contemplated proceedings to make presentations in relation to the intended proceedings and to respond to the ITAC notice. To this end, the ITAC notice conforms to a similar provision in the URAA that requires notification of parties who might be interested in the dumping investigations.[722] The general provision on public notice is found in Article 12 of the URAA.

In terms of Article 12, anti-dumping authorities of the importing Member States are obliged to publish public notices of initiation, and of preliminary and final determinations, as the investigation progresses. Article 12 further requires the authorities to publish detailed explanations of their determinations. Article 12 requires the public notice of the initiation of an investigation to contain adequate information on several issues, including the name of the exporting country and product involved; the date of the initiation of the investigation; the basis on which dumping is alleged in the application; a summary of the factors on which the allegation of injury to the domestic industry is based; the address to which representations by interested parties are to be directed; and the time limits allowed to interested parties for making their views known.[723]

The notice for provisional measures should contain sufficiently detailed explanations for the authority's preliminary determination on dumping and injury, and should also refer to factual and legal matters by reason of which the arguments of the other parties have been accepted or rejected.[724] A notice of definitive measures should contain all relevant information on the matters of fact and law, and the reasons which have led to the imposition of such final

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721 See ADR, s 28.
722 See URAA, Arts 6 and 12.
723 URAA, Art 12.1.1.1 (i)–(vi).

measures.[725] The South African authorities have not been consistent in respect of the requirement of notification to interested parties. For example, in *PVC Based Roll Goods,*[726] the BOTT failed to timeously notify interested parties and this resulted in the termination of investigations. The concept of "interested party" was never defined in the BTTAs. However, the determination of "interested party" by the BOTT conformed to the URAA.[727] Contrary to Brink's view,[728] it is submitted that there is no need to define the concept of interested party even if it is for the reason of increasing transparency. The non-definition of the concept of interested party is immaterial in light of the fact that the ADR provides guidance to the ITAC in determining who the interested parties are. According to the ADR, "interested parties" may include producers, manufacturers, wholesalers or exporters or importers or trade or business associations in the SACU; and foreign producers or exporters or governments of the countries of origin and of export.[729]

International trade relations and law are forever evolving and it is therefore undesirable to lock in some of the trade remedy concepts in exhaustive definitions and risk excluding other emerging interested persons from applying for protection against dumping or generally from the investigations. The matter should rather be left broad and open enough for purposive interpretation. Japanese law, for example, allows any person who has an interest in an industry in Japan to apply for protection against dumping.[730] This submission is supported by section 1 of the ADR, which allows the ITAC to accept any other parties as interested parties in the anti-dumping investigations. It is further submitted that the phrase "any other parties" must be interpreted in the context of Articles 6.11 and 6.12 of the URAA, respectively, to include industrial users of the product under investigation, and representative consumer organisations if

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724 URAA, Art 12.2.1.

725 URAA, Art 12.2.2. The provision of Art. 12 of the URAA applies in addition to the provision in Art. 5.5, which calls for the pre-initiation notification to the importing WTO Member.

726 *PVC Roll Goods – Germany, India, Netherlands, Thailand,* and BOTT Report No 4159.

727 See, for example, *Clear float glass – Singapore, Thailand, BOTT Report* No 3408, par.11.

728 See Brink *Theoretical Framework for South African Anti-Dumping Law* 758.

729 See ADR, s 1.

730 See Hagiwara, Noguchi and Masui "Anti-dumping Laws in Japan" 1988 *J.W.T* 38.

the product in question is commonly sold at the retail level. Article 6.11 in particular allows importing Member countries to include other domestic or foreign parties as interested parties in anti-dumping investigations. In Article 6.12 of the URAA, the word "investigation" has been substituted by the word "consideration". Reference to product under "consideration" instead of product under "investigation" will broaden the inquiry to be undertaken by the anti-dumping authorities. It is submitted that this approach is to be welcomed because it strengthens Article 6.12 proceedings.

5.2.1.5 Related Parties

During the investigation into the alleged dumping of a product in the SACU area or the review of anti-dumping determination, the ITAC as a matter of practice requires the importer, if a subsidiary, to give the names and addresses of all related manufacturers or producers who supply the importer; if the importer sells the product in question through a related re-seller, it must give a detailed explanation of the circumstances of the resale to such related reseller; and where the importer is related to the exporter of the product in question, the importer is required to provide details of the relationship, including the shareholding of the exporter in the importer.

The BTTA never defined the term "related party". The meaning of the term "related parties" was left to interpretation by the BOTT, which took into consideration the circumstances of each case including special production arrangements between the manufacturer and the exporter.[731] The concept of "related parties" is elaborately defined in section 66 of the Customs and Excise Act of 1964, which is also important in the interpretation and application of the anti-dumping measures.[732] Section 32(6) of the ITAA makes reference to the concept of "related party" in terms similar to those in the Customs and Excise

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731 *Roller Bearings – U.S*, BOTT Report No 3329. See also *Supertension Cable II – Germany*, BOTT Report No 4031 for related parties.

732 Brink is of the opinion that the BOTT seemed to have been oblivious to the existence of the definition of related parties in the Customs and Excise Act of 1964. See Brink *Theoretical Framework for South African Anti-dumping Law* 759.

Act of 1964.[733] "Related parties" refers to an association or compensatory arrangements between the parties and reflects the wording of the provision in Article 2.3 of the URAA.[734]

It is submitted that the description of related parties in the ITAA/ADR conforms to the URAA. I also agree with Brink,[735] and submit that the definition should be expanded to show the connection with the determination of the normal value and the export price.

5.2.1.6 Mero Motu Initiation by the ITAC

Dumping investigations can also be initiated by the ITAC *mero motu*[736] where it seeks to establish the existence of and obliterate practices that affect or may affect trade and industry in South Africa or the common customs area of the SACU, thereby inhibiting industrial growth. The ITAC will generally initiate the investigations without having received a written application where there is sufficient evidence of dumping, material injury to the industry and a causal link to justify the initiation of such an investigation.

The Explanatory Document of the PADR calls for section 3 of the ADR to be amended to provide in great detail and with more clarity as to when and under what circumstances the ITAC will initiate investigations and reviews *sua sponte* – without *having* received a written application from the relevant interested parties, as provided for by section 3(3)(b) of the PADR. The PADR makes provision for initiation of the investigation by the ITAC in the case of an anti-dumping investigation if it "has *prima facie* evidence of dumping, material injury

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733 The provision is similar to that in s 1(2)(b) of the BTTA of 1986.

734 S 32(6) of the ITAA is further broadly explained in s 1 of the ADR in the form of a mutually exclusive 10-point criterion, namely: (i) ownership or control of the equity shares of the other; (ii) power to appoint or nominate a director to the management of the other; (iii) being an office bearer in the other's business; (iv) being business partners; (v) being an employee of the other; (vi) both parties being under the control of a third person; (vii) both parties controlling a third person; (viii) related by blood, adoption or marriage; (ix) their conduct creating the impression of a relationship; and (x) the nature of the relationship excludes trade at arm's length between the parties.

735 See Brink *Theoretical Framework for South African Anti-dumping Law* 761.

and a causal link";[737] and in the case of an interim review, if it has "*prima facie* evidence of – (i) a change in circumstances relating to dumping and/or material injury; and (ii) a change in the margin of dumping and/or the lack of material injury".[738] It is submitted that having clear procedural guidelines in this regard would be welcome.

5.2.2 Evidence and Information

5.2.2.1 Obtaining Evidence and Information

In terms of section 3.1 of the ITAA, read with section 21.1 of the ADR, all the evidence and information needed to determine whether dumping exists, and to what degree, is to be gathered by sending importers and exporters questionnaires requesting information. Thus, the ITAC uses questionnaires to obtain the relevant information required to make a determination. The procedure is that questionnaires are sent to all domestic producers, importers, purchasers and exporters, and should be completed by a specified date, which is usually 30 days from the date of receipt of the questionnaire unless some extension is given under certain circumstances pursuant to the provisions of section 30 of the ADR.

The proposed Article 6.1.1*bis* of the URAA attempts to assist the investigating authorities in dealing with deficient exporters' questionnaire responses by stating that the authorities can make a preliminary analysis of the response within a reasonable period of time after the receipt thereof and notify the party that responded of any request for additional information or clarification.

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736 See ADR s 3.3. See also ITAA, s 16(a).

737 See PADR, s 3(3)(a). *Emphasis added.*

738 See PADR, s 3(3)(b). The problem in this regard is that reference to only interim reviews creates the impression that no other types of review can be undertaken by the ITAC. It is submitted that maintaining such a regulation will not be consistent with the URAA. The URAA makes provision for other reviews including the changed circumstances review, shippers review and sunset review.

It is submitted that the proposed Article 6.1.1*bis* is problematic in the following respects: Firstly, it leaves this area of the law vague by not providing a timeline for the consideration of the questionnaire response and the issuance of the preliminary determination by the investigating authority. The Article merely makes reference to "a reasonable period of time". Secondly, the use of undefined concepts such as "reasonable time" may affect the rights of the parties to be given prior notice and to fully defend their interests.

It is also submitted that this proposal is not materially different from the provisions in the current South African law which enable the ITAC to deal with deficiencies or inaccuracies in questionnaire responses. In practice, the ITAC satisfies itself of the accuracy and/or adequacy of the information provided, including conducting a merit assessment to determine the adequacy of the information supplied.[739] In particular, the ITAC gives parties a deficiency letter and seven days within which the identified deficiencies must be addressed. The ITAC will consider submissions deficient if any relevant information it requested from interested parties has not been submitted; if a proper non-confidential version has not been submitted; or if the submission is without written agreement of the ITAC and is not made in both hard copy and in electronic format.[740]

As indicated in section 5.2.1.1 above, the ITAC normally investigates cases where a request for anti-dumping investigation is supported by domestic producers or workers who account for at least 25 per cent of the total production of the domestic like product; and more than 50 per cent of the total production of the domestic like product produced by that portion of the domestic industry expressing either support for or opposition to the application. It is, therefore, submitted that it is not unusual for some producers or exporters not to receive questionnaires.

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739 See URAA, s 25 read with 26.1.

740 See ADR, s 31.1.

Another factor in the process, and perhaps important in the securing of relevant evidence, is that the ITAC may during an investigation accept a request for an opportunity to make oral representations before the ITAC by any interested party. This process is substantially regulated in section 5 of the ADR. Generally, any interested party may request an oral hearing during the preliminary and/or final stages of the investigation. Should such a request be received, the ITAC may, in terms of section 30 of the ITAA, make recommendations to the SACU Tariff Board that such an application for oral representations be accepted or rejected. Of importance is that the oral hearing shall be reduced to writing, and the usual requirements for a non-confidential version of such information should be satisfied. Subsequent reducing of oral evidence into writing is in line with Article 6.3 of the URAA. The ITAC may also allow adverse party meetings pursuant to section 6 of the ADR.[741]

It is submitted that sections 5 and 6 of the ADR show an honest attempt to align the South African position with the URAA, particularly Article 6.2, which provides for the full opportunity, on request to the national authorities, for interested parties to defend their interests. The opportunity is important to enable all the interested parties to present their opposing views, and for the other to present their rebuttals.[742] The proposed section 6 of the PADR is an attempt to further comply with the provision of Article 6.2 of the URAA. It is, however, submitted that the proposed provision will negate the good attempt under sections 5 and 6 of the ADR, and render the South African anti-dumping law inconsistent with the URAA. The PADR puts more emphasis on written representations and does not clearly indicate that interested parties may request oral hearings, which is a right available to any interested party under the ADR.

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741 See ADR, s6.

742 See for example, EC – *Tube or Pipe*, Appellate Body Report, WT/DS219/AB/R, paras. 149 - 252 discussing and ruling on the obligation pursuant to Article 6.2 read with Article 6.2, to afford interested parties opportunity to defend their cases.

The relevant part of section 6 of the PADR, under the heading "interested party hearings", states:

> The Commission shall provide notice to interested parties of the date of a hearing contemplated in subsection 1 at least 21 days prior to the hearing date. At least 14 days prior to the date of a hearing, interested parties who wish to attend the hearing must provide the Commission with a list of attendees and a detailed agenda and a detailed version, including where relevant a non-confidential version, of the information to be presented at the hearing ... .
>
> Written information provided to the Commission in terms of subsection 3, including the non-confidential version of any confidential information submitted to the Commission, will be placed on the public file.
>
> The Commission may limit or add to the agenda of a hearing and may structure a hearing as it deems efficient.
>
> There shall be no obligation on any party to attend an interested parties hearing, and the failure to do so shall not be prejudicial to that party's case.

5.2.2.2 Verification of Evidence and Information

In line with the URAA, the ITAC usually conducts verifications as it may deem necessary in order to satisfy itself of the information provided by SACU producers, foreign producers, importers and/or exporters following requests through questionnaires.[743] This is an important step towards making the final determination of dumping and/or revoking a standing determination. Once the verification is completed, the ITAC makes available the verification report to the interested party concerned, normally before the preliminary finding.[744] The copy of the non-confidential verification report will be placed on the public file for access by any other interested party.[745] The parties are given seven days to comment on the verification report. In practice, the ITAC may disregard the information provided by a party which refuses it access to relevant information

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743 See ADR, s18 read with s19.
744 See ADR, s 19.1
745 See ADR, s 19.2

or conducts itself in a manner that significantly impedes the investigation,[746] or nevertheless consider such information by the party if the information was properly submitted and verified even though *in loco* verification was not done.[747]

It is submitted that section 18.3 of the ADR must be amended to allow the ITAC to conduct search and seizure operations on premises of uncooperating parties pursuant to the provisions of the Criminal Procedure Act (CPA) of 1997,[748] or of the Customs and Excise Act. Failing to receive the verification visit or impeding the investigation is tantamount to the obstruction of justice in criminal law parlance, and should not be readily accepted by national authorities. Nothing in the URAA prohibits such an approach. It is submitted that such an approach is not unconstitutional, nor should it be viewed as rendering ITAA essentially a criminal legislation.[749]

5.2.2.3 Using the Best Information Available

What happens in cases where respondents are unable or unwilling to provide the information requested by the ITAC within the prescribed time limits and in the form requested, or the data required is not accessible or available? Article 6.8 of the URAA, read with the provisions of Annexure II of the URAA,[750] states that in cases in which respondents do not cooperate with the investigating authority by either refusing to provide access to the relevant information, or impeding the investigation in any other way, the investigating authority may make the necessary determination on the basis of the facts available. If information is, in fact, supplied "within a reasonable period", the investigating authorities cannot use the facts available, but must use the information which is submitted by the interested party. Article 6.8 identifies situations in which the

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746 See ADR, s 18.3 read with 18.4

747 See ADR, s 18.3

748 Criminal Procedure Act 51 of 1977 [hereafter CPA].

749 It is submitted that in such an eventuality the Appellate Body ruling in US – 1916 Act may militate against such an approach.

750 Paragraph 1 of Annexure II of URAA provides that "the authorities should also ensure that the party is aware that if information is *not* supplied *within a reasonable time*, the authorities will be free to make determinations on the basis of the *facts available* ..." (emphasis added).

investigating authority may overcome the lack of information, and further empowers the investigating authorities to arrive at a result less favourable to the interested party than would have been the case had the interested party cooperated.

The WTO's Appellate Body has been mindful of the fact that Article 6.8 does not specify the degree of cooperation required. According to the Appellate Body, what is necessary is that the party requested to provide information must show a significant degree of effort to the best of their abilities, and the national investigating authorities must not insist on "absolute standards or impose unreasonable burden on parties to co-operate".[751] The ITAC followed a parallel approach in dealing with requests for information by splitting its investigations into cooperating and non-cooperating foreign producers or exporters. This approach is not precluded by the URAA. The Explanatory Memorandum of the PADR proposes the ending of the parallel approach.

It is submitted that the practice of following a parallel approach and the proposed ending of such approach is not legally consequential to the anti-dumping investigation, but is rather a logistical practice designed to ease the procedural issues relating to receiving information from interested parties. In any event, the national anti-dumping authorities' investigation need not be stalled by a lack of cooperation by interested parties. In such cases, the authorities may rely on the residual fall-back provisions of Article 6.8 of the URAA. The ITAC, as a matter of practice, will rely on the "facts available", or the "best information available" as it is sometimes called, when the information required is not submitted within a reasonable time.[752]

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751 See for example, *United States – Anti-dumping Measures on Certain Hot-rolled Products from Japan*, WT/DS184/1B/R (24 July 2001), paras 80–81, 99–100, and 102 [hereafter US – Hot-Rolled Steel, Appellate Body Report].

752 In terms of the Appellate Body in *US – Hot-rolled Steel* par.85, in "reasonable period" must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of "reasonableness", and in a manner that allows for account to be taken of the particular circumstances of each case.

The provision of Article 6.8 is very important as it circumvents dilatory tactics by the parties trying to discourage or hold the investigation to ransom. Most importantly, the provision does not preclude the investigating authority from drawing adverse inferences in respect of the matter under consideration. "Best information available" has included allegations contained in the petition and in previous reviews. When a respondent refuses to submit requested information, or unreasonably delays in submitting such information, the ITAC will consider the best available information. Relevant to the point under discussion is that the Appellate Body in *US – Hot-rolled Steel*[753] has highlighted and acknowledged the fact that neither Article 6.8 nor paragraph 1 of Annex II expressly provides guidelines for when the investigating authorities are entitled to reject information submitted by interested parties. However, paragraph 3 of Annex II of the URAA clearly emphasises circumstances under which the investigating authority will be directed to use the information supplied. In terms of Paragraph 3 of Annex II, information should be used if it is "verifiable" and "*supplied in a timely fashion*", in a manner and form requested by the authorities.[754]

The Panel and the Appellate Body in *US – Hot-Rolled Steel*[755] cautioned against readily rejecting information on the basis that it was submitted late. The Panel recognised that it is in the interest of orderly administration for investigating authorities to establish deadlines; however, "a rigid adherence to such deadlines does not in all cases suffice as the basis for a conclusion that information was not submitted within a reasonable period", thereby making way for the application of the facts available.[756]

The Appellate Body held that the US Department of Commerce was not entitled to reject information "for the sole reason that it was submitted beyond the deadlines for responses to questionnaires", and that a decision otherwise is not

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753 *US – Hot-rolled Steel*, Appellate Body report, par.80–81.
754 *Own emphasis.*
755 *US – Hot-rolled Steel*, Panel Report, paras 7.54–7.55.
756 *US – Hot-rolled Steel*, Panel Report, *idem.*

in line with the permissible interpretation of relevant provisions of the URAA.[757] An important jurisprudence on "facts available" developed by the WTO Panel relating to affiliated parties has been recognised in the proposed amendments to section 6.8.1 of the URAA. In the ruling that was subsequently confirmed by the Appellate Body, the WTO Panel in the *US – Hot-rolled Steel* dispute held that the United States violated the provisions of the URAA when it held that the exporter failed to cooperate to the best of its ability and by disregarding all the information submitted by the exporter because the latter could not obtain the cooperation of a related party in supplying the relevant information.[758]

It is submitted that the proposed amendments to Article 6 seek to protect exporters from the adverse decision by national bodies as demonstrated in *US – Hot-rolled Steel* dispute. The proposed Article 6.8.1 allows authorities to request interested parties to supply such information as may reasonably be considered necessary to conduct the investigation, including information in the possession of affiliated parties. The proposed amendments further state that where an interested party can substantiate that it does not control an affiliated party, and that it did what it could do to the best of its ability to get information from such an affiliated party but to no avail, the investigating authorities "shall consider whether to maintain, modify or withdraw the request, taking into account the importance of the information available to the investigation".

Article 6.3.1 of the URAA further enjoins investigating authorities to "take such reasonable steps as are available to them to support the interested parties' efforts to obtain the information" and not to readily "... deem the interested party to have been non-cooperative" as did the United States in the *US – Hot-rolled Steel* dispute, or quickly make a determination on the basis of the facts available.

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757 *United States – Anti-dumping Measures on Certain Hot-rolled Products from Japan*, WT/DS184/1B/R (24 July 2001), par 89 [hereafter US – Japan Hot-rolled Steel, Appellate Body Report].

758 *US –Japan – Hot-rolled Steel*, Panel Report, par.7.61–7.73. See also *US – Japan Hot-rolled Steel*, Appellate Body Report, par.99–100.

It is submitted that the proposed amendments to Article 6.8.1 should be welcome relief to exporters. However, they place an unnecessary burden on national authorities, which in a sense obligates them to assist the exporter in defending its case. Moreover, the proposal does not indicate what it means by "reasonable steps", which might lead to abuse and to dilatory tactics being used by exporters who maintain that the investigating authority did not provide them with adequate or reasonable "support".

5.2.2.4 Right of Access to Information

The parties' ability to access information relevant to the anti-dumping investigation is crucial for their preparation for and informed participation in the anti-dumping investigation. Article 6.4 of the URAA deals with parties' access to information rights by obligating anti-dumping authorities "whenever practicable" to provide "timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases". The Appellate Body in *EC – Malleable Cast Iron* dispute was of the view that access to information is an authentic due process requirement, and held that Article 6 of the URAA establishes a framework of procedural and due process obligations, which national authorities must apply throughout the course of the anti-dumping investigation.[759]

The ITAC, as an administrative body of the state, has a constitutional mandate to have in place measures and policies to properly deal with the proprietary information of companies under investigation, and of other interested parties including issues as to confidentiality and access to such information. Section 32(1)(b) of the South African Constitution of 1996 provides that everyone has the right to information held by the state where access to such information is required for the exercise or protection of rights, subject only to limitation in

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759 *European Communities – Anti-dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted on 22 July 2003, par 138 [hereafter EC–Malleable Cast Iron, Appellate Body Report].

terms of the law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society.[760]

Since constitutional right of access to information has been given legislative effect through the PAIA, the interested party in anti-dumping investigations may request access to information held by the ITAC or by any other parties which is necessary to enable such party to exercise any of its rights or protect its rights during the anti-dumping investigation and/or proceedings. However, access to information must be refused to protect (i) the privacy of third parties;[761] (ii) certain records of SARS;[762] (iii) commercial information of third parties such as trade secrets;[763] (iv) certain confidential information of third parties;[764] (v) information relating to the safety and security of persons, property, documents and records relating to law enforcement agencies, and (vi) information relating to the security and international relations of South Africa.[765] Thus, in order to determine if information should be considered confidential or not, the following questions must be asked: Is the information considered proprietary information? Is the information subject to a confidentiality or non-disclosure arrangement to the benefit of either the State or a private party? Would a competitor gain an advantage as a result of access to this information? Would access to this information have a prejudicial effect on its provider or a third party? Is the information provided generally available?

The problem with the ITAC granting access to information has been of delays and the long time the parties have had to wait to be granted access to the relevant information in the public file. Be that as it may, this may not be viewed as non-conformity with the URAA. To begin with, Article 6.4 requires provision "wherever practicable" of access to all information "used by the authorities in anti-dumping investigations". Thus, the delay, it might be argued, may be caused by the fact that it was not "practicable" for the ITAC to give access as

760 See s 36 of the Constitution of 1996.
761 See PAIA, s 34.
762 See PAIA, s 35.
763 See PAIA, s 36.
764 See PAIA, s 37.

and when required, that it did endeavour to do so within the best time it could, or that the ITAC in its honest opinion regarded access to the information by the requesting party as not "relevant" to its case; or that the information was not "used" during investigations. Reference to concepts such as "practicability", "relevance" and "used" creates a loophole in this regard which may be exploited by national authorities. It would appear that the Appellate Body in the *EC – Malleable Cast Iron* dispute sought to clear the uncertainty that might arise as a result of the parties' interpretation and application of the standard of "relevance" by stating that the understanding in this regard is that the information must be "relevant" to the presentation of the interested parties' case according to the judgement of the interested parties themselves rather than being judged by the investigating authority.[766]

The importance of access to information in anti-dumping proceedings, including the information yielded as a result of the ITAC investigation, was indicated by the court in *Rhone Poulenc v Chairman of the Board on Tariffs and Trade*[767] (hereafter *Rhone Poulenc v BOTT*) when it stated that the applicant had a right to be provided with all information in order to be put in a position where it would know all the consequences of the case against it and in that way be provided the opportunity to meet the case.[768] The Supreme Court of Appeal held that the BOTT was not required to make available all information yielded as a result of its investigation.[769] It is submitted that this decision was in line with the provision of Article 6.4, because it makes provision that the required access to information must relate to information relevant to the requester's case in the circumstances. The proposed amendment to Article 6.4 through the insertion of Article 6.4*bis* to a limited extent seeks to remedy the situation created by the somewhat discretionary provisions of Article 6.4. Article 6.4*bis* is peremptorily couched and states that the national authorities "shall provide opportunities for

765 See PAIA, ss 38–41.
766 *EC – Malleable Cast Iron*, Appellate Body Report, par.145.
767 *Rhone Poulenc v Chairman of the Board on Tariffs and Trade* (Case 98/6589 T), [hereafter Rhone Poulenc v BOTT].
768 *Rhone Poulenc v BOTT* at 25.
769 *BOTT v Brenco* 451E–452H.

all interested parties to see promptly all non-confidential information that is before the authorities in an anti-dumping investigation ...".

It is submitted that once Article 6.4*bis* is adopted, read with the WTO Appellate Body's ruling in *EC – Malleable Cast Iron* dispute, the ITAC will have to put its law and practice in line with the new development. This development will negate the ruling in the *BOTT v Brenco* case by making it obligatory for the ITAC to make available all the evidence yielded during the investigation including the evidence not used during the investigation. The important consideration will be that the ITAC has the information which can be linked to the investigation. Practicality can therefore only be a consideration to granting access if linked to issues of confidentiality, or important for consideration of information protection questions pursuant to section 34 of the PAIA. The position now, it is submitted, is that access to information rights under South African anti-dumping law is WTO-consistent.

5.2.2.5 Confidentiality of Information

Confidential information is information that is not available in the public domain or which is determined as such by the interested party. Most of the information relevant to anti-dumping investigations and/or proceedings is proprietary information, the disclosure of which may prejudice the party who gave such information. Owing to the sensitivity of some information used or submitted during the anti-dumping processes, it needs to be treated with great circumspection. Anti-dumping authorities always seek to strike a balance between the right of access to information and the proprietary interests of parties in trade secrets, commercial, scientific or technical information, and information submitted in confidence or under contractual arrangements.

The BTTA prohibited any person from disclosing information obtained during the course of the BOTT's investigation that relates to the business affairs of any other person, unless so ordered by a court of law or if the information is

disclosed in the performance of such a person's duties.[770] The ITAA provides clearly for the confidentiality of the ITAC's proceedings.[771]

The disclosure of the information should be of such a nature that it could result in a significant adverse effect on the owner, or on the person that provided the information; or give significant competitive advantage to a competitor of the owner.

In terms of section 33 of the ITAA, information may be confidential by nature or may otherwise be claimed to be confidential. What is evident from the ITAC practice is that documents or information are not to be rendered confidential by merely designating them as confidential information or because they contains a secret. All ITAC questionnaires carry a provision on confidentiality of information. For example, section 7 of the "anti-dumping application questionnaire", "importers' questionnaire" and the "exporter's questionnaire", addresses the issues of the treatment of confidential information including the requirement for an explanation why the owner wants the information to be treated as confidential.

According to section 2.3 of the ADR, certain information will normally be regarded as confidential as per section 33(1)(a) of the ITAA, read with section 36 of the PAJA. The information may include (a) management accounts; (b) financial accounts of a private company; (c) actual and individual sales prices; (d) actual costs, including costs of production and importation costs; (e) actual sales volumes; (f) individual sales prices; (g) information the release of which may have serious consequences for the person that provided such information; and (h) information that would be of significant competitive advantage to a competitor.

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770 See BTTA, s 17.

771 In terms of s 1(2) of ITAA, read with the ADR, information is confidential in nature if it refers to trade, business or industrial information that (a) belongs to a person or the

It is submitted that the South African law is in this regard WTO compliant. Article 6.5 of the URAA requires confidentiality of information by stating that information which is by nature confidential or which is disclosed or submitted to the investigating authority on a confidential basis shall, upon good cause shown, be treated as confidential by such an authority. A further obligation in Article 6.5 is that such information shall not be disclosed without specific knowledge of the party submitting it, unless the disclosure is required pursuant to protective orders as is the case in Canada, for example.

5.2.2.6 Treatment of Confidential Information

In an approach that is a sort of mix of the EC and the US approaches, the ITAC treats every information as public information which can be accessed and disclosed pursuant to PAIA unless a party makes a substantiated claim that such information is confidential, in which case the party making the claim is required to provide ITAC with a "written abstract" of the information in a non-confidential form.[772] It is submitted that South Africa imposes stricter requirements on issues of information confidentiality. To begin with, like in the United States, the onus is on a party asserting proprietary status for submissions to justify to the ITAC why the information should not be disclosed by supplying reasons for confidentiality.[773]

In practice, a party is required to submit a non-confidential abstract or summary of all confidential information concurrently with the filing of such confidential information. The ITAC is the last arbiter of whether the information claimed by a party to anti-dumping proceedings is in fact confidential.[774] Moreover, section 2(5) of the ADR gives the ITAC a discretion to disregard confidential information if not accompanied by proper non-confidential summaries thereof. Consequently, the ITAC will have to return the confidential information that was

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State; (b) has a particular economic value; and (c) is not generally available to or known by others.

772 See ITAA, ss 33–37.

773 ADR, s 2(1)(b).

774 See ITAA, s 34 (1).

not accompanied by a proper non-confidential version to the party that submitted it.

It is submitted that in general the ITAC's approach is consistent with the provisions of Article 6.5.2 of the URAA, which states that authorities may ignore confidential information as not warranted if not accompanied by its non-confidential summary, unless it can be demonstrated from an appropriate source that the information is correct. Nothing prevents the ITAC from accepting confidential information that is not supported by a non-confidential version.

The BOTT and the ITAC have in several cases used their discretion to accept or reject, in part or wholly, the confidentiality of information not accompanied by non-confidential summaries. For example, in *Roller Bearing – United States,* an anti-dumping investigation was initiated without a non-confidential version of the required information.[775] In *Supertention Cable II,* the BOTT used confidential information during its investigation despite the fact that its request for a non-confidential version of it was not complied with. In *Poultry – United States* and *Calcium Proprionate II – Netherlands* the BOTT rejected insufficient non-confidential information. The BOTT in the *Wooden Doors – Indonesia* case disregarded all the information provided by the exporter because the latter did not submit a proper non-confidential version of the information in question.

Questionnaires for both the ITAC and the BOTT make provision for the submission of confidential and non-confidential information by the Parties. The PADR proposes a different way of dealing with confidential information. It omits reference to the return of deficient information to the party submitting the same, and also adds a proviso that the deficient information[776] must materially affect the ability of interested parties to defend their interests.

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775 However, the case was taken to review by the exporter in *Brenco v Chairman of the Board on Tariffs and Trade.* See PADR, s 2(5); ITAA, s 34(3)(b).

776 According to s 33 of the PADR "submissions may be deemed deficient (a) If any relevant information has not been submitted; (b) If a proper non-confidential version or, where

It is submitted that reference to return of information should be retained in the PADR. What is interesting about the proposed amendments to section 2(5) of the ADR is that the ITAC is empowered to reject any application by an interested party for the exporter's deficient information to be rejected, provided the applicant can show, on reasonable grounds, that the deficient information materially affects or will affect their ability to defend their interests. Though not obligated under the PADR to return deficient information, it is submitted that the ITAC should continue its practice of returning deficient information to the party submitting it as a precautionary measure and safeguard against misuse of the information whilst in its custody in cases where it rejected the information on the grounds that the information materially affects the ability of the other parties to defend their interest.

It is further submitted that there may be the need to align the provision of the ADR on the requirement of the non-confidential abstract of the information submitted with the similar provision in the ITAA. While the ITAA requires the party to submit a statement under oath as to why it has been unable to supply the ITAC with a non-confidential abstract, the ADR (and the PADR) does not make reference to a sworn statement and merely requires reasons for failure to give a non-confidential version of the information.[777]

5.2.2.7 Verification Visits and Confidentiality Undertakings

WTO members are not confined to information made available by the parties to the proceedings, particularly if the accuracy of such information is in doubt. Article 6.7 of the URAA allows national anti-dumping authorities to carry out investigations in the territory of other Members in order to verify information provided or to obtain further details.

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applicable, a statement of reasons as contemplated in section 2.2, has not been submitted; or (c) In the circumstances contemplated in section 31.5".

777 See PADR, s 33(b).

Interestingly, the Panel in the *Argentina – Ceramic Tiles* dispute indicated in a footnote that "there does not exist a requirement in the Agreement [the URAA] to carry out investigations in the territory of other Members for verification purposes" and that on-the-spot verification visits in the territory of other members, though common practice, are just optional under the URAA. Article 6.7 of the URAA was included to deal with such a possibility.[778] The Panel in *Argentina – Ceramic Tiles*[779] dispute further indicated that there may be other approaches or measures that could be applied by national authorities to discharge their obligation under Article 6.6 of the URAA on the satisfaction of the accuracy of the information supplied by interested parties on which the authorities' findings are based. The important condition attached to on-the-spot verification is that the national authorities must obtain an agreement of the firms concerned and notify the representatives of the government of the Member in question of the investigation.

Paragraph 7 of Annexure 1 of the URAA, titled *Procedures for On-the-spot Investigations Pursuant to Paragraph 7 of Article 6*, prescribes a further condition that the on-the-spot verification visits should be carried out after the response to the questionnaire has been received, unless the exporter in question agrees to the contrary and the government of the exporting Member is notified of the on-the-spot verification visit being carried out before any response to the questionnaire. The rationale for this condition is because the main objective and purpose of the on-the-spot investigation is to verify information provided or to obtain further details of such information.[780]

The provision of Article 6.7 of the URAA that relates specifically to on-the-spot investigations in territories of the other WTO members notwithstanding, it is submitted that a complementary reading of Articles 6.6 and 6.8 indicates that

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778 *Argentina – Ceramic Tiles*, Panel Report, par 468.

779 *Argentina – Ceramic Tiles*, Panel Report, idem.

780 The procedures to be followed when conducting on-the-spot verification are prescribed in URAA Annexure I: *Procedures for on-the-spot Investigations Pursuant to Paragraph 7 of Article 6*, para 1–8.

Article 6.7 would apply to visits within SACU territories, including visits to exporters whose business operations are conducted or controlled from within the SACU territories.

Section 8.3 of the ADR confers on the ITAC the power and discretion to conduct its verification task at such time and place it may deem necessary. It is submitted that section 8.3 is consistent with and gives effect to Articles 6.6, 6.7, and 6.8 on on-the-spot verification investigations. The verification visits undertaken by the ITAC investigating officers in order to satisfy ITAC of the information provided following requests through questionnaires raise confidentiality concerns for exporters and may pose a challenge to obtaining verification. Neither the ITAA nor the ADR address this issue.

It is submitted that the preferable approach is for the ITAC to inform the company visited that its personnel may face criminal sanctions for disclosing confidential information. It is thus proposed that it may be necessary to insert a provision in either the ITAA or the ADR explicitly prohibiting any of its investigators or authorised persons from directly or indirectly making a record of any protected information; or to disclose to any other person any protected information, unless so authorised in the course of performing his or her duties. Such a provision will be consistent with, and acceptable pursuant to paragraph 2 of Annexure I of the URAA. Paragraph 2 of Annexure I is designed specifically to deal with the possible breach of confidentiality whereby the on-the-spot investigation team includes non-governmental experts. According to Annexure I, such non-governmental experts forming part of the investigating team "should be subject to effective sanctions for breach of confidentiality requirements".

It is also submitted that the relevant South African provision need not be confined only to non-governmental members of the investigating team. Government officials may also pose a serious threat to the confidentiality of proprietary information and should thus be subject to the same confidentiality requirements and sanctions.

The Australian Customs Amendment Act of 1985[781] (CAA) read with the Australian Crimes Act of 1901,[782] for example, makes provision for a broader confidentiality regulation. Section 16(2) of the CAA prohibits authorised persons from directly or indirectly making a record of any protected information and disclosing to any person any protected information, except in terms of the provisions of section 16; or as required or authorised by any other law; or as part of the course of performing his/her duties. Failure to comply with the prohibition in section 16(2) may be sanctioned by a penalty of imprisonment for two years.[783]

5.2.2.7 Verification Reports

Section 19.1 of the ADR provides for the preparation of verification reports by ITAC investigators. It is submitted that the verification reports are important in ensuring that interested parties have access to the information necessary to defend their interests as covered by Article 6.2 of the URAA, and also enhance the transparency of the ITAC's investigations. Section 22.1 of the PADR proposes a rather undesirable provision which may lead to inconsistency with the transparency and access requirements of the URAA, because of its bias in favour of foreign producers.

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781 Australian Customs Amendment 1985 [hereafter CAA 1985].

782 Crimes Act 1914.

783 In terms of s 70 of the CCA:

> (1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorized to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, *shall be guilty of an offence.*
> (2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him or her), any fact or document which came to his or her knowledge, or into his or her possession, by virtue of having been a Commonwealth officer, and which, at the time when he or she ceased to be a Commonwealth officer, it was his or her duty not to disclose, shall be guilty of an offence.
>
> Penalty: *Imprisonment for 2 years.*

The relevant provision of section 22.1 provides:

> The purpose of a verification report related to an examination of information submitted by a foreign producer is to ensure that the Commission and the foreign producer verified agree on what was verified during the Commission's verification. The failure to refer in the verification report to information verified will not preclude the Commission from using such information in its determinations.

Section 2.2.1 as it stands is unfairly discriminatory against domestic interested parties and may not pass constitutional muster. It is submitted that such a provision should also cover verification of information provided by domestic industry and other interested parties.

5.2.2.9 Release of Information to Specified Persons

The question of to whom the information is released may provide an added check and balance on the ITAC's proper treatment of confidential information without exposing itself to action for inappropriate release of such information. The position in the United States is that once the information is accepted as confidential proprietary information such information may only be released to attorneys or other representatives of interested parties under an administrative protective order (hereafter APO).[784]

In terms of the APO, it is required that the attorneys or other representatives of interested parties must establish a sufficient need for the information and capacity to adequately protect its proprietary status. Violation of the APO may result in sanctions or even disbarment from practice of the attorney in question.[785]

Although the United States' approach is not required under the URAA, it is submitted that it may be a desirable approach under South African law. The

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784 See generally the *USITC Anti-dumping and Countervailing Duty Handbook*, 3rd edn, http://www.usitc.gov/trade_remedy/documents/handbook.pdf, par.II 55–27.

785 See USITC *Anti-dumping and Countervailing Duty Handbook*, par.II–27.

approach may put the application of section 35 of the ITAA in proper context in so far as privacy to information and release thereof is concerned. In terms of section 35 of the ITAA, read with section 36, any other party wishing to access information rendered confidential by the ITAC may have recourse to the High Court or the Supreme Court of Appeal in order to have the ITAC's designation of the information as confidential overturned.

One of the proposals during the negotiations of the URAA was to have a provision in line with the United States' approach, in which authorities establish a mechanism allowing timely access, for the representatives of interested parties, to confidential information contained in the administrative record subject to the imposition of some penalties against such representatives for disseminating the information among individuals who are not authorised to access the information or for using the information for personal benefit. Unfortunately the proposal has not been included in the final version of the URAA text.

5.2.3 Rejection and Termination of Proceedings

In the form of a *nolle prosecui*[786] determination, the general rule in terms of Article 5.8 of the URAA is that an application shall be rejected and an investigation terminated promptly as soon as the investigating authority is satisfied that there is not sufficient evidence of either dumping or injury to justify proceeding with the case. Article 5.8 elaborates on the situations under which the investigation will be terminated immediately. The investigations shall be terminated immediately where the investigating authorities determine that the margin of dumping is *de minimis* or that the volume of dumped imports, actual or potential, or the injury, is negligible to warrant continuance of the investigation.

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786 In terms of s 7 of the Criminal Procedure Act of 1977, the National Prosecuting Authority (NPA) of South Africa may decline to prosecute an alleged offence and such decision will be contained in a *nolle prosecui* certificate. The certificate will confirm that the prosecutor has examined the statements or affidavits on which the charge is based and, that he/she declines to prosecute based on these facts.

The common threshold is that the margin of dumping is considered to be *de minimis* if the margin is less than 2 per cent, expressed as a percentage of the export price. Article 5.8 provides that the volume of dumped imports should normally be regarded as negligible if less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the import of the like product in the importing Member collectively account for more than 7 per cent of the imports of the like products in the importing Member.

5.2.4 Finalisation of the Investigations

The WTO provides a strict timeline for the conclusion or finalisation of anti-dumping investigations. Article 5.10 of the URAA provides that the "investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation". This means that under normal circumstances, the ITAC anti-dumping investigations must be finalised within a period of twelve months after their initiation.

South Africa has adopted a less stringent timeframe by providing that all investigation and reviews shall be finalised within 18 months after initiation. However, the inability of the ITAC to meet its own prescribed timeframes is a matter of concern, and may, it is submitted, afford more credence to an argument that the ITAC in this respect fails to comply with its obligations under the URAA. A case in point is *Polypropylene Film – Brazil* where the investigation period far exceeded twelve months. In this case, the ITAC set a precedent of publishing its reasons for its failure to conclude its investigations with 12 months.[787]

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[787] *Polypropylene Film – Brazil*, ITAC Report No 215, p20. The following were the reasons advanced by the ITAC: (1) the investigation was initiated on 4 November 2005, and parties applied and were granted an extension to submit information until 17 January 2006; (2) their subject product was of a complicated nature and extent; (3) considerable time was spent on the clarification of the product in question to importers and exporters; (4) the importers' and exporters' information was only verified after the preliminary determination; and (5) the causal link issues were raised throughout the investigation and the Commission had to provide interested parties with an opportunity to address the Commission on these.

In *Polypropylene Film – Brazil,* the investigation period was supposed to be from 1 June 2004 to 31 May 2005. Interestingly, the injury investigation ran from 1 January 2002 to 31 May 2005. A request for extension to comment on the essential facts letters until 16 November 2006 was received from the exporters, importers and the Brazilian Embassy, which was allowed until 2 January 2007. The final determination was only made on 31 January 2009. Be that as it may, it is submitted that the ITAC took an unreasonably long time to finalise the matter, and that such delays will have an effect on the legitimacy of the ITAC's final determination. In order to avoid such delays, it is proposed that ITAC must engage the services of specific product experts in complicated product cases, who will also bear the responsibility of clarifying the products to all interested parties.

5.2.5 Impact of Constructive Remedies on Anti-dumping Investigations

The defendant in anti-dumping complaints may follow certain courses to influence the suspension, termination or withdrawal of the anti-dumping investigations. A typical course is the so-called "undertakings". An undertaking is an agreement by exporters to conduct themselves in a manner that would avoid causing or threatening to cause material injury to the domestic industry. Price undertakings are preferred solutions by exporters because they avoid the hassles of litigation.[788]

Article 8 of the URAA permits the suspension or termination of the dumping proceedings without imposing an anti-dumping duty if the authorities receive a "satisfactory voluntary [price] undertaking" by the exporters and satisfaction that "the injurious effect of dumping is eliminated". It is submitted that the provision in Article 8 of the URAA is almost tantamount to a voluntary export restraint, which is generally a prohibited trading arrangement under the WTO rules.

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788 For a more detailed discussion on price undertakings, see Tao *Dumping and antidumping regulations* 93–125.

The South African anti-dumping regime reflects Article 8 of the URAA by allowing acceptance of undertakings. In terms of the ADR, the defendant may enter into a price undertaking with the other parties producing like products for the revision of company prices, that is, an increase in the price complained of or cessation of imports.[789] The price undertaking should be communicated to the ITAC for the latter to make a preliminary determination whether or not to continue with the investigations.[790] The anti-dumping proceedings may then be suspended or terminated if the ITAC is satisfied that dumping or the injurious effect thereof is eliminated. In this instance the ITAC practice is compatible with Article 8 of the URAA.

5.2.5.1 Exporter's Unilateral Price Increase

In terms of section 39.1 of the ADR, the defendant may unilaterally increase the price of the alleged dumped product in order to diminish the alleged dumping. However, it is submitted that this approach is likely to meet with opposition from other industries in that the increase may affect price mark-ups of like products in South Africa or in the SACU area. Depending on the level of the increase, this may be viewed as a form of disruptive trade practice.

5.2.5.2 SACU Producer Withdrawals

In terms of section 7.5(a) of the ADR, South African authorities may have to terminate anti-dumping proceedings upon application for a withdrawal by a SACU producer. However, the ITAC may disregard such an application for withdrawal if there is insufficient proof that such application is submitted by or on behalf of the SACU industry, and that less than 25 per cent of the SACU producers support the application.[791] It is submitted that the law in South Africa that allows for the anti-dumping proceedings to be terminated or influenced through constructive remedies is consistent with the URAA. As with the URAA,

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789 ADR, s 39.1.
790 ADR, s 39.1.
791 See ADR, s 7.5(b).

the ADR provides for situations under which the ITAC may refuse to discontinue the investigation following the price undertakings by the exporters.

Under Article 8.3 of the URAA, price undertakings may be refused if their acceptance is considered impractical by the investigating authorities. For example, if the number of actual or potential exporters is too great and the continuance of the proceedings is deemed necessary, for instance, to deter potential exporters. Similarly, in terms of section 39.3 of the ADR, the ITAC need not accept the undertakings if it considers their acceptance impractical. The ITAC may consider the undertaking impractical if, for example, the number of exporters is too great, or for other reasons including reasons of general policy. Use of the word "may" in section 39.1 of the ADR and use of the phrase "need not" in section 39.3 of the ADR implies that the ITAC has a discretion in deciding whether or not to accept the undertakings. Furthermore, the use of the phrase "for other reasons" in section 39.3 of the ADR indicates that the ITAC is given a broad discretion in considering reasons for not accepting or for accepting the undertaking and, thus, look beyond the ADR prescriptions. Another important element in the manner in which the ITAC deals with price undertakings is that it may, pursuant to section 39.2 of the ADR, terminate an undertaking if the conditions agreed are not met.

According to the WTO Panel in the *EC – Bed Linen* dispute, the acceptance of price undertakings may qualify as a constructive remedy in cases involving developing countries. While retaining the discretionary powers of the ITAC in dealing with undertakings, section 40 of the PADR attempts to give more clarity on price undertakings by requiring a preliminary determination of a finding of injurious dumping to be made before the ITAC accept a proposed price undertaking. Moreover, section 40 provides that the ITAC may not consider undertakings that it considers "impracticable" for several non-exhaustive reasons, including the fact that the "number of foreign producers is too great", or for "reasons of general policy". It is submitted that although the amendment is welcome, the requirement of a preliminary determination might have the

unintended result of delaying the termination of injurious effects and thus disadvantaging the domestic industry.

5.3 Anti-Dumping Measures

5.3.1 Provisional Anti-dumping Duties

Article 7 of the URAA, which is to be read with Article 9 on the imposition and collection of anti-dumping duties, generally provides for the imposition of provisional anti-dumping duties. The provisional anti-dumping duties are applied in order to prevent further injury, or to prevent the threat of injury, to the domestic industry during the course of the anti-dumping investigation. Article 7.1 of the URAA provides that national authorities may apply provisional measures only if:

> (i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice have been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;
>
> (ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and
>
> (iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

In South Africa, anti-dumping duties are imposed through a publication in the *Government Gazette* by SARS, which is the official source of levels of anti-dumping duty in the country. The South African anti-dumping law and practice on provisional duties generally reflects a serious effort to replicate the intent of Article 7 of the URAA. The ITAC may at any time during the course of its investigations, but not less than 60 days after the initiation of the anti-dumping proceedings, having satisfied itself that urgent action is justified to prevent material injury being sustained by the SACU industry concerned, impose provisional payment.[792] The application of provisional payment may not exceed

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792 See generally the ADR, s 33 read with s 36.

six months,[793] save in exceptional circumstances when the ITAC may extend the period for a further three months at the request of any interested exporter[794] or when the finalisation of the investigation has been delayed by one of the interested parties.[795]

The ITAA provision on the period for the imposition of provisional payment differs slightly from Article 7.4 of the URAA on the timeframes. Article 7.4 of the URAA, for instance, requires that the period of the provisional measure or relief be as short as possible, but should not exceed four months, which may under exceptional circumstances be extended to six or nine months.

The provisional payment serves as security for any dumping duty that may be imposed "retrospectively to the date of the provisional payment" on products under investigation.[796] However, should no final anti-dumping duty be imposed before the expiry of the provisional duty, such provisional payment is refunded to the importer of the goods which were under investigation.[797] Where final anti-dumping duties are imposed, the provisional payments are taken into consideration in the calculation of the final anti-dumping duty. Where the provisional payments are in excess of the level of final anti-dumping duties the difference will be refundable.[798] Similarly, anti-dumping duties collected will be refunded where the importer or an exporter can show that the dumping margin which was the basis for such anti-dumping duty has been eliminated.[799]

It is submitted that though not materially different from the provisional relief provisions of the URAA, provisional relief measures that can be taken by the ITAC seem to be limited compared to those under the URAA. For example, in terms of Article 7.2 of the URAA, provisional anti-dumping measures may range

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793 ADR, s 33.2.

794 ADR, s 33.3. See also section 57A (2) of the Customs and Excise Act (on the extension of payment of provisional payment).

795 See ADR, s 33.4.

796 Customs and Excise Act, s 57A(3)

797 Customs and Excise Act, s 57A(4) and (5). See also ADR, s 65 on refunds.

798 See ADR, s 65.1. See also *Roller Bearings from the United States* par.115.

799 See ADR, s 65.1.

from provisional duty, security by cash deposit to bond equal to the amount of the anti-dumping duty provisionally determined. The ADR mentions only "provisional payment".[800] This difference notwithstanding, it may *arguendo* be concluded that since a provisional payment order by the ITAC serves as security for anti-dumping duties that may be imposed, it can therefore be regarded as the equivalent of "security by cash deposit or bond" that is applicable under Article 7.2 of the URAA. South African law, therefore, should be regarded as WTO/GATT compatible. The ITAC has the discretion whether or not to impose provisional measures. This discretionary practice, though not contained in the ADR, is in line with the provisions of Article 7.5 of the URAA, which by reference requires a *mutatis mutandis* application of the provisions of Article 9. The latter makes provisions for the "permissive" imposition of duties.[801]

Interestingly, section 35.1 of the PADR contains a provision similar to Article 9.2 of the URAA in respect to the permissive imposition of provisional duties. Section 35.1 of the PADR provides that "[t]he decision whether or not to apply a provisional measure shall be permissive even where all requirements for the application of a provisional measure has been fulfilled".

5.3.2 Definitive Anti-dumping Duties

The practice under the BOTT was that upon the completion of the final investigation, the BOTT made a decision and submitted its findings to the Minister of Trade and Industry together with its recommendation in terms of

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800 See ADR, ss 33.3 and 33.4.

801 Article 9.1 of the URAA provides:

> The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is *desirable that the imposition be permissive in the territory of all Members*, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry [emphasis added].

section 4(2) of the BTTA. The Minister had to approve any recommendation for action or rejection of the dumping petition by the BOTT. Subsequently, the Minister of Finance imposed the final duty by notice in the *Government Gazette* at the request of the Minister of Trade and Industry.[802] However, the Minister of Finance could, in terms of the Customs and Excise Act and notwithstanding the request from the Minister of Trade and Industry to impose anti-dumping duties, exempt the importer from the payment of the determined duty if he were of the opinion that the goods have been imported "in such circumstances or in such quantities" that their importation does not amount to irregular trade practice.[803]

The ITAC's decision is also in the form of a recommendation to the Minister of Trade and Industry. According to section 38 of the ADR, the definitive anti-dumping duties will remain in place for a period of five years from the date of the publication of ITAC's final recommendation, and may be imposed retrospectively.

Few amendments are proposed in the PADR. Firstly, a definitive anti-dumping duty must remain in place for five years from the date of publication in the *Government Gazette* of the notice imposing such duty in the original investigation; or for five years from the date of publication in the *Government Gazette* of the notice giving effect to the final determination in the most recent review of such duty covering dumping and injury. Secondly, if a sunset review is initiated prior to the lapse of an anti-dumping duty, such anti-dumping duty must remain in force until the sunset review has been finalised.[804] Lastly, the PADR supports the initiative to have the anti-dumping recommendations by anti-dumping authorities of the SACU member states forwarded to the SACU Tariff Board, which is not yet established, for the latter to make recommendations to

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802 If the BOTT recommended that the petition be rejected the Minister had the power to so reject the petition or to order the reconsideration of the issue by the BOTT. S 4(2) of the BTTA states: "Upon receipt of the report and recommendations referred to in subsection (1) (b), the Minister may– (a) accept or reject such a report and recommendations, or refer them back to the BOTT for reconsideration; and (b) if he accepts the report and recommendations concerned, request the Minister of Finance to amend the relevant Schedule to the Customs and Excise Act."

803 BTTA, s 55(5)

804 See PADR, s 54.

the SACU Council of Ministers. Thus, the authority of the Minister of Trade and Industry to make final decisions on definitive measures is temporary and will be terminated upon the establishment of the SACU Tariff Board.[805]

A notable difference between the South African and the WTO provisions, which we argue does not render the South African law WTO-inconsistent, is the permissive nature of definitive duty impositions in the territory of all WTO members as contained in Article 9.1 of the URAA. It is submitted that the absence of a similar provision in the South African law should not be understood to mean that the law is WTO incompatible. The issue of permissive imposition of duties in other members is merely a desirable goal that members need not be pressed to incorporate into their national laws.

5.3.3 Residual Anti-dumping Duties

The South African anti-dumping authority will impose residual duties on exporters or importers who do not cooperate in the investigations, or who are not included in the investigations in line with Article 9.4 of the URAA. In practice, the ITAC will impose determined duties to the full extent of the margin of dumping, as has been the case in a few of its investigations.[806] These are the duties based on best information available from other exporters or importers pursuant to section 32.2 of the ADR.

It is submitted that the ITAC's residual duties imposition is WTO-consistent. It is further submitted that any inconsistent imposition of residual duties can be justified by the application of the "public interest" rules, as explained in section 5.3.4.1 *infra*, and the fact that the imposition of anti-dumping duties is a discretionary power by national authorities, and therefore should not be considered to be inconsistent with the WTO.

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805 See PADR, s 39.1

806 See, for example, *Acetaminophenol – China, Hong Kong, India, Singapore*, BOTT Report No 3366; *Aluminium Hollowware China, Hong Kong, Zimbabwe*, BOTT Report No 3722; *Picks – India, UK*, BOTT Report 3651; *Woodfree Paper – Brazil, Indonesia, Poland,*

The *WTO Appellate* Body in the *US – Hot-rolled Steel* dispute attempted to clarify the law on the imposition of residual anti-dumping duties in respect of parties who were not investigated by stating that Article 9.4 does not prescribe any specific method the investigating authorities must use to establish the residual duties rate.[807] Rather, Article 9.4 merely identifies a maximum limit, or ceiling, which investigating authorities "*shall not exceed*" in establishing the residual rate. This limit is to be established by calculating a weighted average margin of dumping established with respect to those exporters or producers who *were* investigated, subject to not considering zero and *de minimis* margins and, the margins established in cases of uncooperative or recalcitrant parties pursuant to Article 6.8 of the URAA.[808]

5.3.4 Related Matters

5.3.4.1 "Public Interest" Considerations

The imposition of anti-dumping duties by WTO Members is discretionary, and may sometimes be discouraged by recourse to public interest provisions in enabling legislation and regulations of national authorities. Neither the URAA nor GATT Article VI contains a public interest clause, except for the provision of Article 6.12 of the URAA which calls on national authorities to give consumers and intermediate users the opportunity to provide information relevant to the investigation and the determination of dumping. WTO Members have argued for the inclusion of the public interest test provision in the URAA in terms of which the effects of anti-dumping orders on the whole national economy could be measured.[809]

As indicated in section 5.3.2 above, the South African Minister of Finance may intervene at the end of the proceedings. It is submitted that, in this regard, it

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Sweden, BOTT Report No 3824; *Wooden Doors – Indonesia, Malaysia*, BOTT Report No 4119.

807 See *US – Hot-rolled Steel*, Appellate Body Report, par.116.

808 See *US – Hot-rolled Steel*, Appellate Body Report, *idem*.

809 See Barfield 2005 *World Economy* 729.

may be argued that the Minister of Finance enjoys a discretion to impose the anti-dumping duty based on "public interest" considerations. However, South African anti-dumping law does not have a comprehensive provision for considering the "public interest" before anti-dumping duties can be imposed.

Countries like Singapore, Canada, the EU and the United States have in their anti-dumping legislation a clear provision on public interest consideration: Singaporean anti-dumping legislation, for example, requires the Minister of Trade and Industry to consider the "public interest"' factor. Public interest is the criterion for determining whether to institute an anti-dumping investigation in Singapore. The Singaporean Minister of Trade and Industry has a duty to confirm, once a petition is received, whether the envisaged anti-dumping investigation is in the public interest. If the Minister determines that there is such evidence and that an investigation is in the public interest, the investigation would proceed.[810] Writing on Malaysian anti-dumping duty determination, Alavi and Ahamat[811] argue in favour of a public interest clause giving consumers and intermediate users meaningful legal standing in anti-dumping duty determination. In making out their case, Alavi and Ahamat convincingly argue, *inter alia*, that workers will also be affected when the domestic industry closes down owing to dumping as they will lose their jobs; consequently, when anti-dumping measures are used to protect inefficient industries the costs that consumers and intermediate users in the importing country have to pay may outweigh the costs resulting from the closure of such inefficient industries.

Tharakan points out that, in 1994, the EU went a step further by amending its "public interest" clause to give consumers some meaningful legal standing in anti-dumping cases.[812] In a more guided manner, Article 21.1 of the Basic Regulation, for example, urges the European Commission and the Council to take into account "community interests" before a decision is made to impose anti-dumping measures on imports.

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810 See generally, Hsu 1998 *JWT* 121–145.

811 Alavi and Ahamat 2004 *Journal of Economic Cooperation* 71–72.

812 See Tharakan 1999 *World Economy* 182–183.

In South Africa, public interest considerations are also important in anti-dumping investigations. In the *Italie – Ansoek of Pasta* case, for example, it was held that public interests are important in deciding if the anti-dumping action should be instituted. Recourse to public interest is in the form of an enquiry after a directive by the Minister of Trade and Industry to the ITAC. The ADR makes provision for public interest considerations, which the ITAC should consider in determining whether or not to impose any type of anti-dumping duty. Public interest provision in the ADR gives the ITAC broad discretionary powers to determine if there are reasonable grounds to conclude that the imposition, amendment or continuation of any type of anti-dumping duty, or the imposition, amendment or continuation of an anti-dumping duty in the amount determined in an investigation or review proceedings is justified. The ADR provides that the ITAC's determination of the public interest shall be based on consideration of any relevant factors. This is a very important provision because it provides a non-peremptory guidance on, and indices of, public interests.

Public interest may militate against the imposition, amendment or continuation of an anti-dumping duty, or for the imposition, amendment or continuation of an anti-dumping duty if (i) it is likely to substantially lessen or prevent, or has substantially lessened or prevented, competition in the domestic market for goods or services; (ii) it is likely to substantially lessen or has substantially lessened the competitiveness of domestic producers; (iii) it is likely to cause significant damage or has caused significant damage to domestic producers that use the product under investigation in the production of other goods or the provision of services; (iv) it is likely to significantly restrict, or has significantly restricted, consumer access, at competitive prices, to the product under investigation or like product, or to other goods produced or services that use the product under investigation as an input; or (v) it is likely to significantly impact, or has significantly impacted, negatively on the public health, the public safety or the environment.

It is proposed that section 4(2) of the ITAA and the ADR be amended to contain a clear provision on "public interest",[813] requiring the ITAC to consider the applicability or not of public interests without having to rely on the directive by the Minister.[814] Part of the amendment should include a specific and clear articulation of public interest criteria, and a non-exhaustive list of factors that can guide the ITAC on whether and how to conduct a public interest enquiry.

It is submitted that a "public interest" provision fashioned along the lines of Article 21.1 of the European Community's Basic Law could be workable for South Africa. The relevant part of Article 21.1 of the Basic Law states:

> A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interest of the domestic industry and users and consumers; and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as may be determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.

Furthermore, it is submitted that the current provision of section 4(2) of the ITAA will need to be redrafted to give an indication of the basis upon which the Minister makes a determination that the imports under investigation do not amount to irregular trade practice. The provision should permit the consideration of all relevant interests and put the elimination of trade-distorting effects of injurious dumping as the main objective. Writing in 2005, Barfield proposed a change in the United States anti-dumping regime which will make it possible for the President to intervene at the end of the process in favour of

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813 See Tao *Dumping and Antidumping Regulations* 107–108, stating that it is necessary for South Africa to enact a clear provision to address the aspect of public interest.

814 See, for example, Arajou *Anti-dumping and Competition Policy* 2001 www.eclac/publications/comercion/5/LGL, arguing against such a provision on the basis that the purpose of anti-dumping law was originally to protect producers and not consumers.

national interest and introduce a solution which covers both the economic and political goals of the United States.[815] We disagree with the introduction of such a highly politicised anti-dumping provision in South Africa. Contrary to what Barfield observes, fundamental economics still plays a significant part in the South African anti-dumping process.[816]

5.3.4.2 Lesser Duty Rule

The URAA provides that "[i]t is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry".[817] The ITAC may apply the lesser duty rule when the exporter has cooperated by providing the ITAC with all necessary information. This means that the provisional or definitive duty imposed in respect of such exporter shall not exceed the margin of dumping established, and shall be imposed at a level less than the margin of dumping if such lesser payment or duty would be sufficient to remove the injury.

The application of the lesser duty rule is engraved in the ITAC's practice.[818] After consideration of the reports of the ITAC it is submitted that the South African anti-dumping law is WTO-consistent with respect to the maintenance of the lesser duty rule. Section 17 of the ADR contains a provision that obligates the ITAC to consider applying the lesser duty rule if both the corresponding importer and exporter have cooperated fully. In order to be more consistent with the URAA's provision, which requires that the anti-dumping duty be less than

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815 See Barfield 2005 *World Economy* 729.

816 See Barfield 2005 *World Economy* 729, who points out that the US Congress has sometimes legislated rules and given instructions to the USITC that have little relevance to injurious dumping, and that members of the USITC have not been "political hacks with neither interest in or competence in economic analysis".

817 URAA, Art 9.1.

818 See, for example, *Aluminium Hollowware China, Hong Kong, Zimbabwe*, BOTT Report No 3722; *Carbon Self-Copy Paper – Germany*, UK, BOTT Report No 3443; *Glass Microspheres – Austria, Belgium, UK*, BOTT Report No 3797; *Optical Fibre Cable – Korea*, BOTT Report No 4028; Laundry Drying Machines – Australia, BOTT Report No 3231; *PVC Based Roll Goods – Germany, India, Netherlands, Thailand*, BOTT Report No 4158.

the margin of dumping if such duty would be sufficient to remove the injury caused by dumping, the PADR contains a provision for consideration of lesser payment or lesser duty when sufficient to remove the injury caused by dumping.[819]

5.3.4.3 Anti-dumping Duty Collection and Administration

In the *EC – Bed Linen (Article 21.5 – India)* disput, the Appellate Body clearly confirmed that there is "injury caused by a certain volume of dumping necessarily precedes and gives rise to the consequential right to impose and collect anti-dumping duties".[820]

According to Article 9.3 of the URAA, the amount of the anti-dumping duty to be imposed and collected shall not exceed the margin of dumping as may be established under Article 9.2. The proper reading of Article 9.3 is that no anti-dumping duties should be collected for the review period and the time taken to finalise the review. In line with the provisions of the URAA, section 38.2 of the ADR provides that, where the ITAC finds that a product is being dumped and causing injury to the domestic industry, the ITAC may impose definitive anti-dumping duties with retrospective effect.

5.3.4.4 Withdrawal and Refund of Anti-dumping Duty

The refunding of anti-dumping duty is a remedy that can apply if an anti-dumping measure is held to be in violation of WTO rules. Before the establishment of the WTO refund of duties was a contentious issue. For example, the GATT Panel in the *United States – Imposition of Anti-dumping Duties on Seamless Stainless Steel Products from Sweden* dispute[821] recommended that the anti-dumping duties be refunded. In contrast, however,

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819 PADR, s19.

820 *EC – Bed Linen (Article 21.5 – India)*, Appellate Body Report, par.123.

821 *United States – Imposition of Anti-dumping Duties on Seamless Stainless Steel Products from Sweden*, 20 August 1990, ADP/47 [US – Seamless Stainless Steel Hollow from Sweden, GATT Panel].

the Panel in the *Salmon* dispute was not prepared to recommend refund of the anti-dumping duties.[822] The URAA now explicitly makes provision for the refund of anti-dumping duties. WTO Members are obliged to make provision for prompt refunds of anti-dumping duties paid in excess of the margin of dumping, the payment of which should normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund has been made by an importer of the product subject to the anti-dumping duty.[823]

Prior to the ADR, no provision existed in South Africa for the refund of anti-dumping duties. Accordingly, the Customs and Excise Act did not make provision for the refund of anti-dumping duties, only for the refund of provisional payments. In terms of the ADR, refunds can be requested by the importer by indicating that the ITAC had found that no dumping took place, justifying the continued imposition of duties. *Sub-Part VII – Refund* of the ADR contains provisions on the request of refunds and the information needed to support such a request.[824] The concern for the ITAC has been that the URAA does not provide any guidance as regards the process to be followed or how an application for refunds should be evaluated. It is submitted that, in this regard, the ITAC is given a broad discretion on procedures and approaches to be followed. In terms of Article 9.3.3 of the URAA, the ITAC should, in determining whether and to what extent a refund should be made, take into consideration several factors, including any change in the normal value of the product in question, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices. Moreover, the ITAC is required to calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of these factors are provided.

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822 Note that the Panel was particularly of the view that a challenge to one aspect of the methodology did not necessarily lead to the conclusion that the dumping duty was unfounded.

823 URAA, Art 9.3.3.

824 ADR, ss 65 and 66. The latter provision relates to refund following anti-dumping reviews.

The evolving practice of the ITAC is that an application for a refund should take the form of an interim review. This is a shift in approach seen in the light of previous approaches of the BOTT, recommending that the duties be withdrawn retroactively to the start of the period of review.[825] In line with the URAA, the ADR provides that "an importer may request reimbursement of anti-dumping duties collected where it is shown that the dumping margin, on the basis of which anti-dumping duties were paid, has been eliminated or has been reduced to a level which is below the level of the duty in force".[826]

The ADR sets some strict requirements that should be complied with by an applicant. The refund application shall only be lodged during the anniversary month of the anti-dumping duty and shall relate only to the preceding 12-month period.[827] In practice, the onus lies with the applicant to prove the justifiability of such a refund, whereas the ITAC has an onus to verify the applicant's claims through, among other things, the information submitted by the applicant. The information required to be submitted with the application includes information on the amount of the refund claimed, information on normal values and export prices to the SACU for the producer or exporter to which the anti-dumping duty applies, and all customs documentation relating to the calculation and payment of such anti-dumping duties.[828] Section 66 of the ADR provides that where the ITAC, following an interim review, recommends that the existing anti-dumping duty be decreased or withdrawn, the applicant may request that anti-dumping duties be refunded in line with its findings.

The ITAC normally enters into consultations with the Commissioner for SARS to determine if SARS can administer a refund of anti-dumping duty, and the calculation of the amount of the refund. Generally, the South African law on refund of anti-dumping duties is GATT compliant. There have been cases where the practice of the ITAC contravened the URAA, including not sticking to the prescribed timelines for the consideration of the refund application and for

825 See *Calcium-Propionate – Netherlands*, BOTT Report No 4109.
826 ADR, s 65.1.
827 ADR, s 65.2.
828 See ADR, s 65.3.

making the refund to the applicant.[829] Fortunately, the ITAC has moved to avoid such contravention of the URAA. Brink maintains that the ADR are *ultra vires*[830] the ITAA, thereby suggesting that in this respect South Africa is not WTO-consistent. The problem with this argument is that it overlooks the fact that the ITAC has considered the provisions of the ADR in this respect and has always considered the ADR as supplementary to the ITAA.

It is submitted that if there were any improvements to be made on the refund provisions these should include a clear refund procedure, and specific details on how the refund should be claimed by the applicant. In this regard, lessons can be drawn from the procedure followed by the Pakistani National Tariff Commission. Pursuant to section 55(2) of the Pakistani Anti-dumping Duties Ordinance 2000,[831] a secular was issued in 2006[832] to set clear procedures for anti-dumping duty refunds. The applications for refunds should be made within fifteen days of publication of notice of final determination, supported by the necessary documents. Once the claims are verified, the duty paid will be transferred into a designated account of the Commission. Once it has satisfied itself of the claims, the Commission will request the Pakistani Anti-dumping Directorate to issue a sanction letter to the appropriate accounts division for the payment of the refund. The latter will eventually issue the cheque/cheques to the parties in the amount sanctioned by the Directorate. The Pakistani approach provides some level of certainty as to how the parties will get their refunds. It is therefore submitted that the ADR be amended to contain clear provisions on the procedure to be followed which would include reasonable timeframes.

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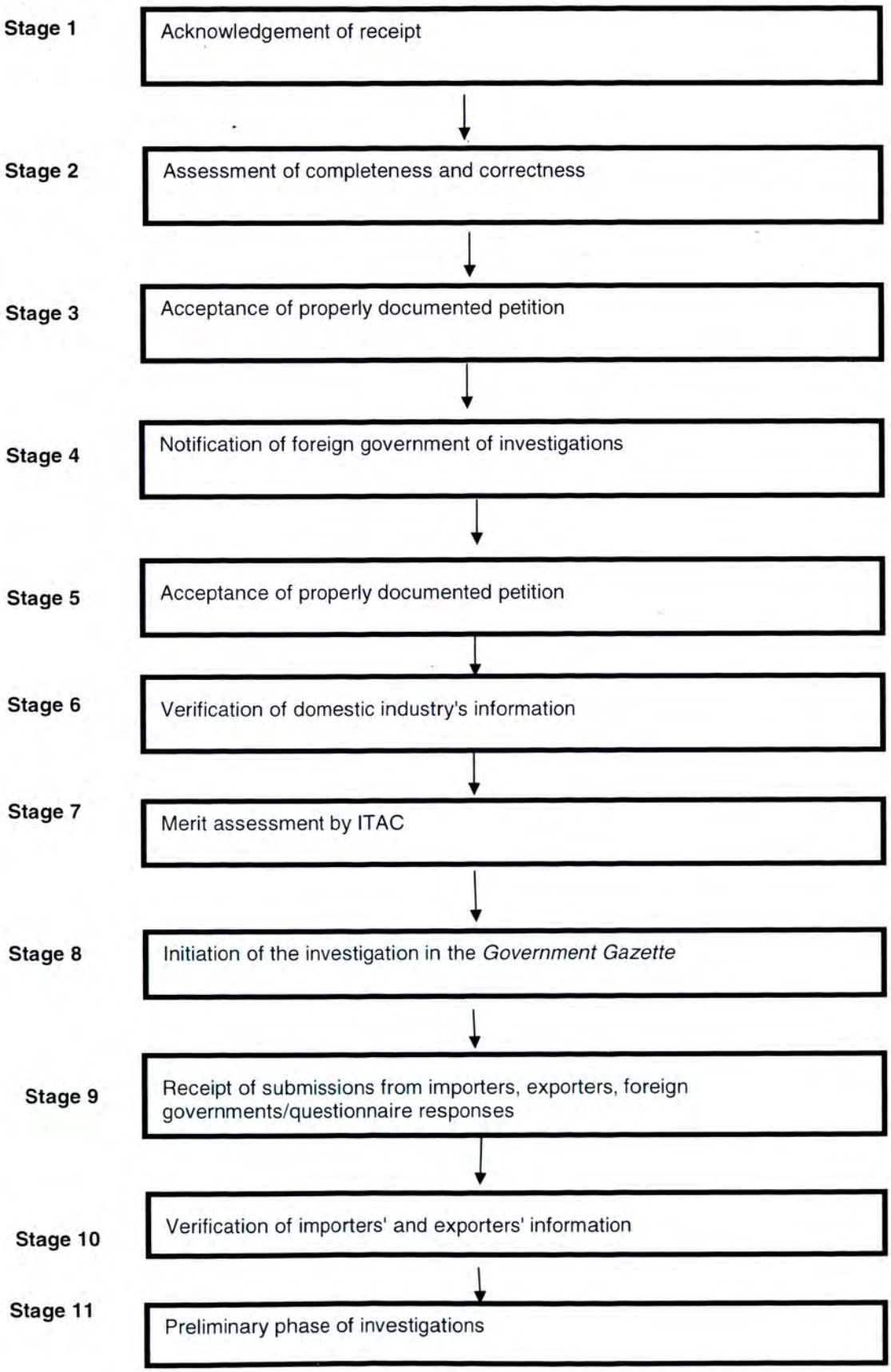
829 See Brink, *Theoretical Framework for South African Anti-dumping Law*, 933.

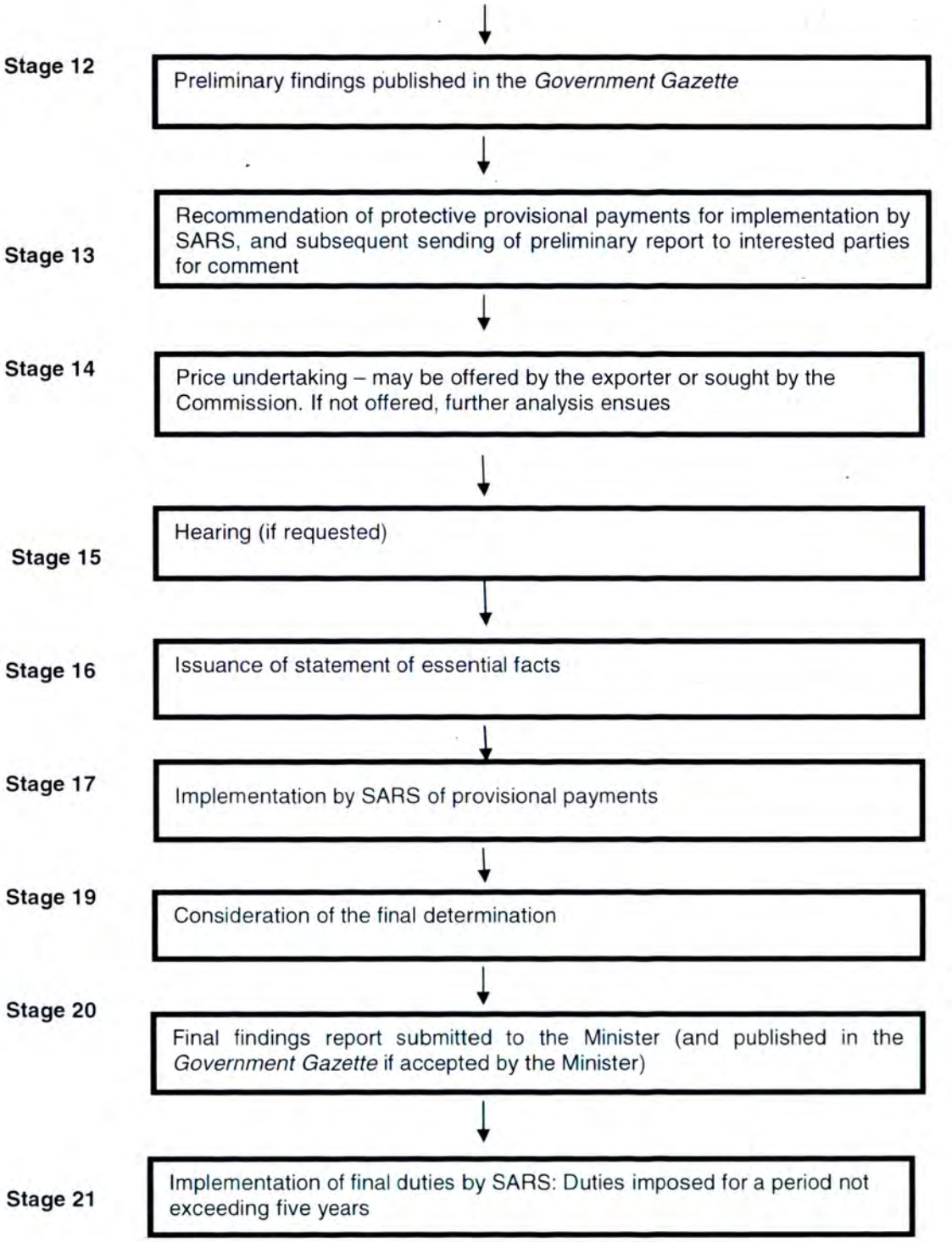
830 Brink, *Theoretical Framework for South African Anti-dumping Law* 937.

831 Anti-dumping Duties Ordinance 2000, which became effective 22 December 2000.

832 Circular No. 001/2006/NTC/Refunds (21 June 2006)

Figure 5.1: Depiction of the main stages of AD process in South Africa (compiled from provisions of the ADR)




Stage 12
Preliminary findings published in the Government Gazette
Stage 13
Recommendation of protective provisional payments for implementation by SARS, and subsequent sending of preliminary report to interested parties for comment
Stage 14
Price undertaking – may be offered by the exporter or sought by the Commission. If not offered, further analysis ensues
Stage 15
Hearing (if requested)
Stage 16
Issuance of statement of essential facts
Stage 17
Implementation by SARS of provisional payments
Stage 19
Consideration of the final determination
Stage 20
Final findings report submitted to the Minister (and published in the Government Gazette if accepted by the Minister)
Stage 21
Implementation of final duties by SARS: Duties imposed for a period not exceeding five years

5.4 Summary

This chapter discussed the procedural aspects with regard to the initiation, investigation and prosecution of anti-dumping complaints. It also discussed the various relief measures that can be taken by authorities in cases where they find that injurious dumping is taking place, or is threatening to take place, including price undertakings. No price undertakings may be accepted if it is found that acceptance of such undertaking is undesirable, unacceptable or impracticable for any other reason. It is submitted that mere non-reflection of the URAA provision in the ITAC's practice and in its enabling regulations does not warrant a conclusion that the South African law is *in toto* or predominantly inconsistent with the URAA. The South African anti-dumping processes are designed to ensure compliance or consistency with the URAA. This has been evident in respect of review proceedings, which permit investigations as serious as the one conducted in the original anti-dumping investigation. Conseqenlty, only a few changes need to be effected to the current law and practice.

The next chapter, Chapter 6, undertakes a comparative and juridical study of the anti-dumping reviews conducted by the ITAC, and judicial reviews of anti-dumping measures in South African courts.

CHAPTER SIX: ANTI-DUMPING DUTY REVIEWS AND JUDICIAL REVIEWS

6.1 Introduction

This chapter deals primarily with the anti-dumping reviews conducted by the ITAC and other judicial reviews, which are critical aspects of the due processes of South African anti-dumping law. Anti-dumping measures remain in force only for as long as, and to the extent necessary, to counteract dumping that is causing injury or threatening to cause injury. In line with the URAA, the ITAC will review the need for the continued imposition of anti-dumping duty either on its own initiative, or upon request by any interested party that can substantiate the need for such review. In terms of the WTO's semi-annual reports, which are compiled and made available by the WTO Secretariat for inspection by other members pursuant to Article 16.4 of the URAA, as "reports of any anti-dumping actions taken within the preceding six months", South Africa has undertaken several anti-dumping related reviews.[833]

6.2 Types of Review

6.2.1 General

The URAA contains three broad types of review, namely, new shipper reviews, dealing with producers which did not export the product in question during the original investigation period and which will be subjected to the residual duty imposed by the original investigation;[834] and interim and expiry reviews. The former is commonly referred to as a change in circumstances review[835] and the latter as a sunset review[836] because it relates to duties that expire after a set

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833 For example, about 65 sunset reviews covering 32 products from 28 countries have been finalised by the South African anti-dumping authority between 1998 and 2007. See Nakawaga *Anti-Dumping Law and Practices* 219.

834 See URAA, Art 9.5.

835 See URAA, Art 11.

836 See URAA, Art 11.

period. Judicial reviews are conducted by independent judicial, arbitral or administrative tribunals.[837]

6.2.2 Change in Circumstances Reviews

Article 11.2 of the URAA provides for a change in circumstances review (or interim review) of anti-dumping orders by anti-dumping authorities "where warranted on their own initiative or, provided a reasonable period of time has elapsed since the imposition of the definitive duty, upon request by any interested party which submits positive information substantiating the need for a review". Any interested party, not only the party subject to a definitive anti-dumping duty, may seek examination of the necessity of the continued imposition of the duty or modification thereof. The URAA contains a slightly changed provision in this regard, as it expressly incorporates the concept of "change in circumstances of a lasting nature" to determine if the continued imposition of the anti-dumping duty is warranted or if the level of the duty is no longer appropriate to the extent that it must be terminated immediately or at least modified.

The change in circumstances reviews have been part of practice in South Africa, and are available to all interested parties, namely, the domestic industry;[838] governments of the exporting countries;[839] importers and exporters,[840] who are of the opinion that circumstances have changed since the imposition of the anti-dumping duty. The change in circumstances can include, for an example, the fact that the domestic industry no longer exists or that the duty is too high or too low in the circumstances. Thus, any interested party seeking the modification or termination of the definitive duty has a burden of

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837 See URAA, Article 13. For the purposes of this study, judicial review will be treated differently in a narrow sense as "judicial review" and "administrative review", in order to fit the South African system.

838 See, for example, *Calcium Proprionate II – Netherlands*, BOTT Report No 4062.

839 See, for example, *Bed Linen – Pakistan*, BOTT Report No 3520; *Optical Fibre Cable – Korea*, BOTT Report No 4182.

840 See, for example, *Glass Microsphere – Australia, China, France, Germany, and UK*, BOTT Report No 4164.

proof that circumstances indeed has changed, thus warranting the relief sought by providing relevant information substantiating its request and claim.[841] The South African anti-dumping authorities could modify the level of duty by increasing, decreasing or confirming the scope of the application of the duty.[842]

It is submitted that Article 11.2 of the URAA was, even prior to the enactment of the ITAA, reflected in essence in the BOTT's practice, as supplemented by the applicable anti-dumping regulations. The ITAA does not, however, contain an express provision on change in circumstances reviews, although this omission is intended to be remedied by the ITAA Amendment Bill of 2005.[843] Section 9 of the ITAA Amendment Bill functionally reflects Article 11.2 by providing for an interim review or a change in circumstances review, upon a request by exporters, provided at least one year has elapsed since the imposition of the definitive anti-dumping duties. Section 9 of the ITAA Amendment Bill codifies case law under the BOTT, and it also captures the proposed amendment in the provision of the URAA in respect of change in circumstances review. Section 9 of the ITAA Amendment Bill retains, among other things, the established policy of the South African anti-dumping authorities that at least 12 months must have elapsed before the interim review is requested by any interested party.

It is submitted, however, that section 9 does not correctly reflect the provision of section 11.2 with regard to initiation of interim reviews by the ITAC. Section 9 of the ITAA Amendment Bill is, in this regard, confusingly drafted, as it is not clear what section 9 means by referring to "on the initiation the Commission ..., upon a request by any exporter". The word "or" which appears in Article 11.2 of the URAA is omitted in section 9 of the ITAA Amendment Bill. The only plausible and reasonable interpretation of section 9 is that in South Africa interim reviews can only be conducted after the ITAC has been petitioned by an interested party. As a practice, this is at variance with the practice in other jurisdictions such as the United States, where the Department of Commerce (USDOC) does

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841 See *Calcium Proprionate II – Nertherlands,* BOTT Report No 4062; *Underwear – China,* BOTT Report No 3820.

842 See ADR, s 47.2.

on its "own initiative" start review proceedings. It is submitted that the reference to "initiative by the Commission" is superfluous and should be deleted. Alternatively, the whole of section 9 should be redrafted to clearly provide for an interim review on initiation by the ITAC.

Considered differently, if the review is preceded by a request by the exporter, such review is technically not a review initiated by the ITAC. Moreover, Article 11.3 of the URAA uses the phrase "own initiative" of the anti-dumping authority, whilst section 9 refers to "the initiative of the Commission".

The *Oxford Dictionary* gives the meaning of the word "initiative" as the ability to "start a process", "initiate" or "to begin things".[844] Thus, without the prefix "own", reference to "initiative by the Commission" in section 9 simply means that the ITAC will begin an interim review upon being requested or petitioned by an interested party to do so. It is submitted that the enactment of section 9 in its current form will render the interim reviews under the South African law of narrow application vis-à-vis other jurisdictions, notwithstanding the fact that the ITAA Amendment Bill excludes governments of the exporting countries from the list of interested parties for the purposes of interim reviews, contrary to the practice under the BOTT. Moreover, section 9 of the ITAA Amendment Bill appears to be in conflict with section 3(3)(b) of the PADR, which in clear terms proposes that the ITAC should be able to initiate an interim review without having received a written application from the relevant interested party if it has prima facie evidence of "(i) a change in circumstances relating to dumping and/or material injury; and (ii) the change in the margin of dumping and/or the lack of material injury".[845] In this respect there is an internal contradiction and inconsistency in the South African anti-dumping regime.

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843 The Bill was not yet enacted at the submission of this thesis for examination.

844 *Oxford Mini School Dictionary* (2007) 305.

845 PADR, s 46.2

6.2.3 New Shipper Reviews

In terms of Article 9.5 of the URAA, new shippers are exporters or producers that did not export a product subject to anti-dumping duties or did not export it in sufficient quantities during the period of investigation, provided that they are not related to any producer or exporter in the exporting country that is subject to the anti-dumping duties on the product. According to Article 9.5 of the URAA, new shipper reviews are to be carried out on an accelerated basis in order to determine individual margins of dumping for new shippers "who are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product". The WTO envisages introducing a few changes to Article 9.5 of the URAA. One such important change is the additional proviso that the exporter must have "engaged in *bona fide* sales in commercial quantities".

It is submitted that although this is a good development, it is difficult to fully appreciate its application and import because the concept is undefined. Without any clarification of "*bona fide* sales in commercial quantities" national authorities may find it difficult to determine if new shippers reviews should be based on the volume of sales or on the manner in which the export was conducted, in order to determine export price or normal value of the product in question. Members of the WTO have suggested instead the addition of the proviso that the product should have been exported in "commercially representative quantities".[846]

There is currently no provision in the ITAA that gives effect to Article 9.5 of the URAA. However, attempts are underway to amend the ITAA to give such effect. Section 10(12) of the ITAA Amendment Bill provides for new shippers reviews for the purposes of determining individual margins of dumping for new exporters. Section 10(12) does not mirror the provisions of Article 9.5, except that it gives an opportunity for new exporters that have not exported the product in question during the period of investigation on which the anti-dumping duty

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[846] The proposal has not been considered in the final text.

was based. However, sub-part III of the ADR contains a provision on new shippers reviews, which supplements the ITAA, and its proposed amendments. The ADR gives exporters or manufacturers that did not export to SACU during the original investigation of dumping an opportunity to request the ITAC to conduct a new shipper review.[847] The ITAC will conduct the review if it is satisfied that the requester is not and was not related to any party to which anti-dumping duty was applied.[848] In this regard, the ADR reflects a proviso in Article 9.5 of the URAA. Accordingly, the request for a new shippers review can only be considered once definitive anti-dumping duties are imposed.[849]

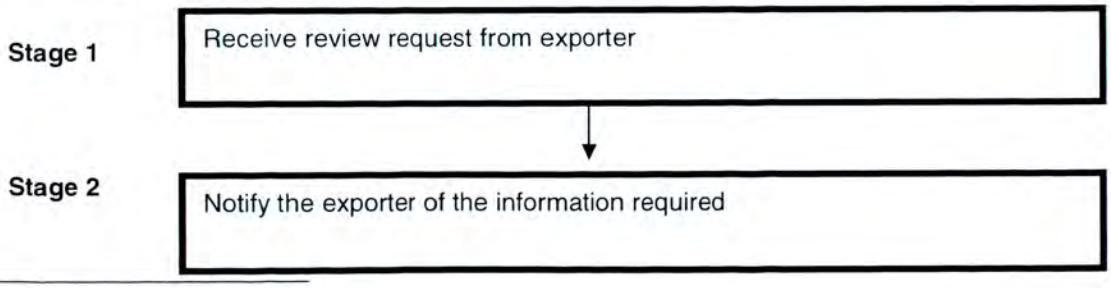
The ADR presents a rather straightforward procedure for new shippers reviews. Accordingly, the procedure is a single investigation phase procedure.[850] Typically, the application for a new shippers review should be accompanied by full relevant information in the prescribed format to enable the ITAC to arrive at its determination. This information should contain, in particular, details on the normal value and export price and any information deemed necessary by the ITAC, such as a description of the product to which the application relates. The description enables the ITAC to determine the likeness of the said product to the product in the original investigation.

The current procedures do not exactly reflect the requirements in the URAA, as South African law does not provide time frames as is the case under the URAA. The URAA requires new shippers reviews to be "promptly" instituted upon application by the new exporter. This lack of timeframes under South African law has led to a shippers review conducted by the BOTT taking almost two years from the receipt of the request for review to initiation of the review in the *Stainless Steel Sink – Egypt*[851] case. Article 9.5 of the URAA requires national authorities to initiate new shipper reviews only at the end of the month following the completion of six months from the date of the anti-dumping order, or at the

847 ADR, s 48.1
848 ADR, s 48.2.
849 ADR, s 48.3.
850 ADR, s 51.1.
851 *Stainless Steel Sink – Egypt,* BOTT Report No 4174.

end of the month of the anniversary of the date of the anti-dumping order, whichever is earlier. Another difference relates to the determination of export price in new shippers reviews. The ADR provides for the determination of exporter's margin of dumping as the difference between the normal value and the export price. It is further provided that in the event that the ITAC cannot determine the export price to South Africa, the ITAC can have recourse to any reasonable basis for determining the export price. This reasonable basis may include referring the new shipper's export price to "an appropriate third country".[852]

It is submitted that even though the ADR does not explain some of the concepts used, the ITAC's practice is not necessarily in danger of falling foul of the URAA. First, reference to "reasonable basis" for determining export price should be regarded as a safeguard against untrammelled powers of the ITAC in this regard. Furthermore, the ADR reference to "appropriate third country" renders the absence of the definition of the concept inconsequential, as it requires the ITAC to exercise caution in selecting the third country. Ideally, it would make things a lot easier for the ITAC if there were a conclusive and clear criterion on the selection of an appropriate country for the purposes of determining the export price. It is proposed that, in this regard, the ITAC should follow the processes it employs in deciding the appropriateness of third countries for determining normal value in original investigations. It is further submitted that the correctness or not of reference to "appropriate third country" and the lack of guidelines to determine an appropriate third country is not of great concern in the light of the fact that the ITAA Amendment Bill has deleted reference to the word "appropriate".[853]



852 ADR, s 51.3.
853 See ITAA Bill, s 10(4) (b) &(c).

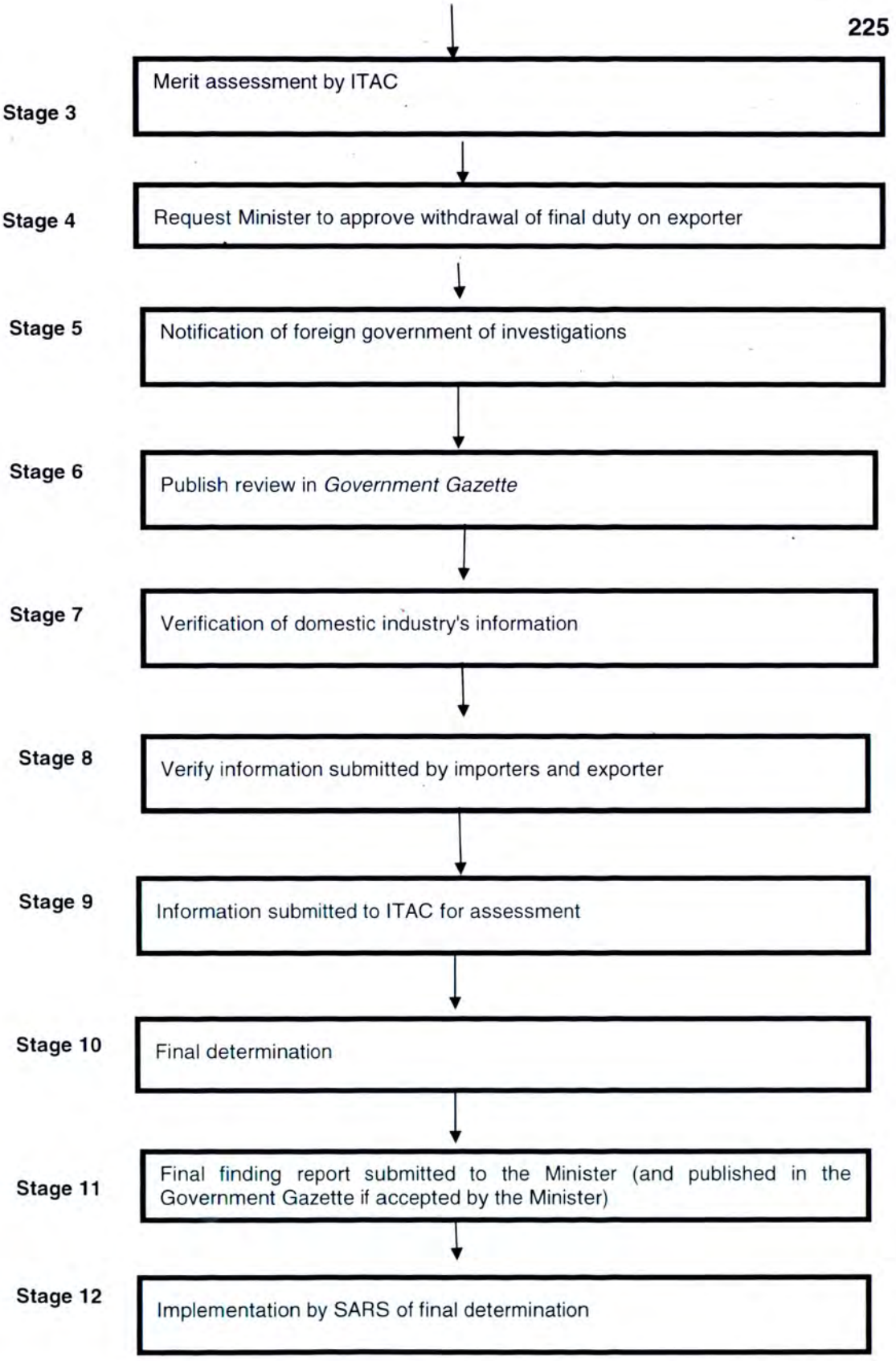


Figure 6.1: New shipper review process (compiled from provisions of the ADR)

6.2.4 Sunset Reviews

6.2.4.1 Termination and/or Continuance of Duties

The proliferation of anti-dumping measures is a cause for concern, particularly if they are used as alternative protectionism measures as a result of being maintained for long periods by the national authorities; for example, the duties imposed by the BOTT in *Aluminium Garden Furniture – Hungary*[854] in 1987 which were only withdrawn in 2000. As a rule, anti-dumping measures may not remain in force indefinitely, and can only be maintained or remain in force only as long as, and to the extent necessary, to counteract the action that is causing injury or threatening to cause injury. It is for this reason that the URAA requires authorities to review "the need for the continued existence of the duty". [855]

When anti-dumping reform was negotiated at the Uruguay Round, and before it was agreed to introduce sunset reviews as mandatory reviews, only Australia,[856] Canada,[857] and the EU[858] already had sunset review provisions in their anti-dumping laws.[859] Article 11.3 of the URAA provides for any definitive anti-dumping duties to be terminated after the expiry of five years, unless it is otherwise found necessary after careful review and analysis of the conditions that led to the imposition of the duties. Therefore, Article 11.3 places a temporal limitation on the maintenance of anti-dumping duties, provisions which are often referred to as "sunset reviews". In this regard, a WTO panel has made an important observation, that is, a "finding that the absence of present dumping

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854 *Aluminium Garden Furniture – Hungary,* BOTT Report No 4057.

855 See URAA, Art. 11.2.

856 Australian sunset reviews were introduced gradually between 1988 and 1996. See Australian Customs Service 2000.

857 Canada introduced the sunset review provisions in 1984.

858 EU introduced its sunset reviews provisions through amendments to its basic Regulations in 1984.

859 The negotiations around mandatory sunset review provisions at the Uruguay Round were contentious. The United States, for example, sought to agree to the introduction of such reviews provided the standard of review in Article 17.6 of the URAA reflected US law's differential standard of review doctrine called "Chevron doctrine", in terms of which the WTO panels would rule in favour of national anti-dumping authorities where there is no clear violation of the URAA provisions.

does not in and of itself require the immediate termination of an anti-dumping duty pursuant to Article 11.2".[860]

The requirement for sunset reviews differs from the requirements of original investigations. In the original investigation the main determination is whether dumping existed, while in sunset review proceedings the question is whether the expiry of the respective anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury.[861]

The ITAA contains no provisions on sunset reviews. This omission should not, however, be interpreted as non-compliance or inconsistency with the provisions of the WTO framework. Sections 53 to 59 of the ADR deal with sunset reviews as required by the URAA. Like Article 11.3 of the URAA, section 53.1 of the ADR in essence requires that anti-dumping duties are to remain in force "for a period not exceeding 5 years".

Pursuant to section 54.4 of the ADR, the anti-dumping duty measures must be reviewed by ITAC and the Minister of Trade and Industry every five years, and be revoked unless it is shown that dumping and material injury would be likely to continue or recur within a reasonably foreseeable time. The sunset review questionnaire makes it clear that before any further investigation of the effect of the expiry of the anti-dumping duty can be considered, the ITAC must have sufficient evidence to reach a reasonable conclusion that the expiry of the duty would be likely to lead to a continuation or recurrence of injury to the SACU industry. Thus, the petitioner should provide information of injury. The information submitted with regard to each of the injury indicators should reflect the petitioner's position for the three financial years prior to the imposition of the anti-dumping duty and for the years following the imposition of the current anti-

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860 *United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, WT/DS99/R*, para 6.32, [hereafter US – DRAMS, Panel Report].

861 *United States – Sunset Review of Anti-dumping Duties on Corrosion-resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, par.107, [hereafter *US – Corrosion-Resistant Steel Sunset Review*, Appellate Body Report].

dumping duties. The ITAC also requires that the petition should include a substantiated estimate of what the effect of the expiry of the duty will be on the petitioner's business.

It is clear from the sunset review questionnaire that the information that the petitioner must submit may relate to actual and potential negative effects on employment; the actual and potential negative effects on wages and substantiate how this factor is indicative of material injury and/or why the expiry of the anti-dumping duty is likely to lead to the continuation or recurrence of material injury in respect of this particular factor; whether the petitioner's growth in the market for the product in question is inhibited because of the alleged dumped imports, and the elaborative account of the actual and potential effects of this inhibition, showing that the inhibitory factor is indicative of material injury; inventories – actual or potential negative effects for the three years prior to and for all the years subsequent to the imposition of the anti-dumping duty, together with an estimate for the next year in the event of the expiry of the duty; and others.

In light of the fact that Article 11.3 of the URAA does not prescribe any particular methodology in making a likelihood determination of dumping and injury, nor does it identify specific factors that must be taken into account nor prescribe the methodology to be used, the ITAC practice in respect of required information seems to be WTO-consistent. What is important is that the information that the ITAC requests from petitioners and the probative value thereof will be considered on a case-specific basis, as implicitly ruled by the WTO Appellate Body in the *US – Corrosion Resistant Steel Sunset Review*[862] dispute. The Appellate Body stopped short of introducing the methodology by requiring "a prospective determination" of likelihood of dumping and injury in which national anti-dumping authorities must "undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the

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862 See *US – Corrosion-Resistant Steel Sunset Review*, Appellate Body Report, paras 175 and 176.

duty was terminated".[863] Moreover, the Appellate Body has stated that where the determination of likelihood of dumping is flawed, it does not follow that the likelihood of injury determination is *ipso facto* flawed as well. Part of the approach is to use cumulation in sunset reviews to determine the likelihood of injury, since the URAA is silent on the matter.[864]

There have been instances where the timeframe for sunset reviews has not been honoured by the ITAC. In contrast with the URAA on when the review has to be initiated, the ITAC has had delayed investigations in the *Carbon Black – Egypt* and *Galvanised Steel – India* cases, for example. In the *Carbon Black – Egypt* case, the sunset review had to be initiated by 5 February 2004. However, the reviews were only initiated on 23 July 2004. In the *Galvanised Steel – India* case, reviews had to be initiated by 8 February 2007, however, the ITAC only initiated the sunset review on 13 June 2007. In this regard, ITAC practice has been inconsistent with the requirements of both the URAA and the ADR.

In practice, the ITAC publishes a notification to all interested parties in the *Government Gazette* that, unless a duly substantiated request is made by or on behalf of the SACU industry indicating that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury to the domestic industry, the anti-dumping duties order will expire. This notification will detail the affected products, dates of imposition and expiry dates. Moreover, the dates of submission are listed in the document, but not the provisions. An example of the notification is the *Government Gazette* 32333, R.902 of 26 June 2009, calling for responses from all interested parties with regard to duties that will expire during 2010. It is submitted that in this regard South African law reflects the URAA.

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863 *US – Corrosion-Resistant Steel Sunset Review*, Appellate Body Report, par.105.

864 See United *States – Mexico Oil Tubular Goods*, Appellate Body Report, upholding the earlier Panel's finding that the United States's decision to conduct a cumulative assessment of imports from different countries in its likelihood of injury determination was not inconsistent with Arts. 3.3 and 11.3 of the URAA.

The determination of the expiry of five years requires a specific methodology and clear guidelines on how the calculation should be done and when the five-year period starts. In terms of Article 11.3 of the URAA, an anti-dumping duty may not remain in place for a period exceeding five years from its "imposition". Similarly, section 53.1 of the ADR contains reference to the time of "imposition". Prima facie, South African law is WTO compliant, except with regard to the difference in the wording used in the ADR. The ADR provides that "anti-dumping duty shall remain in force *until the sunset review has been finalized*".[865] On the other hand, Article 11.3 of the URAA states that "any definitive anti-dumping duty may remain in force *pending the outcome of such a review*".[866] It is submitted that the difference in the wording is immaterial: the finalisation of the review should be understood to refer to the outcome of such review.

The critical issue is that neither the URAA nor the ADR gives clear guidelines as to what is meant by "imposition". Does it mean that definitive anti-dumping duties lapse five years after the publication of the final notice or five years after the retrospective application thereof, including the period of provisional measures? This lack of clear guidelines on the meaning of "imposition" in order to enable WTO members to determine the five-year period has led to varying approaches by members and interpretation problems, as was apparent in the South African case of *Progress Office Machines v SARS*. Prior to the decision by the Supreme Court of Appeal, the approach followed by the ITAC mirrored that of countries like India and the United States, whose practice has been that the five-year period starts on the date of the publication of the final notice. This is the approach that ITAC sought to defend in the *Progress Office Machines v SARS* case.

According to the Supreme Court of Appeal in the *Progress Office Machines v SARS* case, the five-year period should be determined with effect from the date

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865 ADR, s 53.2. *Emphasis added.*

866 *Emphasis added.*

on which the duty came into effect – which is the date of the provisional duties, and not the date of the notice introducing the duty. This decision, which also confirmed that anti-dumping duties or anti-dumping measures should be imposed on the date from which they had retrospective effect, was later followed by the ITAC, rescinding its earlier decision to initiate sunset and interim reviews of anti-dumping duties imposed in the *Carbon Black – Egypt* and the *Galvanised Steel Tubes – India* investigations.[867]

It is submitted that this is the most desirable interpretation given unfortunate cases like *PTFE Tape – China* case[868] in which the South African authorities' duties were to be maintained for a further period of five years before officially being revoked. It is submitted that the *PTFE Tape – China* case decision brings clarity to the review and termination or extension of definitive anti-dumping duties, while retaining the protection afforded to companies against dumping.[869]

The court ruled in favour of *Progress Office Machines v SARS*, and ordered SARS to refund the former all the anti-dumping duties it paid after 28 November 2003. Accordingly, the Supreme Court of Appeal made a policy decision with serious ramifications to the South African anti-dumping law and practice. Firstly, importers now have the right to ask for a refund for any duty paid after the expiry of the period of five years unless the period of more than five years was as a result of the determination to continue the imposition of anti-dumping duties. Secondly, anti-dumping duties imposed after a period of five years

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867 See *Decision by the Commission to Rescind its Decision to Initiate Sunset and Interim Reviews of Anti-dumping Duties on Carbon Black Originating in or Imported from Egypt and India* and the *Sunset Review of the Anti-dumping Duties on Galvanised Steel Tubes and Pipes Originating in or Imported from India*, *Government Gazette* No 31145 of 20 June 2008, Notice 763 of 2008.

868 See, *PTFE Tape – China*, ITAC Report.

869 But see Brink 2007 *TRALAC Trade Brief* 13, who views the court interpretation of five-year period as a "shortened five year period" which limits the "protection against unfair international trade to which the industry is entitled in terms of international law". It is submitted that Brink's view is not entirely correct as it creates a wrong impression and an assumption that the provisional duties are irrelevant and not affording the industry protection as envisaged under the URAA.

calculated with effect from the date on which the duty had an effect should be treated as null and void.[870]

Unlike the URAA, the South African law contains no provision for the initiation of sunset reviews by the ITAC. While Article 11.3 of the URAA provides for review by authorities "on their own initiative" or "upon request by any interested party", under the South African legal framework it is still left to the domestic industry to request the initiation of a sunset review, and to submit information indicating that there is a likelihood of a recurrence or continuation of dumping and injury to the domestic industry should the anti-dumping duty be removed pursuant to the ADR.[871]

Section 8 of the ITAA Amendment Bill provides specifically that definitive anti-dumping duties "shall expire five years from the date of the publication of the final determination;[872] or five years from the conclusion of the most recent review ... unless it is determined in a review that the expiry would probably result in a continuation or recurrence of dumping ... or injury".[873] The glaring omission in section 8 of the ITAA Amendment Bill is the provision on initiation by ITAC. Interestingly, Article 11.3 of the URAA Draft inexplicably now omits reference to initiation by investigating authorities.[874] It is submitted that this omission of self-initiation in sunset reviews in the ITAA Amendment Bill is an attempt by the South African anti-dumping law to reflect verbatim the URAA Draft should the latter be adopted.

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870 ITAC has since swiftly moved to justify its previous practice and started conducting all its subsequent sunset review in accordance with the judgment of the SCA in *Progress Office Machines*. See ITAC *Media Statement* "Ramifications of the Court Ruling on Anti-dumping Sunset Reviews, 11 July 2008. Following the *Progress Office Machines* case the United States has flagged a dispute with the WTO to get a determination of the legality of duties re-imposed by ITAC on US frozen chicken pieces on 22 February 2006, a year after the duties lapsed in 2005. See South Africa – Anti-dumping Law, *Meat Trade News* 11 December 2009 http://www.meattradenewsdaily.co.uk/news/091209/south_africa___anti_dumping_laws.aspx. For the case in question see *Frozen Gallus Domesticus Sunset Review – US*, ITAC Report No 195.

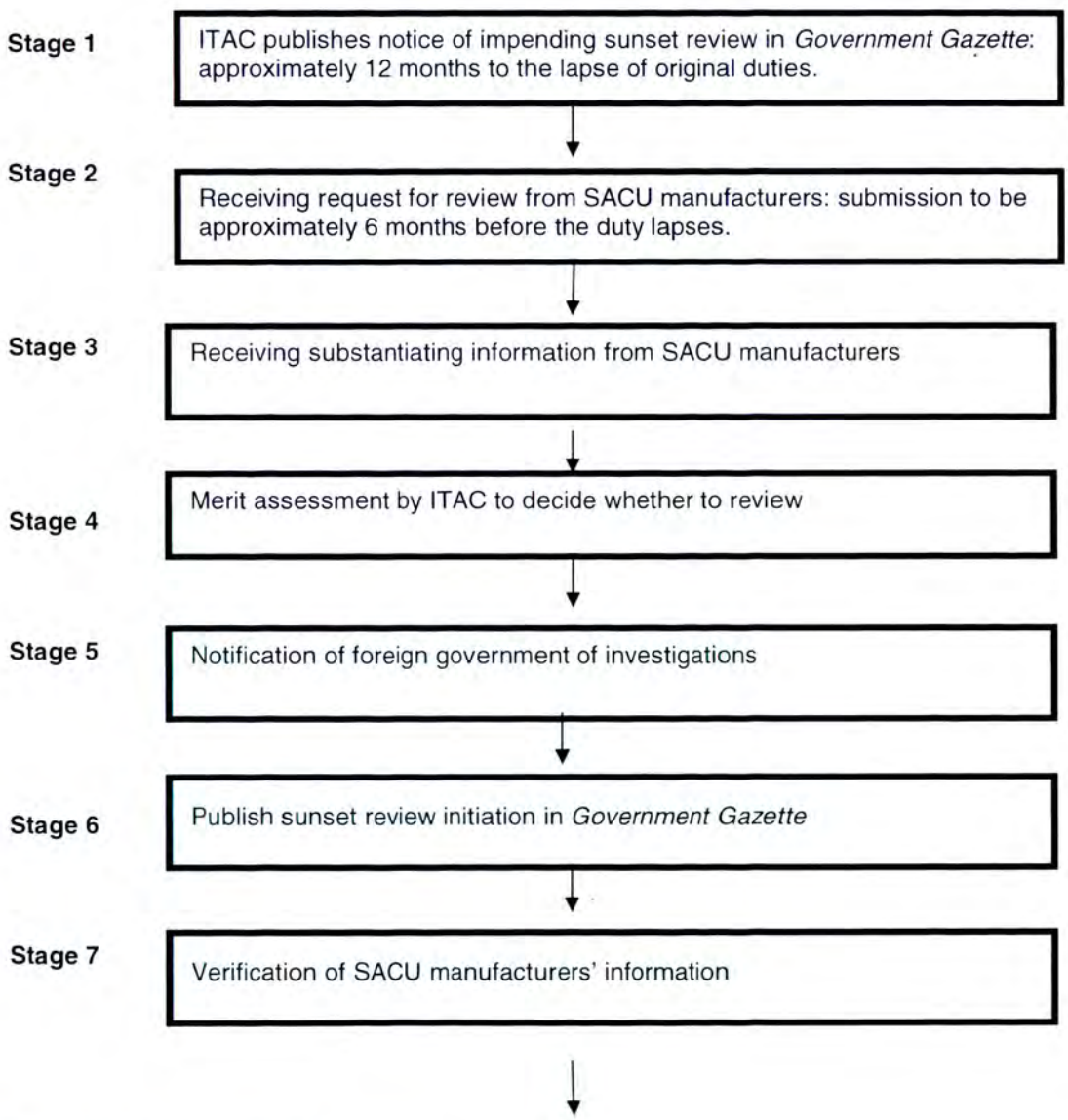
871 See ADR, ss 54.4 and 57.2.

872 ITAA Bill, s 8(i)(a).

873 ITAA Bill, s 8(i)(b).

874 It is submitted that the omission is a step backwards in the country's anti-dumping jurisprudence.

The unsettling approach in sunset reviews noted by Howse and Staiger, for example, is the one of the United States Department of Commerce, in which the Department seldom modifies the initial dumping margins of anti-dumping orders under review, and adjusts orders upwards to penalise exporters.[875] The problem with such an approach is that it fails to appreciate the fact that initiation requirements in initial determinations can lead to different conclusions when used in sunset reviews. Article 11.3 must be read with Article 5 of the URAA, which properly construed calls for a clear distinction between initial investigations and review investigations.



875 See Howse and Staiger 2005.

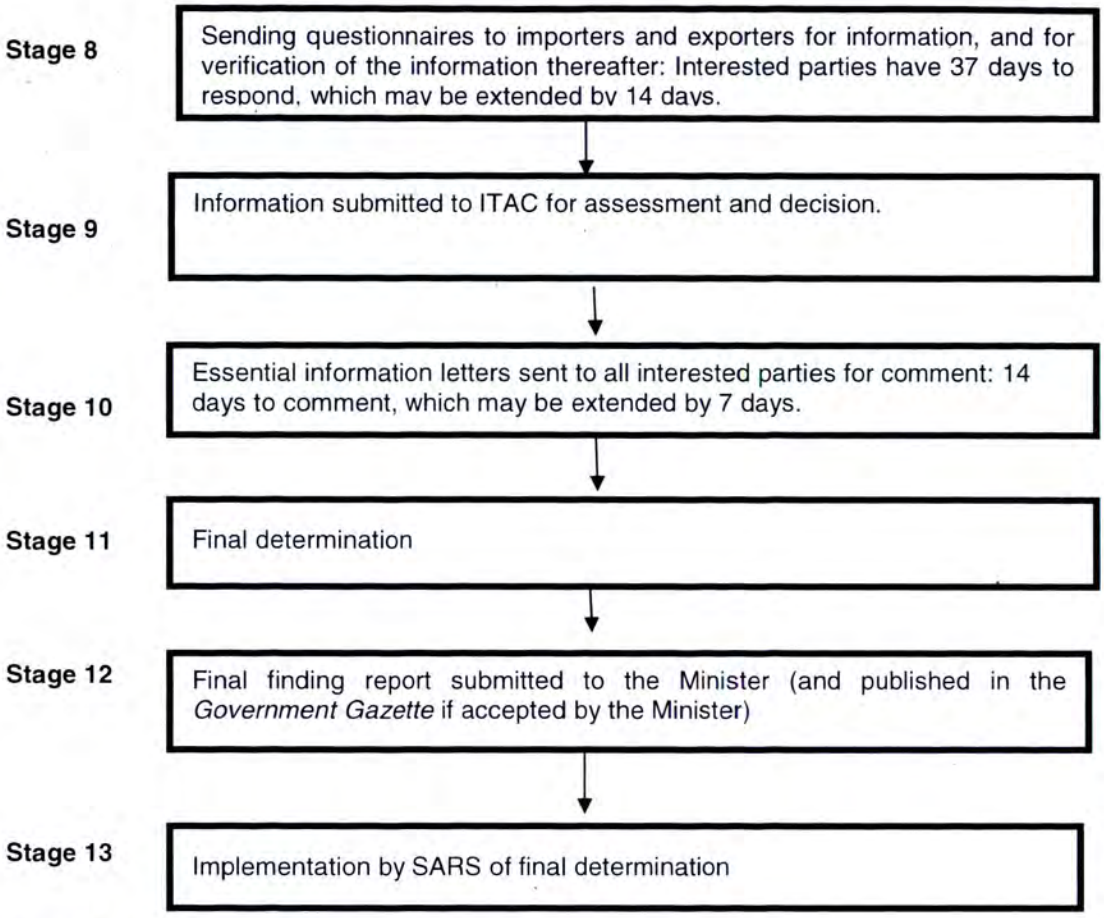


Figure 6.2: Sunset Review Process (compiled from the provisions of the ADR)

6.2.4.2 Standard of Review, Evidence and Procedures in Sunset Reviews

As noted in section 6.2.4.1 above, Article 11.3 of the URAA provides that the anti-dumping duty shall expire after a period of five years, unless the authorities "determine", in a "review" that the expiry of the duty would be likely to lead to the "continuation" or "recurrence" of dumping and injury. However, the text of Article 11.3 does not provide guidance on how the national authorities must proceed to determine the need for the continued maintenance of the anti-dumping duties. Hence, the WTO Appellate Body has sought to give direction in several of its rulings. In *US – Corrosion-resistant Steel Sunset Review* dispute, the Appellate Body stated that the terms "determine" and "review" in Article 11.3 should be given ordinary meanings, which requires a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and

examination" by national investigating authorities.[876] According to the Appellate Body, this should be based on a "rigorous examination" [877] of the issues which will lead to "reasoned and adequate conclusions".[878] The determination must be substantiated with "positive evidence" and a "sufficient factual basis".[879]

It is submitted that the investigating authorities have wide powers and discretion to choose an appropriate method to use in sunset reviews. For instance, the investigating authority may rely pon margins of dumping, calculated in conformity with Article 2.4 of the URAA, to determine the likelihood of dumping recurring if the duties are allowed to expire.[880]

It is further submitted that the investigating authority must *mutatis mutandis,* rely on the injury factors contained in Article 3 of the URAA to determine the likelihood of continuance or recurrence of injury in a sunset review. Reference to the continuation of injury in sunset reviews requires the finding of injury, in the light of Article 3 of the URAA, that there is injury continuing and that it would continue if the duties were allowed to lapse. On the other hand, reference to the recurrence of injury suggests that there is a belief that injury might occur again if the duties were allowed to lapse. It would consequently have to be argued that there is a threat of injury, which would then require injury determination and analysis, pursuant to Article 3.7 of the URAA. Moreover, it is submitted that the investigating authority will have to consider factors that are mentioned in Article 3.4 of the URAA.

The Appellate Body's ruling in *US – Corrosion-resistant Steel Sunset Review* dispute must be read in conjunction with Article 11.4 of the URAA. Article 11.4 requires investigating authorities to follow procedural and evidentiary requirements, pursuant to Article 6 of the URAA. It is submitted that the South

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876 *US – Corrosion-resistant Steel Sunset Review*, Appellate Body Report, par.111. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews,* par.*283.*

877 *US – Corrosion-resistant Steel Sunset Review*, Appellate Body Report, par.113.

878 US – *Corrosion-resistant Steel Sunset Review*, Appellate Body Report, par.114.

879 *US – Corrosion-resistant Steel Sunset Review*, Appellate Body Report, par.114.

African anti-dumping law generally reflects the URAA in this regard through its ADRs. All interested parties known from the original anti-dumping investigation or last anti-dumping review are directly informed by the ITAC that an anti-dumping duty will expire on a specific date unless a sunset review is initiated.[881] These parties are then given 30 days from the publication of the notice in the *Government Gazette* pursuant to section 54.1 of the ADR regarding the lapse of anti-dumping duty to request a sunset review.[882] The notification is now extended to the government of the country concerned, as an interested party in line with Article 6.11 of the URAA.[883]

It is submitted that as one of the interested parties, the foreign government should be notified of both the initiation of the investigation and the termination thereof. Pursuant to Article 6.1.3 of the URAA, it is mandatory for the ITAC to give the foreign government concerned the "full text of the written application" received pursuant to Article 11.3. The current provision of section 55.2 of the ADR is permissively couched and gives the ITAC discretionary powers to decide when to notify the foreign government. It is submitted that these discretionary powers are inconsistent with Article 6.1.3 of the URAA, and that the ADR must be amended to reflect that notification is mandatory at all stages of the sunset review proceedings.

Article 6.1 of the URAA states that all interested parties in an anti-dumping investigation shall be given notice of the information required and reasonable enough opportunity to submit all written evidence which they consider relevant in respect of the investigation in question. The ADR reflects this requirement of the URAA by requiring the SACU industry to provide the ITAC with "detailed information" indicating the likelihood of a continuation or recurrence of dumping and injury.[884] The SACU industry is afforded the opportunity to even submit "any

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880 *US –Corrosion-resistant Steel Sunset Review*, Appellate Body Report, par.127.
881 ADR, s 54.2.
882 ADR, s 54.3.
883 See ADR, s 55.2.
884 ADR, s 57.2.

other information"[885] deemed relevant to the sunset review proceedings. The ADR further calls on exporters and foreign producers of the product in question to provide the ITAC with all the evidence necessary to enable it to make its finding.[886] Although the ADR does not explicitly indicate the period for which information is to be provided to the ITAC, it is submitted that the ITAC will consider information over a significant period of time as required by questionnaires usually sent to interested parties. This conclusion is supported by the fact that the ADR requires information to be in the "prescribed format".[887] In practice, the prescribed format is the ITAC questionnaire. It is interesting to note that the South African anti-dumping law does provide all parties interested in the sunset review investigation a full opportunity for the defence of their interests.

The first South African sunset review was initiated in 1999.[888] The problem, it would seem according to early sunset review proceedings and determinations, is that the ITAC's sunset review determinations failed to adhere to the applicable South African law. For instance, the methodology used by the ITAC in the *Carbon Black – Egypt*[889] case to determine the likelihood of a recurrence of dumping was in 2007 ruled by the High Court (the Transvaal Provincial Division) in *Algorax v The International Trade Administration Commission and others* (hereafter Algorax v ITAC) as vitally flawed. The review before the High Court followed a failed application by the domestic industry for the ITAC to maintain anti-dumping duties. The ITAC's flawed approach can first be explained with recourse to a great latitude that Article 11.3 of the URAA allows in the determination of the likelihood of dumping and injury resumption, which

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885 ADR, s 57.4.

886 ADR, s 57.3.

887 See ADR, s 57.2 and s 57.3.

888 See Brink *Theoretical Framework for South African Anti-dumping Law* 918–919. Note the inconsistencies in Brink's studies in this regard. In his 2004 study, Brink asserts that the first South African sunset review was initiated "on 17 December 1999". His subsequent study in 2007, "Sunset Reviews in South Africa: New Direction given by the High Court" (2007) *TRALAC Trade Brief* 3, states that the first sunset review was initiated on "19 December 1999, only days before such duties would have lapsed in terms of the AD Agreement".

889 *Carbon Black – Egypt,* ITAC Report No 169.

has led to some problematic approaches and procedures by national anti-dumping authorities.

The sunset review in the *Carbon Black – Egypt* case follows an application lodged in 1998 by a domestic producer of carbon black against the alleged dumping of carbon black from Egypt, India and Korea. The definitive duties were imposed against all producers of carbon black in these countries, and were due to lapse on 10 September 2004. In response to the ITAC's notice in the *Government Gazette,*[890] calling upon the domestic industry to indicate if it would request a sunset review to be conducted, failing which the Commission would recommend to the Minister of Trade and Industry that the duties be terminated, the domestic industry gave notice that it would request a sunset review to be conducted in respect of Egypt and India but not in respect of Korea. The ITAC does not have an obligation to consider whether the expiry of the anti-dumping duties would likely lead to the continuation or recurrence of dumping and injury should the industry submit insufficient information.[891] Not even the withdrawal of an application requesting the review of the anti-dumping duties obligates the ITAC to consider the likelihood of dumping and injury, and not *ipso facto* recommend termination.[892]

The industry gave the ITAC notice that it would request a review in respect of Egypt and India only. The application before the High Court argued that the ITAC's final determination was wrong because it used the average dumping margin methodology, which lacked rationality, and that it was made without considering certain relevant information.

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890 Notice 1560 in *Government Gazette* 24893 of 30 May 2003.

891 See, for an example, *Automatic Circuit Breakers – France and Italy,* ITAC Report No 294 2009 when the ITAC proceeded to recommend that the anti-dumping duties on automatic circuit breakers be withdrawn after the requester, CBI Electric (Pty) Ltd failed to submit its formal substantial application for the non-withdrawal of duties.

892 See, for example, *Uncoated Woodfree Paper Reels – Brazil and Poland* (ITAC Report No 295) 6. It is submitted that in a case where the industry subsequently withdraws the application, ITAC must consider proceeding with the enquiry as the withdrawal may not be in the public interest.

The court found the ITAC's use of the methodology of average dumping in *casu* to be "totally irrational" and that "it had the effect of wiping out or cancelling out evidence of dumping [by Egypt] in 16 countries".[893] According to the Court, *per* Botha J, it was not understandable how the ITAC could conclude that an exporter was, on average, not a dumper. In setting aside the final determination that dumping measures be removed, Botha J noted that the ITAC should have looked at the countries where there were positive dumping margins and not involve itself in simplistic findings by recourse to average dumping methodology. Most importantly, Botha J stated that "[to] negate the prima facie evidence of deliberate dumping by applying average dumping margins is ... an exercise in obfuscation that defies logic".[894] The effect of the *Algorax v ITAC* judgment is that, in sunset reviews, the ITAC may consider only exports to those countries for which positive margins of dumping were found, that is, the ITAC's investigation must be focused on exports made to countries in which dumping took place. This ruling provides the domestic industry with more protection against the likelihood of future dumping.

6.2.5 Anti-circumvention Reviews

An exporter may employ some tactics in order to avoid its finished products being subject to anti-dumping measures. This practice is normally called "circumvention". In 1987, the circumvention of anti-dumping duties became a subject of dispute before the GATT dispute settlement bodies following the EU's amendment of its anti-dumping regime to allow for measures where there was "circumvention" of anti-dumping[895] duties as a result of assembly operations conducted within the European Community. The Panel in *EEC – Imports of Parts and Components* dispute found the EEC anti-circumvention measures to be inconsistent with Article III of GATT and was not justified under Article XX (d)

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893 *Algorax v ITAC* 13–15.

894 *Algorax v ITAC* 13–15.

895 The current EU anti-circumvention measure provision is contained in Article 13 of the Council Regulation No 384/96 O.J 1996 L.056 as amended by the Council Regulation No 461/2004 O.J 204 I77. See Yu *Circumvention and Anti-circumvention Measures* (2008) 21. For the legislative history of the EU anti-circumvention review see Yu *Circumvention and Anti-circumvention Measures* (2008) 60–75.

of the GATT.[896] The US, which adopted anti-circumvention rules in 1988,[897] had argued as a third party that anti-circumvention principles were a corollary of GATT rights under Article VI.[898]

Both Articles III and XX(d) of GATT prohibit the application of measures by Member States which are unjustifiably designed to afford protection to domestic industries. Article XX(d) of GATT permits the adoption of enforcement measures which are necessary to secure compliance with national laws or regulations, including those relating to customs enforcement, and the prevention of deceptive practices. The panel in the *United States – Restrictions on Imports of Tuna from Mexico* dispute (hereafter *US – Tuna Mexico* Panel Report*)* also noted that "Article XX(d) requires that the "laws and regulations" with which compliance is being secured be themselves "not inconsistent" with the General Agreement".[899] Article III: 1 of the GATT states that internal taxes and internal regulatory measures should not be used "to afford protection to domestic production".

The *EEC – Imports of Parts and Components* Panel Report was the background to the negotiations on the failed URAA provision on anti-circumvention, the Dunkel Draft.[900] Article 12 of the Dunkel Draft limited anti-circumvention measures to assembled products. In particular, it had to be specifically established that: (a) the product assembled/completed had to be a like-product with regard to a product that was subject to a definitive dumping

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896 *European Economic Community – Regulation on Imports of Parts and Components*, adopted 16 May 1990, BISD 37S/132, paras 4.34-5 and 4.41 [hereafter EEC – Imports of Parts and Components, GATT Panel Report].

897 See and the Tariff Act § 781, 19 U.S.C. § 1677j (1930) as inserted by the *Omnibus Trade and Competitiveness Act* of 1988, Pub. L. No 100-418, § 1321, and amended by the Uruguay Round Agreements Act (URAA) L. 103–465, 109 Stat. 4809 (Dec. 8, 1994). See generally Yu *Circumvention and Anti-circumvention Measures* (2008) 75–90.

898 It is submitted that the problem with the Panel finding is that it did not consider the fact that the acceptance of circumvention strategies would result in the nullification of anti-dumping measures.

899 *United States – Restrictions on Imports of Tuna form Mexico, DS21/R (*circulated on 3 September 1991, not adopted), par.5.40, [hereafter US – Tuna Mexico, GATT Panel Report].

900 GATT Secretariat, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,* MTN.TNC/W/FA/F-21 (20 Dec. 1991) [hereafter Dunkel Draft].

measure; (b) the assembly/completion operation had to be carried out by an entity which was related to the original dumping exporter (such as a contractual arrangement with the exporter); (c) the components used in the assembly/completion operation had to be, directly or indirectly, sourced by the dumping exporter; (d) the assembly/completion operation had to have started or expanded substantially after the initiation of the anti-dumping investigation; (e) the total cost of the components used in the assembly/completion operation had to be no less than 70% of the total cost of all the parts used in the operation, with the exception that no anti-dumping measure should be extended if the value of the assembly/completion operation was greater than 25% of the ex-factory cost of the like-product; (f) there had to be evidence of dumping concerning the difference between the price of the product in the importing country and the normal value of the product when subject to the original definitive anti-dumping duty; and (g) that there had to be evidence that the extension of the anti-dumping measures to the components was within the scope of the definitive anti-dumping duty in order to prevent the injury to a domestic industry with regard to the like-product.[901]

Currently, the WTO rules contain no provisions allowing or prohibiting circumvention practices and anti-circumvention measures. Neither is there a ruling by the WTO DSB on anti-circumvention. Subsequently, WTO Member States are to agree on an anti-circumvention provision to be included in the URAA.[902]

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901 The USA argued strongly against the limited nature of the proposed anti-dumping provision in the Dunkel Draft. See *Communication from the United States, Proposal for Improvements to the Anti-dumping Code*, MTN.GNG/NG8/W59 of December 20, 1989. *See* also Komuro "US Anti-circumvention Measures and GATT Rules" 1994 *JWT* 26–30 commenting on the position of the US during the Dunkel Draft negotiation. Negotiations around Article 12 of the Dunkel Draft failed and it was agreed that the matter be referred to the ADP Committee for further consideration and deliberation. See *Decision on Anti-circumvention Annexed to the Agreement Establishing the Multilateral Trade Organizations, enclosed with the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, done at Marrakesh, 15 Apr. 1994, http://www.wto.org.

902 See Yu *Circumvention and Anti-circumvention Measures* (2008) 54.

The issues of circumvention and anti-circumvention are very significant but full of complexities in contemporary anti-dumping law and practice. According to Yu, while countries like Australia and Canada are supporting efforts to modify the URAA to address anti-circumvention practices, other countries like Korea, Hong Kong, China and Japan resist such efforts as they view anti-circumvention measures as a new "weapon for protectionism".[903] The current position is that WTO Member States are at liberty to design their respective anti-circumvention measures for as long as they do not conflict with the URAA.

The South African anti-circumvention provision contains an elaborate but non-exhaustive list of circumstances under which circumvention shall be found to exist or deemed to be taking place. No circumvention factor is controlling and more important than the other, nor is the ADR creating any hierarchical order of circumvention factors. The circumvention may occur, for example, where an exporter located in a country subject to an anti-dumping measure, ships the component parts of its product to a third country or within the common customs area of the SACU region for final assembly in order to avoid paying anti-dumping duties.[904] This is called transhipment or third country circumvention. For instance, assume that South Africa (the importing country) is applying an anti-dumping duty order on helicopter engines from the People's Republic of China. The producers or exporters of helicopter engines in China then export components to a third country, Zimbabwe, assemble the final product there, and export it from Zimbabwe to South Africa. Generally, no anti-dumping duty would be applied in this case because formally Zimbabwe is the place where the dumped helicopter engines were assembled, and the anti-dumping duty order was originally imposed by South Africa on helicopter engines imported from China.

The ADR gives an example of possible situations of circumvention. Accordingly, circumvention can also occur by changing the origin of the goods or improperly

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903 Yu *Circumvention and Anti-circumvention Measures* (2008) 9.

904 ADR, s 66.5(c).

declaring the origin of the goods in order not to be associated with a country subject to an anti-dumping measure and thereby avoid paying the applicable anti-dumping duties.[905] It can also occur where there is a change in the pattern of trade between third countries and the SACU for which there is no or insufficient cause or economic justification other than the imposition of the anti-dumping duties.[906]

There can also be minor modification or minor alteration circumvention. This will be in cases involving minor modifications of the product subject to an anti-dumping duty, which has materially the same production processes, uses the same raw materials and has basically the same physical appearance or characteristics as the product subject to an anti-dumping duty; or such changed product is a substitute for the product on which anti-dumping duties have been imposed".[907] The modification may also concern different minor aspects of the product subject to the anti-dumping order, such as the way the product is presented to consumers; and country-hopping circumvention.[908]

Country-hopping occurs when the importers or exporters of the product subject to an anti-dumping duty switch to a supplier related to the supplier against which an anti-dumping investigation has been or is being conducted and such new supplier is based in another country or customs territory.[909]

It is submitted that the South African anti-circumvention provisions reflect the URAA anti-dumping rules, and are not at significant variance with the law in other jurisdictions like the United States's *Anti-circumvention Regulation*.[910] More interesting is that the ADR sets criteria or guidelines to determine if a

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905 ADR, s66.5 (a) (ii).

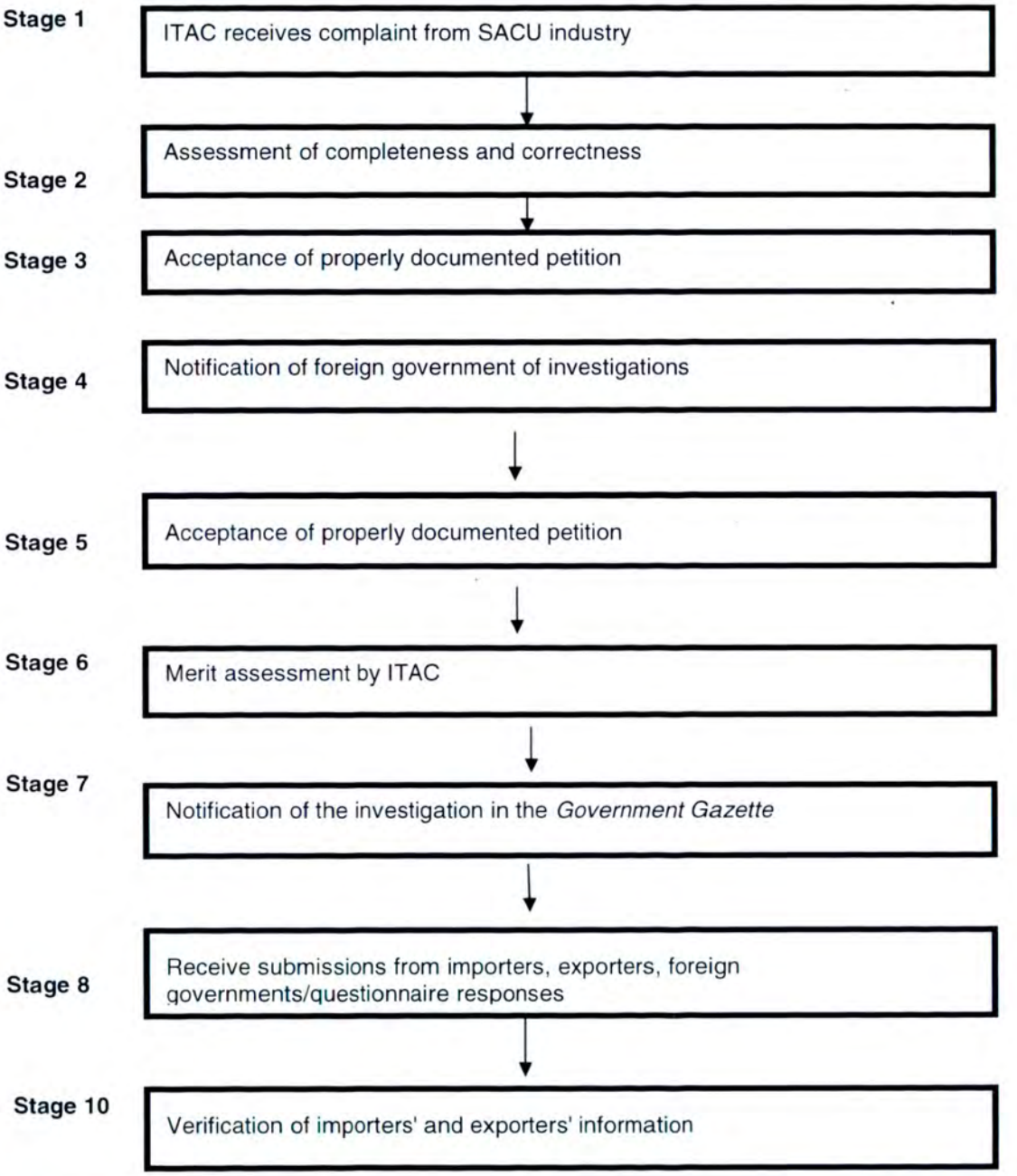
906 ADR, s66.4 (b) (ii).

907 See ADR, s66.5 (b).

908 ADR, s66.5 (e).

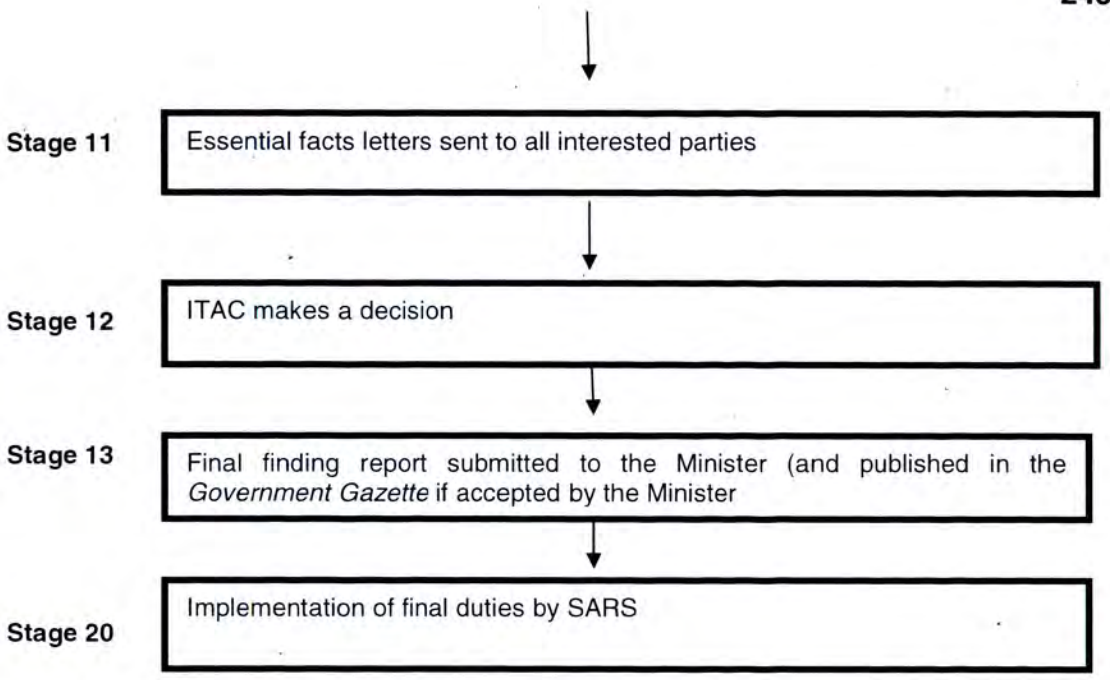
909 See s 66.12 of the ADR. There may be variations to country hopping in the form of importing-country circumvention. Importing-country circumvention occurs when individual parts or components of the dumped product are exported to the country which is applying the anti-dumping measure and assembled there for sale. See, *Brother Industries, Ltd. and Brother Industries (USA), Inc.*, 56 Fed. Reg. 14922-01 (Dep't Commerce Apr. 12, 1991)

particular practice falls within the proscription of circumvention. The only notable concern is the previous inconsistent practice which has resulted in the BOTT having to initiate anti-dumping investigations anew in *Acrylic Blankets – China, Turkey* and withdrawing the anti-circumvention duty in place.[911]



910 Tariff Act 781, 19 U.S.C. 1677j.

911 See *Acrylic Blankets – China, Turkey,* and BOTT Report No 4132 in which Turkey requested the WTO for a formal consultation with South Africa under the DSU. See generally, Nakawaga *Anti-dumping Law and Practice* 221.



Flowchart 6.3: Anti-circumvention review proceedings (compiled from provisions of the ADR)

6.2.6 Judicial Review and Appeal

6.2.6.1 Review by Courts and Independent Tribunals

One of the commendable requirements by the WTO is for Members having anti-dumping legislation to maintain independent, judicial, arbitral or administrative tribunals or procedures for, *inter alia*, the prompt review of administrative actions relating to final determinations of anti-dumping duties or undertakings.[912] The difference in the review tribunals or procedures in this respect is that they should be independent of the authorities responsible for the determinations in question. The judicial review of administrative actions is a well-established practice in South Africa, and has long historical origins dating back to 1828.[913] This concept is succinctly explained by the Law Reform Commission of Western Australia (LRCWA) in its 2002 report on the judicial review of administrative decisions. In the Report, the LRCWA states that the judicial review of administrative actions is a "compendious description of the

912 See URAA, Art 13.
913 See Corder *Codified and Uncodified Judicial Review 2.*

process whereby a court determines whether or not decisions having an administrative character comply with the requirements of the law".[914] It is submitted that the process of judicial review of administrative actions should be construed as relating to substantive law and procedural law, as prescribed under South African anti-dumping law.

It should be acknowledged that the URAA only calls for judicial review but does not provide for the procedures and grounds for such reviews, nor does it distinguish between review and appeal *strictu sensu*. It is submitted that review should be broadly interpreted to refer to either dissatisfaction with the procedures used by the ITAC in arriving at its decision – what is normally called "review", and dissatisfaction with the judgment of the ITAC – what is normally called "appeal". This submission finds support in sections 46(1) and 47(1) of the ITAA. Section 46(1) of the ITAA, provides that a person affected by a determination, recommendation or decision of the ITAC, may apply to a High Court for a review of that determination, recommendation or decision.[915] Section 47(1) of ITAA further provides that the SCA or the Constitutional Court is competent to hear an appeal against a decision of a High Court in respect of a review application pursuant to section 46(1). The fairness of the exercise and performance of its administrative duties by the ITAC will be judicially reviewed by the courts or tribunals pursuant to the provisions of the PAJA, which is a primary administrative fairness legislation giving effect to section 33(3) of the Constitution of 1996.

The South African courts, which are independent of the ITAC, have not hesitated to review the correctness of the ITAC's determinations. For an example, in *Algorax v ITAC*,[916] the High Court expressed clearly, and in strong terms, its disapproval of the inappropriate manner in which the ITAC determined the margin of dumping. The *Scaw* case was, at the time of writing of this thesis,

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914 Law Reform Commission of Western Australia – *Report on Judicial Review of Administrative Decisions* 2.

915 According to s 46(2) of the ITAA, the high Court may make an order for the payment of costs against any party or any person who represents a party in such review proceedings.

916 See the discussion on *Algorax v ITAC* in 6.5.2

the only case that has come before the Constitutional Court through a process of judicial review of an anti-dumping case with respect to a claim relating to a sunset review.

6.2.6.2 Grounds for and Standard of Review

In South Africa, the procedures, rules and legal principles for anti-dumping judicial review should follow those applicable in ordinary cases. The grounds or standard of judicial review used by the courts may be based on a statute or be based on the common law. Section 6(2) of the PAJA contains the grounds for administrative reviews,[917] which any person who is not satisfied with the ITAC's anti-dumping determination or any court's ruling may rely on for reviewing such a determination or ruling.[918] The relevant statutory ground for reviewing the ITAC determination or procedures may include (a) absence of jurisdiction on the part of the ITAC; (b) interest in the cause, bias, malice or corruption on the part of the presiding commissioner; (c) gross irregularity in the proceedings; and (d) the admission of inadmissible or incompetent evidence and/or information, or

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917 In terms of section 6(2) of the PAJA, anti-dumping determinations will be subject to review if: the administrator had no authority to take the decision in question; the administrator took the decision pursuant to an unauthorised delegated power; mandatory and material procedures or conditions prescribed by the empowering legislation or provision were not complied with; the proceedings were procedurally unfair; there was an error of law; the institution of the proceedings was influenced by some ulterior motives or purposes; irrelevant considerations were taken into account and relevant considerations were not taken into account; a party to the proceedings had been unduly influenced, or some pressure was brought to bear; the anti-dumping action was taken in bad faith; the action was taken arbitrarily or capriciously; there is no rational connection between the action and the purpose for which it was taken, to the purpose of the empowering legislation, to the information before the administrator, or to the reasons given to the administrator; and that the anti-dumping action consisted of the failure to take a decision.

918 Judicial review by the courts in South Africa has been the prerogative of superior courts pursuant to the Supreme Court Act of 1959. In terms of the Supreme Court Act of 1959, magistrates' courts are inferior courts and do not have review jurisdiction. Furthermore, only provincial divisions of the High Court have review jurisdiction. Local divisions of the High Court, except for the Witwatersrand Local Division, do not have review jurisdiction, unless the review jurisdiction is conferred by a particular statute. It is submitted that the exclusion of magistrates' courts to hear review matters is not applicable if the review is brought pursuant to the PAJA. The PAJA confers review jurisdiction on courts that previously were precluded from exercising such jurisdiction. Thus, a person not satisfied with the decision of the ITAC may approach the magistrates' court for relief. This is supported by the preamble to the PAJA and by section 1(iv) of the PAJA that defines "court" to include a magistrates' court, "either generally or in respect of a specified class of administrative actions".

the rejection of admissible or competent evidence and/or information.[919] In addition to PAJA, which is the "primary avenue"[920] setting framework and grounds for the review of administrative actions, aggrieved parties may have recourse to the grounds under common law.

Under the common law, the ITAC's determinations may be reviewed because it has disregarded important provisions of the ITAA, the ADR and/or the URAA in arriving at its determination. Alternatively, that the ITAC committed a gross irregularity or clear illegality, and therefore that the determinations must be set aside.[921] In reality, the grounds for review are non-exhaustive and codify the common law grounds for review long observed by the South African courts and tribunals, and the statutory grounds for review pursuant to section 24 of the Supreme Court Act of 1959.[922] The court in the *BOTT v Brenco* case reviewed an anti-dumping determination on the ground of procedural fairness, which is present under both legislation and common law. A rather special fact about the decision, as pointed out by Osode, is the transcending of anti-dumping law into the broader discipline of administrative law.[923] The court clearly asserted that the general standards of review of administrative actions developed under South African administrative law were applicable in the case in question. [924]

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919 See, s 24(1) of the Supreme Courts Act No 59 of 1959. See also, Theophilopoulos *et al Civil Procedure* 319–320.

920 Osode 2003 *Penn State Int'l L. Rev* 28.

921 See *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111, at 114–117.

922 The grounds for review set out in s 24 of the Supreme Court Act are absence of jurisdiction on the part of the inferior court to hear the matter; interest in the cause, bias, malice or commission of the offence of corruption on the part of the presiding judicial officer; gross irregularity in the proceedings; and the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

923 See Osode 2002 *Speculum Juris* 298.

924 See Osode 2002 *Speculum Juris* 295.

6.2.7 Judicial Review Procedures

6.2.7.1 General

Any interested party who is dissatisfied with a determination or procedures of the ITAC may lodge an application for review with the courts. Neither the URAA nor the ITAA and its regulations prescribe or set out the procedures to be followed by independent courts[925] or tribunals or bodies when conducting judicial reviews of anti-dumping determinations. Section 9 of the PAJA makes provision for the promulgation of procedures to be followed in respect of matters dealt with therein. However, such regulations had not yet been promulgated at the time of writing. Therefore, reviews of the ITAC determinations brought in terms of the PAJA shall be brought *mutatis mutandis* by notice of motion in accordance with the procedure set out in specific court rules,[926] for instance the High Court Rules[927] (HCR), and the Constitutional Court Rules (CCR).[928] The Constitutional Court sits at Constitution Hill, Johannesburg, and is the final court

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925 Excluding the various special courts in South Africa, such as the Admiralty Courts, Commercial Courts, Income Tax Courts, and Small Claims Courts, the basic court system consists of the Constitutional Court, the Supreme Court of Appeal (previously the Appellate Division), the High Courts, and the Magistrates' Courts.

926 The rules of the courts supplement the particular Act of the specific court for which they were developed, and as such must be read in conjunction with the enabling Act. The body called the Rules Board, constituted in terms of the Rules Board for Courts of Law Act 107 of 1985, has the power to make, amend or repeal rules for both the High Courts and the Lower Courts. Note that the Magistrates' Courts Rules (hereafter MCR) have recently been amended by the Rules Board through the *Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa,* notified in Government Notice No. 888 as published in the *Government Gazette* No. 33620 of 8 October 2010.

927 Note that as far as the High Court Rules are concerned, there are different sets of rules for each division of the High Court, as well as a set of rules commonly referred to as the Uniform Rules of Court promulgated with effect from 15 January 1965.

928 Rules of the Constitutional Court Rules, Government Notice R1603, *Government Gazette* No 25643 of 31 October 2003 [herein after CCR].

of appeal in constitutional matters.[929] The High Courts are situated in various places and jurisdictional areas across South Africa.[930]

6.2.7.2 Procedures in the Single Bench High Court

Pursuant to Rule 53(1) of the HCR, the review procedure involves the following basic steps:

(a) delivery of a notice of motion to review, which is supported by an affidavit setting out the grounds and facts which form the basis of the review,[931] to the relevant tribunal and to all interested parties;

(b) The notice of motion must: (i) call upon all interested parties to give reasons why the ITAC's decision should not be reviewed and corrected or set aside, (ii) call upon the ITAC to, within 15 days after receipt of the notice of

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929 However, it is possible to approach the Constitutional Court as a court of first instance. This will be cases involving constitutional issues which are sufficiently serious and urgent to require immediate attention of the Constitutional Court as required by Constitutional Court Rule (CCR) 17 read with s 167(6)(a) of the Constitution. For reasons for granting direct access to the Constitutional Court see, for example, *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) par 15.

930 Under the Renaming of High Courts Act No 30 of 2008, which came into force on 1 March 2009, the following are the names of the High Courts in South Africa and their geographical areas: the Eastern Cape High Court, Bisho; the Eastern Cape High Court, Grahamstown; the Eastern Cape High Court, Mthata; the Eastern Cape High Court, Port Elizabeth; the Free State High Court, Bloemfontein; the KwaZulu-Natal High Court, Durban; the KwaZulu-Natal High Court, Pietermaritzburg; the South Gauteng High Court, Johannesburg; the North Gauteng High Court, Pretoria; the Northern Cape High Court, Kimberly; the North West High Court, Mafikeng; and the Limpopo High Court, Thoyandou. Note, however, that the Superior Courts Bill of 2010, which is before Parliament at the time of writing this thesis, proposes the establishment of a single High Court of South Africa, consisting of a number of General and Special divisions. The General Divisions of the High Court of South Africa will be the following: Eastern Cape General Division, Bisho; Free State General Division, Bloemfontein; KwaZulu-Natal General Division, Pietermaritzburg; Limpopo General Division, Polokwane; Mpumalanga General Division, Nelspruit; Northern Cape General Division, Kimberly; North Gauteng General Division, Pretoria, North West General Division, Mafikeng, South Gauteng general Division, Johannesburg; Western Cape General Division, Cape Town (see s 7 of the Superior Courts Bill, 2010). Special Divisions of the High Court will be the following: Competition Appeals Special division; Electoral Matters Special Division; Tax Matters Special Division; Labour Matters Special Divisions; and Land Claims Special Division (see s 8 of the Superior Courts Bill, 2010).

931 See HCR 53(2).

motion, forward the record of the proceedings to the Registrar[932] of the High Court which will be hearing the application for review, together with such reasons in support of the determination as the ITAC must legally provide, or wishes to provide, (iii) indicate the relevant determination or proceedings and must be accompanied by an affidavit containing the grounds, facts and circumstances whereupon the application relies for review;

(c) The Registrar of the High Court then makes the record of proceedings available to the applicant for inspection and makes copies of such parts of the record relevant to the review application;

(d) The applicant may then, within 10 days after receiving the record from the registrar, amend or expand on the notice of motion and supplement the supporting affidavit;

(e) Any interested party who intends to oppose the application for review, including the ITAC, must within 15 days of receipt of the notice of motion or an amendment thereof, deliver a notice of intention to oppose the grant of the relief sought by the applicant, and within 30 days after the expiry of the period mentioned in Rule 53(4) of the HCR, currently 40 court days after the Registrar has made the record available to the applicant, file an answering affidavit opposing the application.[933]

(f) The applicant then files a replying affidavit within seven court days after an answering affidavit has been served upon the applicant and the application will thereafter be set down for a hearing.[934]

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932 The Registrar of the High Court is an official appointed in terms of s 34 of the Supreme Court Act of 1959, whose duty it is to control the general organisational work in each High Court. The registrar is an equivalent of the clerk of the court in a Magistrates' Courts.

933 See HCR 53(5)(b).

934 See HCR 53(7).

6.2.7.3 Procedures in the Full Bench High Court

The procedures involved in this instance will differ from the procedure for the review of the determinations of the ITAC in the High Court. Rule 40 of the HCR sets out the following procedure for bringing an appeal against the decisions of a High Court:

(a) Leave to appeal may be requested at the time of delivery of the judgment or the order appealed against.[935]

(b) The court granting leave to appeal must direct that the appeal be heard by a full bench of the High Court, unless the questions of law and fact are of such a nature that the appeal must be heard by the SCA.[936] The directive by a court granting appeal as to which court must hear an appeal may be set aside by the SCA and be replaced by another directive.[937]

(c) When leave to appeal has not been requested at the time of judgment, leave must be sought within 15 court days after the date of the delivery of the judgment or grant of the order in question.[938] However, the court may extend the 15-day period upon good cause shown.

(d) The application will then be set down by the Registrar, who will also give written notice of the date to all the parties.[939]

(e) If leave is granted to appeal to a full bench of a High Court, notice of appeal must be delivered to all the interested parties within 20 court days of the date on which leave to appeal was granted. However, the court may extend the 20-day period upon good cause shown.[940] The notice of appeal must state whether judgment is appealed in whole or in part, and must further specify the

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935 See HCR 49(1)(a).
936 See s 20(2)(a) of the Supreme Court Act.
937 See s 20(2)(b) of the Supreme Court Act.
938 See HCR 49(1)(b).
939 See HCR 49(1)(d).

finding(s) of fact and/or rulings of law appealed against and the grounds thereof.[941]

(f) The appellant has 60 days after the delivery of a notice of appeal to make a written application to the Registrar of the High Court that will be hearing the application for a date for the hearing of such appeal.[942] However, the applicant shall before applying for a date for the hearing and lodging copies of the record provide good and sufficient security for the respondent's costs unless if the respondent waives the right to such security or the court has released the appellant wholly or partly from the payment of security.[943]

(g) The appellant is required to deliver not later than 15 days before the appeal is heard a concise and succinct statement of the main points which he/she intends to argue on appeal, generally called heads of arguments, as well as a list of authorities to be tendered in support of each point. The respondent is also required to deliver a similar statement not later than 10 days before the appeal is heard.[944]

6.2.7.4 Appeal Procedures in the Supreme Court of Appeal

Decisions of the High Court may be taken on appeal (review) to the SCA. Under section 20 of the Supreme Court Act of 1959,[945] no appeal may be lodged against the judgment of a High Court, except with the leave of the court against whose judgment or order the appeal is to be made, or where such leave has been refused, with the leave of the SCA.[946] Only in exceptional cases will the

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940 See HCR 49(2).
941 See HCR 49(4).
942 HCR 49(6).
943 HCR 49(13)(a).
944 HCR 49(15).
945 Supreme Court Act 59 of 1959. See generally Pete et al *Civil Procedure* 319–320 (appeals procedure in the SCA).
946 See, s 20(4)(b) of the Supreme Court Act.

SCA hear a matter without a prior leave of the court *a quo.*[947] Rules of the Supreme Court of Appeal (SCA Rules), which were published in 2005 as "Practice Directions: Supreme Court of Appeal",[948] set out the procedures to be followed when an appeal has to be heard by the SCA.

6.2.7.5 Appeal Procedures in the Constitutional Court

The procedure for bringing an appeal to the Constitutional Court is set out in rule 20 read with rule 19 of the Constitutional Court rules. CCR 19 governs the application for leave to appeal directly to the Constitutional Court by a litigant who is aggrieved by the decision of any court including the SCA. The leave to appeal shall be granted by the Constitutional Court if the applicant satisfies two important requirements, namely, that the matter or issue involves a constitutional matter or issue, and that the application is in the interest of justice.[949]

According to CCR 20, if leave to appeal is granted under Rule 19, the appellant shall note and prosecute the appeal as follows:

(a) Prepare and lodge the appeal record with the registrar of the court within such time as may be fixed by the Chief Justice in the Practice Directives.[950] The appeal record shall consist of a transcript of the judgment of the court from which an appeal is noted, including all the documents lodged by the parties in that court and a transcript of all the evidence which may have been led in the proceedings and that may be relevant to the issues that are to be determined.

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947 *Pharmaceutical Society of SA and Others v Minister of Health and Another: New Clicks SA (Pty) Ltd v Tshabalala-Msimang NO and another* [2005] 1 All SA 326 (SCA) at 334h–335a.

948 See Practice Directions: Supreme Court of Appeal 10 May 2005 (SCA Rules) published in 2005 (5) SA 1 (SCA) 1–3.

949 See *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) confirming these two requirements.

950 See CCR 20(20)(a)–(i).

(b) The parties are to endeavour to reach an agreement on what should be included in the record. In the absence of such an agreement the appellant shall apply to the Chief Justice for directions to be given in regard to the compilation of the record. Such an appeal shall be made in writing and shall set out the nature of the dispute between the parties in regard to the compilation of the record and the reasons for the appellant's contentions.

(c) The respondent to respond to the application within ten days of being served with the application and shall set out the reasons for the respondent's contentions.

(d) Once the record has been agreed to and correctly lodged, the registrar shall cause a notice to be given to the parties to the appeal requiring the appellant to lodge with the registrar written heads of arguments. The respondent will also be required to lodge with the registrar the written heads of argument by a specified date determined by the Chief Justice, which shall be subsequent to the date on which the appellant's argument was served on the respondent.[951]

(e) The appellant is given further opportunity to lodge written argument with the registrar, in answer to the respondent's argument. Such written argument must be lodged within ten days from the date on which the respondent's argument was served on the appellant.[952]

(f) The Chief Justice may thereafter decide if the appeal shall be dealt with on the basis of written arguments only, or if oral representations may be allowed. If the Chief Justice determines that oral representations will be allowed, the registrar shall within five days of such determination notify all the parties to the appeal of the date of the hearing by registered post or facsimile.[953]

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951 See CCR 20(3)(a).
952 See CCR 20(4).

6.2.7.6 Examples of Anti-dumping Related Court Cases

The South African Courts are showing an interesting trend of not shying away from ruling against the ITAC in respect of its law and practice. The classic example is the case of *Algorax v ITAC*, in which the ITAC's approach in determining the likelihood of dumping and injury resumption in sunset reviews was considered flawed and problematic.

In *Scaw v ITAC,*[954] the ITAC lost an appeal against it by Scaw Metals, which challenged a decision to have anti-dumping duties terminated on fishing and mining rope. The history of the case is that, during 2002, anti-dumping duties were imposed on stranded wire, ropes and cables originating in or imported from the People's Republic of China (PRC), Germany, Korea and the United Kingdom, and countervailing duties on wire, ropes and cables originating in or imported from India. On 17 August 2007, the ITAC initiated a sunset review and investigated whether the removal of the anti-dumping duties imposed on wire, ropes and cables originating in or imported from these countries and countervailing duties imposed on wire, ropes and cables originating in or imported from India would likely lead to the continuation or recurrence of injurious dumping (and subsidisation).

During the process of finalising the ITAC's report to be forwarded to the Minister of Trade and Industry with recommendations pertaining to this sunset review investigation, Scaw South Africa (Pty) Ltd brought an urgent application in the High Court to restrain the ITAC from forwarding its recommendation regarding the anti-dumping duties applicable to Bridon International (Bridon UK) to the Minister of Trade and Industry until a High Court application to review the recommendation of the ITAC had been finalised. In particular, Scaw South Africa wanted to prevent the ITAC from forwarding a recommendation to the Minister of Trade and Industry to terminate the existing anti-dumping duty imposed in respect of stranded wire, ropes and cables, of iron or steel, not

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953 See CCR 20(5) and (6). See generally Pete et al *Civil Procedure* 320–323.

electrically insulated, of a diameter exceeding 8 mm (excluding stainless steel wire, wire plated, coated or copper-clad wire and that identifiable as conveyor belt cord) imported from Bridon International (Bridon UK), alternatively to restrain the Minister of Trade and Industry from accepting the recommendation from the ITAC.

Scaw South Africa had indicated in the application that the recommendation by the ITAC regarding the products from Bridon International (Bridon UK) was reviewable on the basis that it was procedurally and substantively unfair. It was alleged that the ITAC failed to afford the applicant an opportunity to make oral submissions before the decision was taken. It was argued that the recommendation regarding the anti-dumping duties applicable to the products from Bridon UK was irregular because the ITAC found that the product in question, fishing rope, did not form part of Bridon UK's exports to the Republic or to the SACU area and therefore should have been excluded from the dumping margin. The applicant also contended that the fishing ropes should have been taken into account in determining whether dumping would likely continue or recur if duties were to be removed.

Opposing Scaw's urgent application, the ITAC argued that the recommendation was procedurally fair since Scaw South Africa and other interested parties were afforded a proper hearing before the full Commission as well as being afforded the opportunity to submit written submissions. According to the ITAC, the fishing ropes were excluded from the calculation of dumping margins because they were held in bond stores and subsequently sold to foreign vessels. Therefore, no sales were made of fishing ropes from Bridon UK in the Republic or in the SACU during the investigation period.

However, on the 5 January 2009, the North Gauteng High Court (previously known as the Pretoria High Court) granted Scaw South Africa the requested interdict, but restricted the operation thereof only to products of Bridon

International (Bridon UK) affected by the existing anti-dumping duties. The ITAC appealed but eventually lost the case in August 2009. As in the case of *Algorax v ITAC,* the ITAC was reprimanded by the Court. Judge Eberhard Bertelsmann dismissed the ITAC's case as "irrational and unreasonable" and as a "misdirection".[955] It held that Scaw was entitled to administrative action that was "fair, reasonable, rational and procedurally fair",[956] and that the procedure followed by the ITAC did not allow for the enjoyment of just administrative action.

The decision to grant an interim interdict in favour of Scaw was reversed on 9 March 2010 by the Constitutional Court in the case of *ITAC v SCAW.* Aggrieved by the order made by Bertelsmann J, the ITAC made an application before the Constitutional Court for leave to appeal and asked the Court to set the High Court order aside. In this Court, the ITAC sought leave to appeal against the High Court order and it contended that it is in the interests of justice that this Court grants leave to appeal against the interim interdict because it is final in effect; alternatively, because it is likely to cause irreparable harm. It argued further that it was not competent for the High Court to grant an interdict which had the effect of extending the existing anti-dumping duty, because it was contrary to the domestic and international law regulating the lifespan of anti-dumping duties. In addition, the ITAC contended that it was not appropriate for the High Court to grant the interdict, because it encroached on the domain of the executive branch of government, in breach of the doctrine of separation of powers.

On the other hand, SCAW submitted that the interim interdict is not appealable because it is not finally dispositive of the issues in dispute.[957] In response, SCAW argued that this Court should not grant leave to appeal because the High Court order is an interim order with no final effect. If this Court were to grant leave to appeal, SCAW argued, it would prejudge SCAW's pending

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955 See *Scaw South Africa v ITAC.*
956 See *Scaw South Africa v ITAC.*
957 *ITAC v SCAW* par.56.

application for judicial review. SCAW argued further that it was appropriate for the High Court to grant the interdict because the requirements for interim relief had been satisfied. SCAW also argued that the granting of the interim interdict was within the powers of the High Court, because the domestic regulatory regime does not give rise to the lapse of the anti-dumping duties on the expiry of the five years and the 18-month period. SCAW argued that if the domestic statutory regime had the meaning contended by the ITAC, it would extinguish its right to just administrative action, and thereby render the applicable regulation (Regulation 20) unconstitutional.

The Constitutional Court found that that the "interim" decision of the High Court was appealable in the interests of justice. [958] The Court held further that leave to appeal against the interim interdict should be granted as it implied questions of separation of powers and South Africa's international trade obligations, issues which were not the subject of SCAW's pending review application in the High Court. In respect of the merits of the appeal, Moseneke DCJ found that the relevant regulations meant that anti-dumping duties would lapse on expiry of the statutorily determined fove years and 18-month period, and that the initiation of a sunset review or a judicial review did not extend the lifespan of an anti-dumping duty beyond that period. Even though it was fitting for the High Court to grant the interim interdict, it was inappropriate for it to do so because it had the effect of preventing the anti-dumping duties from lapsing, pending the finalisation of SCAW's review application. The Court held further that decisions regarding the setting or lifting of anti-dumping duties are patently within the domain of the executive, and that the interdict prevented the Ministers involved from performing their legislative functions. It was therefore inappropriate for the High Court to grant the interdict, because it improperly breached the doctrine of separation of powers. In the result, the Court granted the application for leave to appeal, set aside the order of the High Court and ordered SCAW to pay the costs of ITAC and of Bridon UK in the Constitutional Court.

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958 *ITAC v SCAW* paras 56 and 60.

6.2.8 SACU Reviews

SACU institutions, the Tariff Board and the Tribunal, have the powers to review anti-dumping rulings and related matters, although the SACU is yet to promulgate specific rules and/or guidelines on how the reviews are to be conducted by the Tariff Board and the Tribunal. Furthermore, it remains to be seen what will happen to judicial reviews of anti-dumping actions once the Tariff Board becomes operational. Stated differently, what will be the implications of the establishment of the Tariff Board on the judicial review of anti-dumping rulings?

In respect to the operational aspects, it is submitted that the SACU Tariff Board may draw valuable lessons from the NAFTA in a few important areas, particularly in respect of inter-SACU members' dispute resolution. Pursuant to the provisions of Chapter 19 of *NAFTA Review and Dispute Settlement in Anti-dumping and Countervailing Duty Measures*, final anti-dumping determinations by administrative offices of Member countries may be appealed to five-member bi-national panels as a replacement for domestic judicial review.[959]

Accordingly, the NAFTA bi-national panels may confirm or reject national determinations. In the case of the latter the panels will remand the case with appropriate instructions to the investigating authority for further action. Article 1904 of NAFTA provides that the complainant must request the bi-national panel, within 30 days of the date of appeal of the administrative action, and that once established the panel has a period of 315 days from the date of the request to reach its decision on the matter. In terms of Annex 1904.13 of the NAFTA, Member States involved in the proceedings can resort to an "extraordinary challenge procedure" within a reasonable time, if either Member

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959 See Bucholtz "Sawing off the Third Branch: Precluding Judicial Review of Anti-dumping and Countervailing Duty Assessment under Free Trade Agreements" 1995 *Md. J. Int'l L & Trade* 727 which discusses NAFTA's exclusion from national judicial review in final anti-dumping rulings. The roster of panellists includes judges or former judges, and the majority of panellists are lawyers of good standing. See Annex 9012(1) and (2). For a

is of the opinion that the integrity of the review process was compromised and that the decision was affected by panellists' misconduct, procedural violations including a serious conflict of interest, or action manifestly exceeding the power, authority or jurisdiction of the panel. The challenge will be heard by a three-person Extraordinary Challenge Committee, whose main task is to safeguard and preserve the integrity of the NAFTA panel process.

The decision of the bi-national panel may be appealed to a three-member committee of judges or former judges. Time seems to be at the essence during this appeal process because, within 15 days of the request, the committee must convene and make a prompt decision to affirm, vacate or remand the panel's decision.[960]

It is submitted that the issue of the implications of SACU reviews for the competence of national bodies to conduct judicial reviews is a complex one. As indicated in Chapter 4.5.3 above, in terms of Article 13:3 of the SACU Agreement the determinations of the SACU Tribunal are final and binding. It is further indicated in Chapter 4.5.2 that the recommendations of the SACU Tariff Board will become binding on national authorities once approved by the CoM. Do the SACU reviews divest national courts of the power to review anti-dumping cases once adjudicated on by the Tribunal? Will legislative amendments be necessary to address the issue of judicial reviews by national institutions? Before these questions are answered I would like to consider briefly how the NAFTA deals with the issue. In terms of Article 1904 of the NAFTA, the dispute resolution process is to be conducted by an arbitral panel and not by a judicial panel. In terms of Article 1904 of the NAFTA, relevant

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general discussion on the NAFTA dispute resolution systems, see Thomas *International Judicial* (2005) at 42–73 http://proquest.umi.com/pqdweb

960 See Annex 1904.13(1) of NAFTA. The bi-national panels have far-reaching powers similar to those of WTO dispute settlement bodies, including proposing changes in the Member's anti-dumping regime. NAFTA Members may request that an amendment to another party's anti-dumping statute be referred to a panel for a declaratory opinion on whether the amendment is consistent with the WTO and the NAFTA. See Annex 1903.2(3) read with 1904.13(1) of NAFTA.

bodies of either disputing nations are precluded from adjudicating the dispute in question.

The NAFTA Article 1904 approach with respect to a common implementation mechanism for trade remedies may not be suitable or desirable in the SACU region. Firstly, the SACU region has fewer countries with a strong constitutional background, judicial independence and outstanding rule of law.[961] The Article 1904 approach has led to the implementation of decisions that contravene United States law,[962] for example, and its strict application has been seen as "fundamentally flawed and undemocratic".[963] This, according to Riccardi, is because NAFTA review panels have misused the preclusion of judicial review in article 1904 and not adhered to the requirement that they should behave like United States courts and apply United States law.[964] The lack of adequate constitutional protections in the NAFTA dispute resolution system under Article 1904 came to light in the *Certain Softwood Lumber Products from Canada*[965] dispute (hereafter Canada Softwood Lumber), which was decided by panellists divided on national lines. Thus, the NAFTA system that is operational in an environment where Member States have "vastly different power differentials and regulatory models"[966] may be subject to abuse. Secondly, and perhaps the most

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961 For example, South Africa and Botswana.

962 Riccardi "The Failure of NAFTA in Design and Practice: An Opportunity for Reform" 2001 *Ohio N.U.L.Rev* 738–739. For more on the questionable constitutional nature of the NAFTA dispute settlement system in anti-dumping cases, see also Ohana "The Constitutionality of Chapter Nineteen of the United States – Canada Free-Trade Agreement: Article III and the Minimum Scope of Judicial Review" 1989 (89) *Columbia Law Review* 897; Gesser "Why NAFTA Violates the Canadian Constitution" 1998 *Deny J. Int'l L & Pol'y* 121.

963 Riccardi "The Failure of NAFTA in Design and Practice: An Opportunity for Reform" 2001 *Ohio N.U.L.Rev* 727, 737–740.

964 Riccardi 2001 *Ohio N.U.L.Rev* 728.

965 *Certain Softwood Lumber Products from Canada*, USA-92-1904-01 (May 6, 1993) [hereinafter *Canada Softwood Lumber*] referred to in Riccardi 2001 *Ohio N.U.L.Rev* 735–737. *The Canada Softwood Lumber* dispute has been one of the long running disputes in the NAFTA dispute settlement panels. See Osman and Devadoss "Economics of the US – Canada Softwood Lumber Dispute: A Historical Perspective" 2002 2006 *Estey Center J. Int'l L Trade Pol'y* 29. According to Cone, the continuation of the lumber products dispute called into "question NAFTA's utility". See Cone "Canadian Softwood Lumber and 'Free Trade' Under NAFTA" 2006 (51) *NLR* 842, 850. For more studies on Canada's softwood lumber dispute with the United States, see Foese "Contingent Protection Measures and the Management of the Softwood Lumber Trade in North America" 2006 *Estey Center J. Int'l L Trade Pol'y* 126.

966 Foese 2006 *Estey Center J. Int'l L Trade Pol'y* 135.

obvious reason, SACU is a customs union, while NAFTA is an FTA. The two arrangements have different tariff regulation structures, as SACU employs a common external tariff regime, which is administered by the ITAC on behalf of all the SACU member states, while, NAFTA Member States retain jurisdiction over tariffs.

If the approach in Article 1904 of the NAFTA were to be followed it would require legislative amendments in SACU national jurisdictions. It is submitted that a system modelled on Article 1904 of NAFTA would be a startling affront to the constitutional provisions of the judiciary, and on the judicial sovereignty of South Africa. Most worrisome is the fact that such a system would move the effective review and appellate processes in South Africa into the realm of the unknown. Rather than introducing unnecessary and far-reaching amendments to national laws, which in certain cases may possibly be unconstitutional, it is submitted that the SACU members should consider amending the SACU agreement to expressly address the issue of judicial review of final anti-dumping rulings with deference given to national authorities. The amendments should include an express provision that allows for a fast-track judicial review of constitutional challenges to SACU final anti-dumping rulings by national bodies such as the South African SCA and the Constitutional Court, including challenges to the interpretation and application of substantive law applied by SACU panels.[967]

6.3 Summary

The types of review process involved in the South African anti-dumping regime were discussed in this chapter. Anti-dumping measures remain in force only for as long as, and to the extent, necessary to counteract dumping that is causing injury or threatening to cause injury. In line with the URAA, the ITAC will review the need for the continued imposition of anti-dumping duty either on its own

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[967] A similar approach of fast-track judicial review to the anti-dumping rulings of NAFTA panels was adopted by the United States Congress in 1986. See generally Ohana 1989 *Columbia Law Review* 901.

initiative, or upon request by any interested party that can substantiate the need for such review. It was submitted that the South African anti-dumping processes are designed to ensure compliance or consistency with the URAA. This has been evident in respect of the ITAC review proceedings, which permit investigations as serious as the one conducted in the original anti-dumping investigation. The parties to the anti-dumping dispute may also approach any of the ordinary South African courts for relief by way of review or appeal, using the long-established and clear processes of these courts. It is submitted that only a few changes need to be effected to the current law and practice.

The next chapter undertakes a comparative and juridical study of the substantive aspects and provisions of the South African anti-dumping law, and their compliance with the WTO rules. In particular, the chapter appraises the determination of dumping, and the normal value and price of like products.

CHAPTER SEVEN: ANALYSIS AND THE DETERMINATION OF DUMPING, NORMAL VALUE, PRICE AND LIKENESS OF PRODUCTS

7.1 Introduction

Chapter two highlighted the fact that WTO rules allow Member countries to take anti-dumping measures against dumped imports to offset their injurious and anti-competitive effects on national industries. In particular, Chapter two outlined anti-dumping principles and provisions as set out in Article VI of the GATT and in the URAA.

The main thrust of the present chapter, Chapter seven, is a critical evaluation and appraisal of the determination of dumping, normal value, price and like products as substantive aspects of the South African anti-dumping law and in comparison with the WTO rules on anti-dumping. The comparative perspective is important because the WTO rules are applicable and binding on all WTO Members, who are expected to shape their anti-dumping laws and policies in conformity with the WTO rules. Accordingly, the ITAA anti-dumping provisions are designed to make South Africa compliant with the WTO rules. Therefore, in this study we consider whether South African anti-dumping law is in line with the concepts, principles and objectives of the WTO rules, in particular Articles 2 and 3 of the URAA.

7.2 Determination of Dumping

An important consideration in terms of the imposition of anti-dumping measures is for the ITAC to first be satisfied that dumping of goods has actually taken place. ITAC merely needs to be satisfied that such dumping is causing injury to like goods or products of industries in South Africa (and in the SACU area) and that it is in the interests of such industries to intervene using anti-dumping measures. The price and value of the goods in question are used to determine

whether dumping exists. As stated by the WTO Panel in the *Thailand – H-Beams* dispute, Article 2 of the URAA "contains multiple obligations relating to the various components that enter into the complex process of determining the existence of dumping and calculating the dumping margin".[968] With respect to the determination of dumping, Article 2.1 of the URAA clearly 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 comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

Article 2.1 of the URAA grants WTO members discretion with respect to implementation, and provides the basic principles that must be complied with. In South Africa, the BTTA determines dumping as occurring when foreign goods are introduced into the "commerce of the Republic [of South Africa] 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".[969] This entails exporting into and selling goods in South Africa [or/and the SACU area] at a price less than the domestic price or value of the like goods when sold for consumption in the exporting country.

The new provision for determining dumping in the ITAA is, prima facie, not materially different to the one under the BTTA, and is textually similar to Article 2 of the URAA. Section 1(2) 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 32(2), of those goods". The URAA does not explicitly mention common trade areas as a "territory" of an investigating authority for the purposes of anti-dumping investigations. Nevertheless, WTO Members are not

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968 Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-beams from Poland, WT/DS122/R 28 September (2000), par. 2.2 [*Thailand – H-beams, Panel Report*].

969 BTTA, s1.

precluded from investigating dumping in territories of countries in their common trade areas.

In order to justify the application of South African anti-dumping legislation to dumping in the SACU area, the question is whether the SACU common trade area is the territory of South Africa. There are two possible approaches to answering this question. Firstly, if the phrase "introduction into the commerce of another country" means the sovereign territory of the GATT contracting parties, then the South African anti-dumping regulation is not GATT consistent in so far as it relates to the SACU common trade area. Secondly, the phrase "common trade area" is to be understood to mean an area in which a country has the right or preference to carry out commercial activities. Free trade areas or common trade areas will also be included as commerce areas of a country, thus justifying the application of another member country's anti-dumping measures as the legal basis to act against dumped imports. The latter view seems to be the more correct one. The SACU area can be seen as akin to the EU "community area", which justifies the EU's authority in investigating dumping in any member country's territory. Furthermore, it should be emphasised that the ITAC, like its predecessor, the BTTA, does not have powers *mero motu* to investigate alleged dumping in the SACU area. It has to be so authorised by agreement with the SACU country whose domestic industry is directly affected.

7.3 Determination of Normal Value in a Market Economy

7.3.1 Normal Value Defined

Sometimes termed "fair value" or 'foreign market value",[970] or "current domestic value",[971] normal value is defined in three ways in the BTTA[972] as:

970 See, Pattison *Anti-dumping and Countervailing Duty Law* (1990).

971 See Customs Tariff Act, s 8, referring to "current domestic value". S 82 of the Customs and Excise Act refers to "domestic value".

972 BTTA, s 1.

> (a) the comparable price actually paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin; or
> (b) the highest comparable price at which like goods are being exported to any third country in the ordinary course of trade [in the absence of price paid or payable in the exporting country or country of origin];[973] or
> (c) the constructed cost of production of the goods in the country of origin plus a reasonable addition for the selling costs and profit [in the absence of price paid or payable in the exporting country or country of origin].[974]

The South African provision under the BTTA on the determination of normal value is not materially at variance with Article 2.2 of the URAA. Article 2.2 of the URAA states:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profit.

Normal value tests at the disposal of the BOTT include: (a) the export country's domestic market price (EDMP); (b) the third country price (TCP); and (c) the constructed cost of production (CCP) price. In terms of Article 2.1 of the URAA, "normal value" must be established on the basis of sales in the ordinary course of trade of the comparable like product when destined for consumption in the exporting country. Sales of the comparable like products which were not made in the ordinary course of trade must be excluded by the investigating authorities.[975] According to the WTO Appellate Body ruling in the *US – Hot-rolled Steel* dispute, the determination of normal value is not to be reduced to a

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973 See URAA, Art. 2.2.

974 See URAA, Art. 2.2. For more information on normal value see, Jackson and Vermulst *Anti-dumping Law and Practice: A Comparative Survey* 132–133, 162, 444–449.

975 See *US – Hot-rolled Steel,* Appellate Body Report, par. 139–140.

mere comparison of sales or prices of the products in question. Price is merely one of the terms and conditions of a transaction, thus all other terms and conditions of the transaction, for example the volume of sales and other liabilities of the seller, such as insurance, must be assessed by the investigating authority.[976]

The definition and determination of "normal value" under the BTTA was questioned in the case *of South Africa – India Pharmaceutical Products.*[977] India argued that the three above-stated tests for normal value in the BTTA were inconsistent with South Africa's WTO obligations. Accordingly, the normal value methodology calculation was simply incorrect. This was to become a landmark inquiry by the WTO into the South African anti-dumping regime. Unfortunately, the case was withdrawn after South Africa and India reached an amicable solution.

In order to make the South African provision compliant with the WTO rules, the ITAA defines normal value slightly differently to the BTTA by embellishing the BTTA's "normal value" definition with the inclusion of a reference to phrases like "appropriate third country", "surrogate country" and comparable price which is "representative" in section 32(2).[978]

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976 See *US – Hot-rolled Steel,* Appellate Body Report, par. 142.

977 See *South Africa – Anti-dumping Duties on the Import of Certain Pharmaceutical Products from India,* WT/DS168/1 [hereafter South Africa – India Pharmaceutical Products].

978 According to section 32(2) of the ITAA,

> (b) "normal value", in respect of goods, means-
> (i) the comparable price paid or payable in the ordinary course of trade for like goods destined for consumption in the exporting country or country of origin; or
> (ii) in the absence of information on a price contemplated in subparagraph (i), either-
> (aa) the constructed costs of production of the goods in the country of origin when destined for domestic consumption, plus a reasonable addition for selling, general and administrative costs and for profit; or
> (bb) the highest comparable price of the like product when exported to an *appropriate third* or surrogate country, as long as that price is representative [emphasis added].

In practice, the ITAC prefers normal value to be determined by the domestic selling price. Therefore, before the applicant for remedial action can resort to the determination of normal value by means of constructed normal value or by using the export price to a third country, it must be shown that the applicant made reasonable and clear attempts to obtain the domestic selling price in the country of origin of the goods in question. The ITAC may, in constructing the normal value, as contemplated in section 32(2)(b)(ii)(aa) of the ITAA, consider the costs of the foreign producer concerned; the costs of another foreign producer or producers in the same country; the information contained in the application; or any other information at the ITAC's disposal.[979]

The construction of the cost build-up of the foreign producer or exporter concerned shall include production costs; overhead costs; selling, general and administrative costs; any other costs deemed necessary by the Commission to compare the constructed normal value to the export price; and a reasonable profit.[980] Under the BTTA reference was made to "third country", and not to "appropriate third country".

It is submitted that the ITAA added the word "appropriate" to the South African legislation in order to be verbatim compliant with the URAA, which requires "appropriate third country".[981] Furthermore, while the BTTA did not require that the "comparable price" be "representative" as under the URAA,[982] the ITAA does.[983] It is further submitted that the ITAA goes a step further than both the URAA and the BTTA by admitting a comparable price from a "surrogate country".[984] Neither the BTTA nor the URAA refer to "surrogate country". The definition of "normal value" in section 32(2)(b) of the ITAA finds further exposition in section 8.1[985] of the ADR, which contains additional information on

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979 See ADR, s 8.9.
980 See ADR, s 10.
981 See URAA Art. 2.2.
982 See URAA Art. 2.2.
983 See ITAA s 32(2)(bb).
984 See ITAA s 32(2)(bb).
985 The relevant part of section 8.1 of the ADR states:

normal values. Section 8 of the ADR also includes rules and information on how the selling, general and administrative expenses and the profit margins in constructed normal values should be determined; how to deal with cases where there are no sales of the like product on the exporter's domestic market or where sales do not allow for a proper price comparison;[986] how to deal with situations where sales on the exporter's domestic market are made at a loss over an extended period and in substantial quantities;[987] how to deal with domestic sales to related parties;[988] and how to determine normal value in cases where the domestic price of the product in question is unreliable.

The PADR attempts to provide greater precision and clarity in the determination of normal value. The anti-dumping regulations do not refer, among others, to "appropriate third or surrogate country". Reference is made only to the term "third country" in particular in section 9.2 of the PADR, thereby reverting back to the position under the BTTA. It is submitted that the regulations in this regard are not consistent with the ITAA, or the ITAA Amendment Bill, which still refers to "appropriate third or surrogate country".[989] The regulations should not be allowed to pass as they will create internal conflict of the law. This internal conflict will be a legislative nightmare, and a worrisome flaw in the law that would support arguments that the provisions of the South African anti-dumping law are uncertain and inconsistent.

Both the ADR and the PADR explain circumstances under which sales or exports to a third country may be considered to be not in the "ordinary course of trade". This has had the effect of providing some much needed clarity. Sales or

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"normal value" as defined in section 32(2)(b) of the *Main Act* shall be interpreted to mean -

(a) the price paid or payable for like goods produced and sold in the ordinary course of trade and in sufficient quantity for home consumption in the country of export or the country of origin by the exporter or the country of origin by the exporter, the producer or its related party under investigation; or

(b) where such price is not known, the price at which such like goods are sold on the same market by another seller or sellers in the market.

986 See ADR, s 8.3.

987 See ADR, s 8.2(a).

988 See ADR, s 8.2(b).

exports are not in the "ordinary course of trade" if they, firstly, took place at prices below total costs, including cost of production and administration, selling, general and packaging costs, and have taken place in substantial quantities to the amount of least 20 per cent by volume of total domestic sales during the investigation period and over an extended period of time of at least six months; or secondly, when the sales or exports were made to a related party; or thirdly, when sales or exports do not reflect normal (sufficient) commercial quantities.[990] The ITAC in the *Gypsum Plasterboard*[991] case held that the export price should be at the ex-factory level and at the same level of trade to enable a proper comparison of normal value.

The lack of a clear indication on how the "third country" should be determined is a drawback on the pursuit of clarity in the South African law. However, it is submitted that the absence of a definition of "third country" should not detract from the fact that the South African anti-dumping regulations contain elaborate provisions relevant to "third country" related enquiries. For example, the regulations provide that the third country must be a country with an industry on the same level of development as that of the country under investigation and that the industry of such a third country must add sufficient value.[992] Perhaps the legislators considered it unnecessary to include a provision on the determination of a "third country" due to the fact that the ITAC has an established practice of determining a "third country". It is submitted that providing clear guidelines on how to determine a "third country" is one of the things that should be made integral to the whole edifice of South African anti-dumping law.

7.3.2 Exporter's Domestic Market Price

The exporter's domestic market price (EDMP), or in other words, exporter's home market price (EHMP), is the preferred test to determine the "normal

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989 See ITAA Amendment Bill, s 10(b); see also s 10(c) of the ITAA Amendment Bill.

990 See, generally, ADR s 8; PADR s 9.2.

991 See *Gypsum Plasterboard,* ITAC Report No 16, par. 4.6.2.1.

value" of the goods. The BTTA, for instance, mandated the BOTT to first employ the EDMP in the exporting country in order to determine the normal value of the goods under investigation. In terms of Article 2.1 of the URAA, the exporter's domestic market price is the price at which, at the time and place determined by the legislation of the country of importation, the goods are paid for in the ordinary course of trade when intended for consumption in the exporting country or country of origin. Similarly, export price is defined in section 32(2)(a) of the ITAA as the price actually paid or payable for goods sold for export, net of all taxes, discounts and rebates actually granted and directly related to the sale under consideration. The provisions of Article 2.1 of the URAA and section 32(2)(a) of the ITAA both presuppose that there are in fact domestic sales of the like product, and that the sales in question are made in the ordinary course of trade. The ITAC uses EDMP and sales as the preferred basis for ascertaining the true normal value. It is only when circumstances do not allow the use of the EDMP of the exporting country that the investigating authority may have recourse to other alternative criterion for determining normal value. The EDMP is the weighted average selling price in the market of the exporting country.[993]

7.3.2.1 Prices to be of Sales in the Ordinary Course of Business

Circumstances could be deemed not to allow the ITAC to use the EDMP of the exporting country, and to disregard it for other alternative tests. This the ITAC may do when: (i) there are no sales of the like product in the exporting country market and therefore no EDMP to use; (ii) there are sales of the like product in the exporting country market but the sales are not "in the ordinary course of trade"; (iii) the sales of the like products in the exporting country market do not allow proper price adjustment and comparison; (iv) the exporting country is a

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992 See ADR, s 8.14.

993 According to the BOTT in *Investigation into the Alleged Dumping of Trichloroethylyne (TCE) Imported from the Netherlands and Originating in Germany* BOTT Report No. 3615 [hereinafter Trichloroethylene – Netherlands, Germany] par. 21, "under normal circumstances the domestic price is based on the price of the exporter in the country of export."

non-market economy country; or (v) the export price is for some reasons unreliable.

Section 32(2)(b)(i) of the ITAA provides that the normal value of any goods exported to South Africa may include the comparable price paid or payable in the "ordinary course of trade" for like goods destined for consumption in the exporting country or country of origin. To determine normal value under section 32(2)(b)(i), the ITAC will have to examine whether there have been sales of comparable goods destined for consumption in the country of export or the country of origin by the exporter, which are made "in the ordinary course of trade". In this regard it is important to determine if sales are "in the ordinary course of trade" or are outside the course of trade.

Article 2.2.1 of the URAA states that sales below the cost of production may be treated as not being in the ordinary course of trade by reason of price. Thus, profitable sales in certain circumstances are not necessarily in the ordinary course of trade. Certain factors may exist that render profitable sales unsuitable for determining normal value in the ordinary course of trade. Generally, sales will not be suitable for use in determining normal value in the ordinary course of trade; for example, where the prices are artificially low because of the government's influence in the form of distortion of the domestic market, and influence on the costs of output; sales are made within an extended period of time in substantial quantities which do not provide for the recovery of all costs within a reasonable time;[994] and where domestic producers and distributors are related. As indicated by the WTO Appellate Body in the *US – Hot-rolled Steel* dispute, while Article 2.2.1 provides for a method for determining if sales below costs are in the ordinary course of trade, Article 2.2.1 does not purport to establish an exhaustive list of factors to be considered when determining

994 See URAA, Art 2.2.1. The practice in anti-dumping proceedings has been to exclude sales below cost where the weighted average selling price is below the weighted average per unit costs or where the sales represent more than 20% of the quantity of total domestic sales of the merchandise in question.

whether sales are "in the ordinary course of trade".[995] Many other factors may be considered by the ITAC.

The concept of "ordinary course of trade" as a normal value concept is well developed in the United States jurisprudence, and authorities there have established clear guidelines for determining whether sales are in the ordinary course of trade. For example, the investigating authority will consider a range of factors including whether there are different standards and product uses; the comparative volume of sales and number of buyers in the home market; price and price differentials in the home market; profit and dissimilar profit differentials; and whether sales in the home market consist of production over-runs.[996] These factors, which apply only to the calculation of normal value in the home market,[997] are not considered in "the entire circumstances particular to the sale in question".[998]

In the light of the Appellate Body ruling in *US – Hot-rolled Steel*, many other factors may be appropriate for consideration by the ITAC in rendering the sales unsuitable for establishing normal value in accordance with section 32(2)(b)(i) of the ITAA, which contains reference to the concept of "ordinary course of trade". In essence, the ITAC has the discretion to exclude sales that are not "in the ordinary course of trade" and that distort the normal value of the product in question, provided that such discretion is exercised in an *even-handed* manner that is fair to all the parties affected by an anti-dumping investigation.[999]

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995 *US – Hot-rolled Steel*, Appellate Body Report, par. 147.

996 See, for example, *Structural Steel Beams from the Republic of Korea; Final Results of Anti-dumping Duty Administrative Review*, 69 FR 7200 (F13 ebruary 2004). *Notice of Final Determination of Sales at Less than Fair Value: Certain Cold-rolled Carbon Steel Flat Products from Taiwan*, 67 FR 62104 (3 October 2002); *Preliminary Results of Anti-dumping Duty Administrative Review: Gray Portland Cement and Clinker From Mexico*, 71 FR 2909 (13 September 2005); and Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand; Final Results of Anti-dumping Duty Administrative Review, 61 FR 1328 (19 January 1996).

997 See, for example, *Notice of Final Results of Anti-dumping Duty Administrative Review: Granular Polytetrafluoroethylene Resin from Italy* 67 FR 62104 (3 October 2002).

998 See *Notice of Final Determination of Sales at less than Fair Value: Certain Cold-rolled Carbon Steel Flat Products from Taiwan*, 67 FR 62104 (3 October 2002).

999 See, *US – Hot-rolled Steel*, Appellate Body Report, par. 148.

The ADR sets out circumstances whereby sales may be considered to be not in the ordinary course of trade. According to section 8.2(c) of the ADR, this will be when such sales took place at prices below total costs; were made to a related party; or do not reflect normal commercial quantities. The guidance outlined in section 8.2 of the ADR to determine "ordinary course of trade" is a positive step in this complex discipline of international trade. However, a lack of explanation for some of the factors in section 8.2 is a cause for concern as this may open up the provisions of section 8.2 to abuse. For instance, although section 8.2(c) refers to "sales that do not reflect commercial quantities", the ADR contains no provision that indicates when it can be said that sales reflect normal commercial quantities.

Be that as it may, it is submitted that this omission is inconsequential and does not render the South African anti-dumping regime incompatible with the WTO. The issue whether sales reflect normal commercial quantities or not should be determined by looking at the totality of factors in a particular case, and such determination should be case-specific.

7.3.2.2 EDMP and the Country of Origin of the Goods

The determination of the country of origin of the dumped goods is also important in order to construct the proper normal value of these goods. Knowing where the goods originate from or locating the place of origin of the goods for purposes of the URAA investigations is a complicated inquiry. Hotchkiss attributes this complication to, among other things, the modern-day multinational corporations (MNCs) and practices such as those of outward-processing and/or outward-assembly in which a product will have more than one possible place or country of origin.[1000] In the context of anti-dumping measures, companies subject to anti-dumping duties may simply ship the component parts to another country for assembly, in what is called "a

[1000] See Hotchkiss *International Business Law* 233.

screwdriver plant", and then export the goods from the second country, which was not subject to a dumping order.[1001]

7.3.3 Specific Rules for Determining Origin in Dumping Cases

The BTTA and its guidelines had no specific provisions or rules for determining the country of origin of goods in anti-dumping investigations, except reference to origin in respect of alleged circumvention reviews.[1002] Be that as it may, the BOTT has dealt with determinations of the origin of goods. Interestingly, importation or origination from a country has in few cases not been regarded as an important factor in determining when a product was usually manufactured in one country and exported via another country.[1003] Furthermore, the BOTT has also not regarded as an important factor the headquarters of the subsidiary corporations. Thus, in the *Titanium Dioxide – Belgium, Saudi Arabia, UK, and US* [1004] investigation, the BOTT determined that the goods originated from Germany and not from the United States despite the fact that the manufacturer, which was a subsidiary of a company whose headquarters were based in the United States, was itself based in Germany.

Except for the deeming provisions in section 8.5 of the ADR on origin of the goods under anti-dumping investigations, neither the ITAA nor the ADR contains specific provisions for the determination of the country of origin in dumping cases. According to section 8.5 of the ADR, exported goods may be deemed to originate in the country indicated on the certificate of origin attached thereto; deemed to originate from a country indicated on the bill of entry; or

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1001 Hotchkiss *International Business Law* 234. According to Hotchkiss, companies may ship parts and materials to any point for assembly or manufacture for a variety of reasons, including taking advantage of low taxes, low wages, and tariff preference programmes, or circumventing anti-dumping measures. See Hotchkiss *International Business Law* 234.

1002 See ADR, Sub-Part V, s 60; BOTT Regulations s 60.

1003 See for an example *Acetaminophenol – China, Hong Kong, India, Singapore,* and BOTT Report No 3366, in which case the product was found to be manufactured in China but exported via Hong Kong. However, see the change of approach in, for example, *Acetaminophenol – China, France, U.S,* and BOTT Report No 3605, resulting from Hong Kong's reintegration into China.

1004 *Titanium Dioxide – Belgium, Saudi Arabia, UK, and U.S,* BOTT Report No 3566.

deemed to originate in the country indicated in the import statistics provided by the SARS Commissioner. Section 46(1)[1005] of the Customs and Excise Act makes provision for determination of the origin of the goods.[1006]

It is submitted that, in addition to section 8.5 of the ADR, the provision must be used by the ITAC as criteria to determine the origin of goods in dumping cases. It is further submitted that the ITAC should consider as the yardstick for determining the origin of the goods the ROOs as contained in the GATT, and of the SADC and the SACU. In order to have a self-contained anti-dumping legislation the ROOs may be included in the ITAA; alternatively they may be included in the ADR.

The GATT Agreement on Rules of Origin (GATT ROOs) provides the approach to be used in determining the ROOs.[1007] The ROOs may be used to inquire into the nationality or the country of origin of the goods to determine whether such goods should enjoy the benefits of tariffs and quota elimination under a trading arrangement. These are called "preferential rules of origin". Non-preferential ROOs, on the other hand, are used for all other purposes, including enforcing product and country-specific trade restrictions and obligations such as anti-

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1005 S 46(1) has been amended by s 2(a) of Act 61 of 1992 and substituted by s 36(a) of Act 45 of 1995.

1006 S 46(1) of the Act provides that goods will be regarded as originating from a country or territory where:

> (a) at least 25 percent ...of the production costs of those goods, determined in accordance with the rules, is represented by materials produced and labour performed in that territory;
> (b) the last process in the production or manufacture of those goods has taken place in that territory; and
> (c) such other processes as the Minister of Trade, have prescribed by regulation in respect of any class or kind of goods, had taken place in the production or manufacture of such goods or kind in that territory.

See Erasmus 2003 *SAYIL* 162–163 for a short discussion on the rules of origin with reference to s 46 of the Customs and Excise Act of 1964.

1007 GATT Agreement on Rules of Origin (GATT ROO) of 1994, Art. 1(1). See, generally, GATT ROO (1994) (MTNF/FA-AIA-II). See also LaNasa "Rules of Origin in the Uruguay Round's Effectiveness in Harmonizing and Regulating them (1996) *American J. Int'l L.* 625, for an extensive discussion of the WTO/GATT rules of origin.

dumping and countervailing duties.[1008] The SADC ROOs provide that processed industrial products can acquire originating status of a Member State if the imported materials have undergone sufficient transformation to the extent that the cost, insurance and freight (c.i.f.) value of those materials does not exceed 60 per cent of the total costs of the materials used in the production of the goods; or the value-added obtaining from the process of production accounts for at least 35 per cent of the ex-factory costs of the goods.[1009]

7.3.3.1 The Value-added Test

Section 46(1)(a) of the Customs and Excise Act provides for the "value-added test". The value-added test requires that a certain minimum percentage of the value of a good must have been added within the country or preferential area for which origin is being claimed. Accordingly, the ITAC should be satisfied that a territory has at least added 25 per cent value in the goods whose originating status is determined through the production process.[1010] The adding of value is non-cumulative.

7.3.3.2 The Last Substantial Transformation Test

According to section 46(1)(b) of the Customs and Excise Act, the last process in the production or manufacture of the goods will have taken place in the territory in question. This resembles the "substantial transformation" test. This test is the oldest of the tests used to determine the origin of the good(s) in question where production or manufacture took place in more than one country. The test has

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1008 See LaNasa "Rules of Origin in the Uruguay Round's Effectiveness in Harmonizing and Regulation them" 1996 *American J. Int'l L.* 626 & 626 fn 6 and 7.

1009 See, SADC Protocol on Trade, *Annex 1 Concerning the Rules of Origin for Products to be Traded between the Member States of the Southern Development Community* (agreed to on 15 July 1999 by the SADC Ministers of Trade).

1010 S 46(2) of the Customs and Excise Act, as substituted by s 5(1) of Act 68 of 1989, s 2(b) of Act 61 of 1992 and s 36(b) of Act 45 of 1995.

featured in the USA's determinations since the early eighteenth century,[1011] and is also a major test in the EU.[1012]

According to this test, a new product should be created that differs in name, character or use from the original article, as a result of the manufacturing process.[1013] That is, the product should have its own properties and composition. In such circumstances the new product is considered to have originated in the country where it has last undergone this substantial transformation. Therefore, the new product originates in the intermediary or transhipment country.[1014] In determining and explaining whether there has been substantial processing or transformation factors, such as a physical change in the good in question, the complexity and the time involved in the process, level or degree of skill or technology required, and the value added to the good, labour and cost are taken into account.[1015]

Substantial transformation as a test, in the sense explained above, is important in order to exclude goods that that do not originate from a particular country. For instance, like goods that have undergone a *de minimis* or minimal transformation or processing, for example, by "mere dilution by water or other

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1011 See, *Anheuser-Bush Brewing Association v United States*, 207 US 556, 562(1908); *Rules of Origin*, ABA Standing Committee on Customs Law (ABA Rules of Origin) (1991) 11. See also, *GATT Agreement on Rules of Origin*, on Art. 3(b) read with Art. 9(2)(c)(ii) and (iii).

1012 See, EU Basic Law – Regulation No.802/68, OJ (1968) L 148/1.

1013 In *Superior Wire v United States* 669 F.Supp. 472 (*Ct. Int'l Trade* 1987), aff'd 867 F.2d 1409 (CAFC 1989), the court made the following important conclusions: the c*hange in name test*, though met, is not dispositive/or always determinative, though supportive. The change in tariff classification test, not dispositive. That the v*alue-added test must be* considered as evidencing substantial transformation, value added must be significant. Contra, *Ferrostal Metals Corp. v United States* 664 F.Supp. 535 (1987).

1014 The EU *Regulation* No. 802/68 simply expresses the substantial transformation test as follows:

> A product in the production of which two or more countries were concerned shall be regarded as originating in the country in which the last substantial process or operation that is economically justified was performed, having been carried out in an undertaking equipped for the purpose, and resulting in the manufacture of a new product or representing an important stage of manufacture.

1015 But the GATT ROOs do not provide factors that have to be considered as evidence of substantial transformation.

substance",[1016] which does not materially change the characteristics of the good.[1017] In the seminal case on ROOs, the United States court in the *Uniroyal v United States*[1018] case held that the attachment of outer soles to uppers did not constitute a substantial transformation of the uppers. The court arrived at this decision because the attachment was a minor processing operation that left the identity of the uppers intact and unaltered. The uppers in their imported condition were already substantially complete. In the SADC, the last transformation test considers both the value added to the goods, and the tariff classification of the goods in cases of goods produced from raw materials obtained from non-SADC member countries.

In terms of Rule 2(1) of the SADC Protocol on Trade of 1996, the goods produced from materials obtained wholly or partially from outside the SADC shall be regarded as having been substantially transformed in the SADC member country if the production in the member country is such that (a) the cost in freight value of the materials concerned does not exceed 60 per cent of the total cost of the materials used during production; (b) the process of production involved added value of at least 35 per cent of the ex-factory cost of the goods; or (c) the process involved in the production of the goods in question resulted in a change in the tariff classification of the new product.

7.3.3.3 The Wholly-obtained Test

Section 46(1)(c) allows for the use of other approaches not listed in the Customs and Excise Act to determine the origin of the goods. One such other test is the "wholly-obtained or produced" test. In terms of this test, as contained in the WTO/GATT ROOs, a good is regarded as having originated in the territory of a party where the good is wholly obtained or entirely produced.[1019]

1016 The North American-Free Trade Agreement (NAFTA), Art. 412(a).

1017 See, GATT ROO Agreement, Art. 9(2)(c)(i) on the need to come up with a detailed explanation or definition of de minimis or minimal operations and/or processing, which do not themselves confer origin of the good.

1018 *Uniroyal v United States,* 542 F.Supp. 1026 (1982), aff'd *per curiam*, 702 F.2d 1022 (Fed.Cir.1983).

1019 GATT ROO Agreement, Art. 3(b) read with Art. 9(2)(c)(i).

What this means is that the substantial and the final process of manufacture must have been performed within the territory of a particular country.

The wholly-produced test is contained in the SADC Protocol on Trade. According to Rule 4 Annexure 1 of the Protocol, for goods to be accepted as originating in a SADC member country, such goods must have been consigned directly from a member country to a consignee in another member country and wholly produced within that member country. Rule 4 Annexure 1 of the Protocol provides non-exhaustive examples of wholly-produced goods.[1020]

7.3.3.4 The Tariff Classification Test

The substantial transformation test relates to the "tariff classification test" in that it is maintained that a good that has undergone a transformation must also have lost its identity in a tariff sense.[1021] Stated differently, change in tariff classification or heading of a good may be viewed or seen as prima facie evidence of substantial transformation of such good. The "change in tariff heading or classification test" holds that non-originating materials originate in the territory of the party where the materials have undergone change in tariff classification or have been placed in a tariff heading different from the one it was previously placed under, or different from the list its component parts are placed under. It is submitted that the main shortfall of this approach is that it fails or does not adequately deal with cases of assembled goods, particularly articles part classified in the same tariff column or provision as the completed article.

1020 For example, mineral products extracted from the ground or seabed of the member States; (b) vegetable products harvested within the member States; (c) live animals born and raised within the member States; (d) products obtained from live animals within the member States; (e) products obtained by hunting or fishing conducted within the member States.

1021 See, *United States v Gibson-Thomsen.*, 27 C.C.P.A 267 (1940).

7.3.4 Constructed Normal Value

Article 2.2.2(iii) of the URAA permits the constructed value method for administrative, selling and general costs and for other profits.[1022] In terms of Article 2.2.2 of the URAA, the amounts for administrative, selling and general costs and for all profits should be based on actual data from the exporter or producer under investigation.[1023] The actual data to be requested may include cost information of the product in question, even if the applicant does not allege sales below costs.[1024] The chapeau of Article 2.2.2 of the URAA creates a hierarchy for the consideration of data, and indicates that the preferred methodology is to use the actual data of the exporter or producer under investigation. It is only if the data for administrative, selling and general costs and for profits is unavailable or cannot be obtained from the exporter or producer by the investigating authority that recourse can be had to other sources of data in the exporting country.

The data from other sources may be determined on the basis of: (i) the actual amounts incurred and realised by the exporter or producer in respect of production and sales in the domestic market of the country of origin of the same class of products; (ii) the weighted average of the actual amounts incurred and realised by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin and; (iii) any other reasonable method, provided that the amount for profits so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

1022 Note that the provision "ordinary course of trade" in the chapeau of Art. 2.2.2 is not repeated in sub-paragraphs (i) to (iii). This had led to the WTO Appellate Body in *EC – Bed Linen*, par. 83–84 holding that reading the said proviso into sub-paragraph (ii) of Art. 2.2.2 as "not justified either by the text or by the context of Article 2.2.2(ii)".

1023 See Palmeter "United States Implementation of the Uruguay Round Anti-dumping Code" 1995 *JWT* 51.

1024 See *Guatemala – Cement II*, Panel Report, par. 8.183.

Contrary to the view held by other scholars and commentators like Waer, who asserts that Article 2.2.2 of the URAA creates a hierarchy or order of preference for considering data from other sources,[1025] the WTO Panel in the *Thailand – Poland H-beam Steel*[1026] case took the view that no such hierarchy "among the sub-paragraphs" of Article 2.2.2 has been established.

Reflective of the URAA, section 32(2) of the ITAA provides that the ITAC may use the constructed costs 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 profit to determine the normal value of the goods in question. Constructed price includes constructed costs of production of the goods in the country of origin plus reasonable additions for selling costs and profit and other charges.[1027] The BOTT used the constructed price method to find dumping when it could not determine or find the home market or country of origin price.[1028]

There have, however, been few cases where the constructed price method was not employed by the BOTT, despite the existence of another exporter who manufactured the product in question in the country of export.[1029] Such exceptional cases are contrary to the explicit normal value determination hierarchy that is set out in both the ITAA and the BTTA. It is submitted that such deviation in approach may be welcome as freeing the ITAC from an overly controlled and restricted approach to interpreting and applying anti-dumping law, particularly when determining normal values for exports from non-market economies.[1030] Ideally and pragmatically, there should be no hierarchy for

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1025 Waer "Constructed Normal Values in the EC Dumping Margin Calculations: Fiction or a Realistic Approach?" 1993 *JWT* 77–79.

1026 *Thailand – H-beams*, Appellate Body Report, par. 2.2.

1027 BTTA, s 1(b)(a)(ii).

1028 BTTA, s 1(b)(a)(iii).

1029 See, for example, the *Paper cable* investigation.

1030 The United Nations Conference on Trade and Development (UNCTAD) defines a non-market economy as follows:

> A national economy in which the government seeks to determine activity largely through a mechanism of central planning, as in the former Soviet Union, in contrast to a market economy which depends heavily upon

deciding the appropriate method in determining normal value for exports from the non-market economy (NME). It is submitted that the ITAC must be allowed some flexibility to have regard to what is appropriate and reasonable in the circumstances of the case.

Petersen raises a concern regarding the BTTA constructed price formula, suggesting that the BOTT should use actual cost as a preferred method, and that the constructed costs of production calculations violate South Africa's GATT obligations.[1031]

It is submitted that the concern raised against the BOTT's determination of constructed price by Petersen is only valid in part. By using the constructed price, the BOTT was perfectly in line with the URAA, particularly Article 2.2.2(iii) which, in addition to actual price, allows countries to use "any other reasonable methods" to determine dumping and constructed value. Thus, despite an estimated price, constructed price is an acceptable reasonable method employed by the BOTT in determining dumping. The operative words here are "any other reasonable method". A casuistic approach should be followed in determining if the constructed price calculations are reasonable. It is submitted that in this regard reports of the ITAC do not indicate a material difference from the approach taken by the BOTT.

> market forces to allocate productive resources. In a "non-market" economy, production target, prices, costs, investment allocations, raw materials, labour, international trade and most other economic aggregates are manipulated within a national economic plan drawn up by a central planning authority; hence the public sector makes major decisions affecting demand and supply within the national economy.

For more on the determination of NME status, see *UNCTAD'S Glossary of Customs Terms* found in the *Automated Systems for Customs Data (ASYCUDA)*, website maintained by UNCTAD http://www.asycuda.org/cuglossa.asp?term=market+economy According to Wang "Critique of the Application to China of the Non-market Economy Rules of Anti-dumping Legislation and Practice of the European Union" 1999 *Journal of World Trade* 120, the term "non-market economy" is "commonly used to describe countries where goods and resources are allocated by government planning agencies rather than by prices freely set in the market."

1031 Petersen 1996 *Boston Univ. Int'l LJ.* 399.

7.3.5 Third Country or Surrogate Country Price

The ITAC uses the "appropriate third country" price[1032] to determine the normal value, in the absence of price paid or payable in the exporting country or country of origin, or if the country of origin or the exporting country is an NME state. The "appropriate third country" price standard replaces the "any third country" price standard that was used by the BOTT. It can be asked if it was necessary for South Africa to incorporate the "appropriate third country" standard and jettison the "any third country" standard in order to comply with the WTO rules, or if the "third country" standard in anti-dumping investigations would be URAA incompatible.

Petersen has criticised the "any third country" standard as granting investigating authorities unlimited discretion to use a country where the export price to South Africa would be subject to anti-dumping duty.[1033] Petersen argues that the exercise of this wide discretionary power could lead to "... inflated and artificially constructed duty".[1034] Petersen clearly favours the verbatim compliance with WTO rules, and argues that, in order to be WTO compliant, South African anti-dumping law should adopt the "appropriate third country" standard. Petersen's views on and criticism of the "any third country" concept overlooks important aspects of South Africa's anti-dumping investigations and proceedings; in fact, the adoption of the "appropriate third country" standard under the ITAA was unnecessary for several reasons.

Firstly, the criterion used to determine a third country, that is, the free market forces criterion, could be used as a criterion when applying the "any third country" standard. Critical to the inquiry under both standards is whether the third country referred to in a particular case is governed by free market forces in determining prices. Secondly, the URAA itself does not elaborate on what constitutes an "appropriate third country". Thirdly, the criticism lost sight of the

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1032 ITAA, s 32(2)(bb).
1033 Petersen 1996 *Boston Univ. Int'l LJ* 392.
1034 Petersen *Boston Univ. Int'l LJ* 392.

fact that it was possible to have recourse to the third country price comparison only in the absence of price paid or payable in the exporting or country of origin.[1035] This limitation on using a third country comparison can also be found in the URAA.[1036] The only difference between the BTTA and the URAA is that the latter refers to an "appropriate"[1037] third country, while the former referred to "any" third country. In any case, the "any third country price" approach like the "appropriate third country" approach need to be applied with great circumspection by the investigating authority. Just as it is necessary to determine if the export price is from an NME or a market economy country, it was equally important for authorities to be satisfied that the "third country" is "appropriate" in that its economy is based on free market principles.[1038] Furthermore, when using the "any third country" price, the BOTT had to be cautious that the price/profit determined did not exceed the profit normally realised by exporters or producers on sales of products of the same general category in the domestic market of the country of origin.[1039]

Be that as it may, the "any third country" approach was the least favoured by the BOTT because, in order to determine the third country price, the BOTT had to engage itself in the complicated method of value construction. It is submitted, therefore, that the introduction of the "appropriate third country" standard in the ITAA was not necessary, except for making the South African anti-dumping law and procedures appear to conform verbatim to the URAA.

7.3.5.1 Choosing a Third or Surrogate Country

An interesting point under the South African law is that the nomination of an NME is determined by the wishes of the petitioner. In practice, if the petitioner is of the opinion that the normal value of the goods concerned is affected by past

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1035 Under BTTA, s 1.
1036 URAA, Art. 2.2.
1037 URAA, Art. 2.2.
1038 See ADR, par. 48
1039 See URAA Art. 2.2.2(iii).

or present government intervention to the effect that the normal value does not properly reflect the intrinsic value of the product, the petitioner must nominate a third or surrogate country and a producer of a like product in that country for the purpose of determining a normal value for the allegedly dumped product.

The ability of petitioners to nominate a surrogate country is subject to some requirements, which to a large extent call for an active role for the petitioner in the selection of the surrogate country. In particular, the third country must have an industry at a similar level of development as that in the exporting country, and the petitioner must provide reasons for the nomination of such a country as the third or surrogate country. Furthermore, the ITAC requires the petitioner to furnish it with normal value in the surrogate country, which preferably should be the net ex-factory selling price exclusive of all internal taxes.[1040] The petitioner's submission of the net *ex*-factory price must be accompanied by an indication of the adjustments that need to be made to obtain a net ex-factory level price, which should include at least transport, where sold on a delivered basis; payment costs; and a level of trade adjustment if the product is not sold on the same basis as the exports to the SACU region.

7.3.5.2 Application of Third Country or Surrogate Country Price Approach in Non-market Economies

To determine the true normal value of the goods, the anti-dumping authorities will have to find out if the exporting country operates a free market economy, with sales occurring in the ordinary course of trade without government intervention.[1041] Special rules and methodology are required in calculating the domestic price (value) for goods from NMEs.

1040 If the net ex-factory selling price is not available, the petitioner should submit any price available, such as, for example, the price available to the petitioner at a retail invoice.

1041 See ITAA, s32; BTTA, s4 (1) (a) (I) (a). See also, *Clear Flat Glass – Thailand, Singapore,* BOTT Report No. 3408, par..37.

Such a special treatment in calculating NME domestic prices is born out of several factors and reasons, including the view that "concepts such as domestic market price or cost of production have little relevance in the context of a state-controlled economy";[1042] and that the almost exclusive central planning of the economy and too much state/government intervention in prices at which goods are offered or bought in NMEs renders such prices inherently unreliable. Article 2.4 of the URAA enjoins Contracting Parties' law (and administering bodies) to have due regard and allowance to market differences that may affect conditions of pricing and other differences affecting price comparability. It is submitted that the requirement of Article 2.2 of the URAA is a recognition by WTO Members that it may be necessary to treat NMEs differently to market economies in anti-dumping proceedings, and acknowledges that there may be "special difficulties" existing at the time which may render "a strict comparison with domestic prices" inappropriate as recognised in the 1955 Interpretative Note. Consequently, the price determined should be "appropriate".[1043] A particular regard is to imports from countries that have a complete or substantially complete monopoly of [their] trade and where all domestic prices are fixed by the state.

The NME status of an exporting country has serious consequences for determining the normal value of allegedly dumped goods. A particular problem for national authorities regarding the WTO/GATT definition of an NME country emanates from the fact that the URAA does not provide a defined standard as to what constitutes a "substantially complete monopoly". It also does not clearly define the amount of influence the country should have over domestic prices in order to be considered substantial. It is generally left to the administering authorities to determine if the situation merits the use of NME methodology or not.

In South Africa, the anti-dumping authorities do not favour NME normal values because they are not determined according to free market principles. Information provided by exporters from NMEs on prices and costs will normally

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[1042] Van Bael Anti-*dumping and Trade Protection Laws of the EEC* 66.

be rejected in favour of information obtained from surrogate countries or information obtained from third countries operating market economies. The BOTT, for example, has used a comparable price of a third country,[1044] or the so-called surrogate country price, in determining anti-dumping duties. The surrogate normal value is found from a country nominated (selected) as a surrogate (analogue) normal value country.[1045] In practice, the export prices from the NME to the importing country will be compared with the prices or costs in the surrogate country.

The question to be asked in the calculation of the FMP or normal value is: What the foreign market price (FMP) or the normal value of the NME merchandise in question would have been had its production and distribution been located in a free market-driven economy? For example, in December 1993, South Africa officially bestowed NME status on the People's Republic of China,,[1046] requiring the use of a special methodology to determine if imports from China are being dumped in South Africa.[1047] This was essentially because of China's centrally planned economic system. Interestingly, both the United States[1048] and the EC[1049] classify China as an NME. It is submitted that the South African NME methodology approach is essentially the modification of the constructed price/value methodology the BOTT used with regard to NMEs in ordinary

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1043 See URAA Art. 2.2

1044 BTTA, s 4(1)(a)(i)(a).

1045 BTTA, s 4(1)(a)(i)(a).

1046 See, *Aluminium – Hong Kong, PRC and Zimbabwe*, BOTT Report No. 3664, 5. Other NME methodology countries have been Hong Kong, Pakistan, Poland and Korea.

1047 With China's admission to WTO membership on 11 December 2001, it is hoped that China will fully redirect and model its economy along free-market economy principles and requirements. This will then result in China's NME status in dumping investigations being revoked by many countries, and future anti-dumping proceedings against its exports determined by using a normal value based on costs and prices within China.

1048 See, US Government Accountability Office (2006) "US-China Trade: Eliminating Non-market Economy would lower Anti-dumping Duties for some Chinese Companies", Report to Congressional Committees, GAO-06-231.

1049 First, in 1979, together with other countries, including Bulgaria, Hungary, Poland, Romania, Czechoslovakia, GDR, USSR, Albania, Vietnam, North Korea, Mongolia and People's Republic of China. See Council Regulation (EEC) No 925/79 of 8 May 1979, OJ L 131/1, 29.5.1979; Council Regulation (EEC) No 2532/78 of 16 October 1978, OJ L 306/1, 31.10.78. Note that the Council Regulation (EEC) No 925/79 of 8 May 1979, OJ L 131/1, 29.5.1979; Council Regulation (EEC) No 2532/78 of 16 October 1978, OJ L 306/1, 31.10.78 were supplementary to the EC Anti-dumping Regulation No. 1681/79, in which

dumping proceeding determinations, when it looked at a "comparable" price of a third country. That is, a country whose price can be deemed as representative of the price in the NME in question. The BOTT ruled that the Chinese normal value could not be used because China is an NME economy.

In the case of *Anti-dumping Action against Acetaminophenol Imported from or Originating in the People's Republic of China, Hong Kong, India and Singapore,* (hereafter Acetaminophenol – PRC, Hong Kong, India and Singapore),[1050] the United States was used in determining the third country export price.[1051] In *Drawn and Float Glass – China and India,*[1052] the ITAC used India as a surrogate country for the PRC, since India was considered to be having a more market-oriented economy than the PRC and also had a glass industry of significant size. The South African practice indicates that comparability and representativeness did not envisage an absence of differences between the two products – the NME product and the surrogate product – and between the NME country and the surrogate country's economy. The differences may be reconciled through the process of adjustment.[1053]

In the case of *Clear Flat Glass – Thailand and Singapore*[1054] it was stated that if a country does not operate a free-market economy, the normal value is to be determined by using the price at which similar goods are being exported to South Africa from any third country. The *Clear Flat Glass – Thailand and Singapore* case's exposition on the required surrogate value approach seems to set an exclusive and primary surrogate value standard, which is the standard of a "third country" exporting like products to South Africa.

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the non-market economy countries first appeared in which without any definition of the term or setting out of the criteria.

1050 *Acetaminophenol – PRC, Hong Kong, India and Singapore*, BOTT Report, No. 3366, 12.

1051 The United States Department of Commerce (hereafter DOC) surrogate NMEs value/price methodology primarily looks at actual prices for like merchandise found in a surrogate market driven economy at approximately the same level of economic development as the NME under investigation, and which is a significant producer of the merchandise in question. See, Roger "When is China Paraguay? An Examination of the Application of the Anti-dumping and Countervailing Duty Laws of the United States to China and other Nonmarket Economy Nations" 1987 *S. Cal. L Rev.* 79.

1052 *Drawn and float glass – PRC and India, ITAC Report No 69.*

1053 *Briefs and T-Shirts – China, Hong Kong*, BOTT Report No 3080, par. 7.

It is submitted that this should be welcomed as indicative that some measure of clarity and uniformity would prevail in determining the surrogate value country. The "third country" can be a country nominated by the dumping investigation's petitioner, or a country determined by the ITAC on its own, whether or not such country is also part of the investigations.[1055] However, it is established that South Africa is yet to have a clear policy and practice or create a single approach in determining the surrogate value, and has often reached conflicting decisions.[1056] Be that as it may, it is submitted that South Africa's special NME methodology is in line with Article 2.2 of the URAA. The history of ITAC practice in determining NME status seems to support the view that ITAC uses broad discretion in determining NME status on a case-by-case basis supported by the available information.

It is further submitted that the ITAA and the ADR need to be amended to include clear provisions or guidelines on the determination of NMEs and the methodology to be used to determine the prices of goods allegedly dumped from NMEs. Part of the revamped provisions would be to include criteria to determine state intervention. A similar standalone provision on NMEs has been adopted in the United States.

The WTO flexibility standard of deference for national authorities to determine a "substantially complete monopoly" has led to different approaches in determining normal value where an apparently NME country is involved. For example, the United States Department of Commerce (DoC) has as a practice calculated the normal value of the goods on the basis of the home market or an appropriate third country upon the finding that the goods were produced by an NME country industry that is market-orientated.

1054 *Clear Flat Glass – Thailand Singapore,* par. 38.

1055 See for example, *Aluminum Hollowware – Hong Kong, PRC, Zimbabwe* using the Zimbabwean normal value to China; *Clear Flat Glass – Singapore, Thailand* using Thailand normal value to Singapore; *Garlic – PRC,* BOTT Report No. 4044/4067 where the BOTT had to determine the normal value for Garlic from China.

The reason relied upon by the DoC is that an NME country operates essentially free from government intervention in the setting of prices, or because the producing industry is privately owned. The implication here is that an inquiry can also ascertain whether an industry operates as a market economy industry in an NME country.

The flexible approach in the United States applies against the backdrop of the Omnibus Trade and Competitiveness Act of 1988[1057] (hereafter OTCA), which defines what a non-market economy is, and also sets standards that the DoC has to take into consideration when determining whether a specific country is an NME.[1058] In the 1960s, the United States Treasury Department used the prevailing domestic price or export prices in a market economy to determine normal value for articles manufactured in a state-trading country, as the latter were considered not to have been made in the ordinary course of trade.[1059]

Within its broader framework of dealing with imports from NME and state-trading countries,[1060] the European Union also maintains a flexible, hybrid approach when dealing with anti-dumping cases involving China, and similar NME countries. Thus, the European Communities Commission Decision No. 435/2001/ECSC of 2 March 2001 provides for limited circumstances under

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1056 See Brink *Theoretical Framework for South African Anti-dumping Law* 55–62.

1057 Omnibus Trade and Competitiveness Act (OTCA) of 1988, P.L. 100–418, 102 Stat. 1107 (1988).

1058 The OTCA refers to an NME as a country that does not operate on market principles of cost or pricing structures, and whose sales of products in the country do not reflect the fair value of the merchandise. See 19 U.S.C. § 1677(18) (A) (2000).

1059 The cases in point, for example, are *Bicycles from Czechoslovakia,* 25 Federal Register (1960); *Fur Felt Hoods, Bodies and Caps from Czechoslovakia,* 27 Fed Reg 6,099 (1962); *Jalousie-Louvre-Sized Sheet Glass from Czechoslovakia,* 27 Fed Reg 8,457 (1962); and *Portland Hydraulic Cement, Poland,* 28 Fed Reg 6660 (1963). For the discussion on the Unites States NME methodology practice, see generally Cuneo and Manuel 1982 *Fordham International Law Journal* 244–285; Horlick and Shuman 1984 *The International Lawyer* 807–840; Horlic *The United States Anti-dumping System* (1990) 140–143; Bello, Holmer and Preiss 1992 *George Washington Journal of International Law and Practice* 665–719; and Laroski 1999 *Law and Policy in International Business* 369–398.

1060 The first regulatory framework concerning import from state-trading countries was the Council Regulation 109/70 of 19 December 1969, OJ 26.I.70 L19/1, OJ Eng. Sp. Ed. 1970 read with Council Regulation 2897/77, OJ 28.12.77 L338/1. In respect to state-trading country dumping Art. 3(6) of the Council Regulation 459/68 restates *verbatim* the

which imports from China are treated as coming from a market economy if the Chinese exporter can show that market economy conditions prevailed in respect of the manufacture and sale of the like product concerned.

A similar flexible approach seems to have evolved in South Africa. For example, in 1998 in the *Flat Rolled Steel Plates originating from Brazil, Russia and Ukraine* [hereafter Flat Rolled Steel – Brazil, Russia, Ukraine],[1061] the BOTT affirmatively determined that a company (Russian company) operated as a market economy company in an NME environment, thereby applying to it normal value calculated on the basis of its home market prices, or third country prices if the former is not an appropriate method in the circumstances.

The special treatment for granting market economy status to companies operating in or from an NME became the policy of the South African anti-dumping authority in 2004. The ITAC in the *Acrylic Fabric – China*[1062] case held that the company requesting market economy status had to provide a list of all shareholders with at least 5 per cent shareholding; show its ability to appoint the directors without government interference; the type of company structure; and how owners and shareholders are compensated for their investment.

Furthermore, the ITAC will consider a range of issues in its final determination of market economy status, including ownership and stockholding; independent decision making regarding purchases, outputs and sales; cost of major inputs reflecting market values; applicable accounting standards; interventions and distortions from previous or current foreign government; bankruptcy laws; exchange rate conversions; and treatment of profit.[1063]

1955 Interpretative Note, and Art. 3(2) restated in more or less similar terms the provisions of Art. 2(d) of the Kennedy Round Anti-dumping Code.

1061 *Flat Rolled Steel Plates – Brazil, Russia and Ukraine*, BOTT Report No. 3926/3973. See also Cold Rolled Steel – Russia, BOTT Report No 4200.

1062 *Acrylic Fabric – China*, ITAC Report No 50, par. 18–19. In this investigation a Chinese company failed to obtain a market economy status.

1063 See *Acrylic Fabrics – China* par. 18–21.

The South African and the Chinese Governments have agreed to a flexible approach when dealing with Chinese exporters in anti-dumping cases as part of the two countries strengthening their bilateral relations. In the Record of Understanding (RoU), signed in Beijing on 18 September 2006[1064] between the ITAC and the Bureau of Fair Trade for Imports and Exports (BOFT) of the People's Republic of China, it was agreed that China would be accorded market economy status by the ITAC in its anti-dumping investigations. In terms of the RoU, the ITAC may not continue to treat China as an NME for the purposes of anti-dumping investigations.

However, according to the RoU, all anti-dumping investigations, including all reviews, initiated prior to the signing of the RoU in 2006, would be finalised in accordance with practices and procedures which were in application before the date of the signing of the RoU. In this regard nothing prevents the ITAC from treating China as an NME for the purpose of finalising the anti-dumping investigations if the NME methodology was in use at the time. In respect of the initiation of anti-dumping investigations, SACU industries are still allowed to use other alternative methods permitted by the WTO, including surrogate country values, to determine the normal value of the Chinese product for the purposes of initiating an investigation. Therefore, the treatment of China as a market economy is primarily for the purposes of subsequent phases of the anti-dumping investigation after the initiation process has been completed.

In the light of the fact that the WTO Protocol allowing recourse by Members to non-market methodologies will only expire in 2016, the RoU is an important agreement between China and South Africa. South Africa is willing to consider that China is in an overall sense a market economy. In fact, many countries are now willing to consider China as either a market economy country or to employ a hybrid approach in determining prices in anti-dumping investigations.[1065]

1064 *Record of Understanding (RoU) between ITAC South Africa and BOFT China.* http://www.itac.org.za/docs/RoU.pdf.

1065 For example, Korea – which in 1999 changed its longstanding NME approach to China; India – which considers China an NME but has a policy allowing the Indian investigating authorities to apply rules normally used in anti-dumping cases involving market economy

It is submitted that where the ITAC is not satisfied as to the market conditions in China or where evidence suggests that an NME is maintained by the Chinese authorities, Chinese exporters may convince the ITAC that their prices are normal and their costs are not distorted by the operation of an NME. In this way the South African approach will be in line with the WTO Protocol on China's accession, which allows anti-dumping authorities to use alternative methodologies if the Chinese producers under investigation cannot clearly show that market economy conditions prevail in the industry producing like products with regard to manufacture, production and sale of the product in question.

It is further submitted that the ITAC should consider introducing the "producer knowledge provision" in order to avoid the abuse of the application of market condition treatment by corporations in NMEs, and the circumvention practices. Alternatively, the ITAC should use the "producer knowledge provision" when determining normal value from third countries, as is the case in the United States. The United States, for instance, has applied NME methodology in a case in which a supplier from a market economy had knowledge of the ultimate destination of the goods in question, and where the goods from a non-market economy were transhipped to a market economy and thereafter to the United States. The case in point is *Tapered Roller bearings from China,*[1066] where pursuant to section 773(a)(3)(A) of the Tariff Act of 1930 (commonly referred to as the "the producer knowledge provision"), the DoC applied the NME methodology to two Hong Kong companies in calculating normal value, even though Hong Kong is considered a market economy country, because the companies' suppliers in China knew at the time of the sale that the goods were destined for exportation.

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countries where it can be shown that market conditions prevail for an exporter who is subject to the investigation.

1066 *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Preliminary Results of Anti-dumping Administrative Review and Partial Termination of Administrative Review*, 62 FR 36764 (9 July 1997).

Similarly, in the case of *Silicomanganese from Kazakhstan,*[1067] an item of Kazakh origin (an NME) was shipped to ports in Lithuania (a market economy) before it was shipped to the United States. In that case, the respondents argued that DoC should use a market economy normal value calculation. Pursuant to section 773(a)(3)(A) of the Tariff Act of 1930, the DoC Regulations stated that to establish normal value in a third country when a trading company merely acquires merchandise shipped through a third country by the producer would undermine Congress' intent to have the NME provisions apply to imports of merchandise produced in NME countries, where prices and costs are not based on market principles. Subsequently, it was determined that normal value should be based on the value of the item in the country of origin, Kazakhstan.

7.3.5.3 Application of Third Country or Surrogate Country Price Approach in Economies in Transition

The concept of "economies in transition" refers to countries that are in the process of transition from a centrally planned economy to a market economy. As with NMEs, it is submitted that the provisions of the ITAA requires the ITAC to apply appropriate third country or surrogate country method in determining normal value for economies in transition. When it is alleged that goods from an economy in transition are dumped in the South African territory, part of the duty of the ITAC will be to determine if market conditions do not prevail. In assessing if market conditions prevail in an economy in transition, the ITAC may have recourse to almost similar factors considered with regard to NMEs.

The ITAC, for instance, will have regard to the matters prescribed in the ADR. These will include determining whether the company under investigation itself makes decisions about prices, costs, inputs, sales and investment in response to market conditions without unnecessary and/or significant interference from the home government.

[1067] *Notice of Final Determination of Sales at Less than Fair Value: Silicomanganese from Kazakhstan*, 67 FR 15535 (April 2, 2002) and the accompanying Issues and Decisions Memorandum at Comment 2.

7.4 DETERMINATION OF PRICE

7.4.1 General

The price of goods is very important in determining their normal value for the purpose of dumping investigations in the light of the determination of dumping, as indicated in 7.3 above. Article 2 of the URAA and section 1(2) of the ITAA require the ITAC to determine the price of the goods in question over and above the determination of the normal value of the goods. Thus normal value and price are not synonymous concepts.

7.4.2 Actual Export Price

In terms of the ITAA, export price refers to the actual amount paid or payable for goods sold or imported into South Africa, excluding all taxes, discounts and rebates actually granted and directly related to the sale under consideration.[1068] This is sometimes termed the "transaction value" or "purchase price" for exports from the importing country to all countries, which represent the domestic sales value of the good in question. No similar specific definition of export price is contained in the URAA.

Ex-factory price is the price of a product at the moment that it leaves the factory. In order to establish or determine ex-factory value additions to, or deductions from, the transaction value will have to be made. This may include the deduction of costs incurred from the time the allegedly dumped product left the factory, as may be the case in the European Union; or the deduction of packing costs, import duties and taxes levied by the exporting country, as is the case in the United States.

[1068] See ITAA, s 34.2(b). See also BTTA, s 1. This definition of export price is slightly different to that used by the BOTT before the 1995 amendment, which was defined as the free–on-board price.

The ITAC makes certain costs adjustments – either additions to or deductions from the transaction value – on the basis of quantifiable and verifiable information supplied by the Parties, in addition to the petitioner demonstrating that these actual differences affected price comparability at the time of setting prices. Generally, section 2.4 of the ADR allows for adjustments to be made "in each case, on merit, for differences which affect price comparability at the time of setting prices ...". This is in line with the provisions of section 32(2) of the ITAA, which requires adjustments to be made for several reasons, including for the differences in conditions and terms of sale, and for other factors affecting price comparability. The approach of the ITAC in this regard is that adjustment will be allowed only if quantifiable and verifiable evidence is presented, and when it has been demonstrated that the differences in question have indeed affected the price comparability at the time of setting the prices.[1069]

It is submitted that the South African law's requirement for adjustment is in line with the fair comparison and allowances principle as laid down in Article 2.4 of the URAA. Article 2.4 enjoins investigating authorities to make fair comparisons between the export price and the normal value, these comparisons shall be made at the same level of trade and in respect of sales made at nearly the same time. Article 2.4 further requires that due allowance shall be made in each case, on its merits, for differences that affect price comparability. This includes differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and other differences that may be demonstrated to affect price comparability. The main comparison method is that of comparing prices in the two markets on a weighted-average-to-weighted-average basis or on a transaction-to-transaction basis. Under the weighted-average method, the weighted-average normal value is compared with the weighted-average export price, whereas under the transaction-to-transaction method, domestic and export transactions which took place on or near the same date will be compared with each other.

[1069] See *Dumping of PET – China, India, Indonesia, South Korea, Chinese Taipei and*

It is further submitted that the ITAC's true or preferred method of adjustment is difficult to conclusively determine in the light of the sometimes diverging approaches. This was evident in the contradictory decisions in the *Optical Fibre Cable*[1070] case and the *Supertension Cable II*[1071] case, respectively. In the former case, the BOTT indicated preference for using build-up costs in determining normal value, instead of making adjustments for differences exceeding 20 per cent of the domestic selling price. However, the BOTT in the latter case made adjustments where the physical differences between the domestic product and the exported product exceeded 20 per cent. Section 11.3 of the ADR speaks specifically to adjustments to the export price by stating that the comparison of normal value and export price should be made at the same terms of trade, including payment terms. However, it would seem that the South African anti-dumping authorities are sometimes reluctant to make adjustments for payment terms.[1072] Adjustments have been made in respect of annual rebates;[1073] free-on-board (FOB) costs, including harbour costs, inland transport costs, wharf freight-handling costs, gate charges,[1074] and others such as agents commission.[1075]

Under EU jurisprudence, the export price is the amount at which the product is sold in the European Union, minus costs incurred from the time the product left the factory. In the United States, to determine the export price, packing costs, import duties and direct taxes may be added to the purchase price and transportation costs, duties and taxes levied by the exporting country

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Thailand, ITAC Report No 134, 18.

1070 *Optical Fibre Cable* – Korea, BOTT Report 4029.

1071 *Supertension Cable II* – Germany, BOTT Report No 4031.

1072 See, for example, *Acrylic Blankets* – China, Hong Kong, India, Korea, Turkey, BOTT Report 3936; Garlic – PRC, BOTT Report No 4044; *Paperboard* – Australia, Germany, Netherlands, Spain, and BOTT Report No 3808.

1073 See, for example, *Paperboard* – Australia, Germany, Netherlands, Spain, and BOTT Report No 3808.

1074 See, for example, *Plasterboard* – Thailand, BOTT Report 4062; Sunset Review – Thailand, ITAC Report No 169.

1075 See, for example, *Paperboard – Australia, Germany, Netherlands, Spain*, BOTT Report No 3808; PVC Based Roll Goods – India, Korea, Netherlands, Thailand, and BOTT Report No 4131.

deducted.[1076] In several cases, the BOTT and the ITAC compared the *ex factory* value of the goods sold domestically to the ex-factory price of the goods sold internationally.[1077] In adjusting or calculating the export price, the ITAC looks at all the costs between the invoiced price and the ex-factory price. This includes adjustment for the invoiced ocean freight, freight between the factory and the harbour costs.

The PADR contains an interesting provision for the determination of export price in sunset review proceedings. What is interesting about section 11 of the PADR is that it lists the factors that should be taken into account in determining the third country price of the like product. According to section 11 of the PADR, the ITAC may consider any relevant factor, including any or all of the following factors, with no one or several of these factors necessarily giving decisive guidance, namely:

- the similarity of the like good used to establish the normal value and the product exported from the country of origin to the third country in terms of the criteria used by the Commission in its like product analysis;

- the similarity in the level of development of the domestic industry in the SACU producing the like product and in the third country, including but not limited to, the existence and number of domestic producers of the like product;

- the similarity in the volume of exports of the product subject to investigation to the SACU, based on historical data, and exports from the country of origin to the third country; and

- Sales in the SACU and in the third country are at the same level of trade.

1076 See, Bryan and Bourereau "Anti-dumping Law in the European Communities and the United States: A Comparative Analysis"' 1985 *Geo. Wash. J Int'l L & Econ.* 644, 677–778; *Council Regulation (EC)* No 384/96 of 22 December 1995, Art. 2.

It is submitted that this significant proposal of listing guideline factors is a good approach, which will ensure some certainty and consistency in South African anti-dumping law and practice.

7.4.3 Constructed Export Price

Price reconstruction is dealt with under section 32 of the ITAA and in the ADR. In terms of section 32.5 of the ITAA, the ITAC must, under certain circumstances, reconstruct the export price with reference to the price offered to the first independent buyer minus all costs and the importer's profit incurred between the ex-factory price and the selling price. The reconstruction of the export price is further required under the South African anti-dumping regulations. An important obligation in the ADR is that the constructed normal value shall be constructed using the producer's own costs and profits that reflect the actual costs of the product in question, and are consistent with the Generally Accepted Accounting Practice (hereafter GAAP).[1078]

In line with Article 2 of the URAA, section 8 of the ADR requires the authorities to consider costs consisting of production costs or direct costs, including the costs of raw materials and components, which can be determined or be obtained from different sources including foreign parties;[1079] overhead costs, including cost items such as rates and taxes, indirect labour, and research and development costs or expenses;[1080] selling costs, general and administrative

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1077 See, for example, Acrylic Blankets (China, Hong Kong, India, Korea, Turkey) (BOTT Report 3936); Rockwool (Netherlands) (BOTT Report 3996); Poultry (United States) (BOTT Report 4065).

1078 ADR, s 8.11. The Generally Accepted Accounting Principles (GAAP) are more precisely a group of objectives and conventions that have evolved over time to govern that way financial statements are prepared and presented. They are a standard framework of guidelines for financial accounting. The GAAP were created by the Financial Accounting Standards Board (FASB) of the USA, formed in 1973, to establish standards of financial accounting and reporting.

1079 See also, for example, *Glass microscopes – Australia, Belgium*, Board Report 3822, par. 4.2.1.

1080 See *Porcelain Insulators – India*, Board Report No 3752 for the methodology used in the allocation of overheads. In terms of the practice in South Africa, the allocation may be based on the production volume, production value or the time spent on a particular production.

costs;[1081] any other costs deemed necessary by the ITAC to compare the constructed normal value to the export price; and a reasonable profit made.[1082] These are determinable through actual realised profits on sales of the product in question, through the actual profit realised on sales of the narrowest range of products that can be identified, through the average of such actual profit realised by other sellers on the sales of the same category, or through any other reasonable basis.[1083]

In the *Woven Labels – Zimbabwe* case, *for* example, the normal value was constructed using the exporter's cost structure, in particular using the actual sale price of the label on the Zimbabwean market and comparing it with the price of the same label generated on the Merlin costing system. In the *Copper Tubes – Bulgaria, United Kingdom, Yugoslavia* and the *Acrylic Blankets – China, Hong Kong, India, Korea, Turkey* investigations, the BOTT determined and accepted a profit margin of 10 per cent as "reasonable profit" for the purposes of normal value reconstruction.

It is submitted that South African anti-dumping law in this regard is generally WTO-consistent. However, there are issues, some inconsequential, which may put the South African law's consistency with the WTO in some doubt. Firstly, there is some difference in the wording of the provisions of the URAA and the ADR. For example, section 68.13(d) of the ADR states that costs may be determined "on any reasonable *basis*", whilst the URAA states that the determination of costs may be based on "any other method". There is clearly a slight difference in the wording used, which some commentators may unfortunately regard as problematic in terms of the URAA. It is further submitted that the noted difference is inconsequential and does not make the South African law WTO-inconsistent. It would be jurisprudentially incorrect and imprudent to determine the national law's consistency with the WTO

1081 See also ITAA, s 32(2)(b)(ii)(AA).

1082 See, Penicilin – *India, Board* Report No 3799; *Stainless Steel Hollowware – China, Hong Kong, Korea, Taiwan*, Board Report No 3899; *Copper Tubes – Bulgaria, United Kingdom, Yugoslavia*, Board Report No 3805.

1083 See ADR, s 8.13 read with s 8.10.

requirements by overly relying on the verbatim resemblance of the provisions in question. Consequently, Some provisions do not have to restate the WTO agreement in order to discharge national obligations under the WTO.

The ADR seems to perpetuate the undesirable state of difference with the provision of the ITAA. The ITAA provision on price construction is peremptorily couched, whereas in the ADR the provision is generally permissibly couched.[1084] It is submitted, and as Brink correctly states, that the provision of the ADR in this regard is *ultra vires* the ITAA.[1085] It is further submitted that the provisions of the ADR should be amended to address the inconsistency with the ITAA. The PADR makes it possible for the ITAC to determine the constructed export price on any reasonable basis, if the foreign producer and the importer are related; or if the invoiced export price appears to be unreliable for any other reason.[1086]

It is submitted that the proposed provision of the PADR must be jettisoned as it is ambiguous. Instead the provision in the ADR which calls for the prices to be constructed from the first point of resale to an independent buyer, if the foreign producer and the importer are related or if the invoiced export price appears to be unreliable for any other reason, should be retained.

7.4.4 Fair Price Comparison, Due Allowance and Adjustment

The URAA requires that, when determining dumping, the national authorities should make a fair and proper comparison between the export price and the normal value. This, according to the URAA, requires that the domestic and the export price must be compared at the same level of trade[1087] and in respect of sales made at as nearly as possible the same time.[1088] In each case there should be due allowance made for the differences which affect the price

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1084 See PADR, s 12.
1085 Brink *Theoretical Framework for South African Anti-dumping Law*, 811 fn 767.
1086 S 12.1(b).
1087 URAA, Art. 2.4.
1088 See Egypt – *Steel Rebar*, Panel Report, para 7.333–7.334.

comparability. The URAA provides a non-exhaustive list of factors affecting price comparability for which due allowance shall be made. The factors listed include levels of trade; taxation; quantities at sale; physical characteristics; and conditions and terms of sale.

The South African anti-dumping law is WTO-consistent in respect of the obligation for fair comparison and due allowance through the provisions of section 11 of the ADR. The exporter questionnaire is also designed to seek information relevant to proper and fair comparison. Related to the requirement of fair comparison and due allowance is the requirement of adjustment to the normal value. Adjustments to the normal value are important in order to ensure fair comparison of export price and normal value pursuant to Article 2.4 of the URAA. There may be several adjustment factors that can affect proper comparability, which must be considered on a case-by-case basis, and on the facts before the investigating authority.[1089] In this regard, it is submitted that the ITAC's practice is WTO-consistent because the ITAC always makes adjustments in order to achieve proper comparability. The following are examples of factors pursuant to Article 2.4 of the URAA, which, it is submitted, the ITAC has made a good attempt to consider in arriving at a proper comparison:

7.4.4.1 Sales at Different Times

The anti-dumping authority must as far as possible, when comparing export price and normal value, consider sales to which the prices in question relate. The sense in this requirement of closeness of the sales is borne, for example, by the fact that a transaction in December 2009 may not be fairly compared to a transaction in April 2010.

[1089] See, for example, US – *Lumber V*, Panel Report, par.7.357.

7.4.4.2 Conditions and Terms of Sale

In terms of section 11.1(a) of the ADR, in cases of differences in the terms of trade for the product exported to the SACU, the petitioner should indicate the terms of trade for the product in question; indicate the terms of trade for domestic sales in the exporting country; quantify the effect of the difference in the terms of trade on the price and submit details of the petitioner's calculations; and quantify the effect of the difference in the terms of trade on the cost of the product and submit details of the calculations.

7.4.4.3 Physical Characteristics

The WTO Panel in *Argentina – Ceramic Tiles* stated that the meaning of "due allowance in each case, on its merits" *means* at a minimum that the investigating authority has to evaluate any identified differences in physical characteristics of the product in question which are demonstrated to affect comparability.[1090]

In order to ensure that price comparison is fair, the ITAC requires that the export price and the normal value should be on a similar basis and level as regards the physical characteristics of the product – such as structure and design, the quantities sold, and the terms and conditions of sale. It is submitted that the differences to be considered are non-exhaustive and may include quality and chemical composition, as the case may be, so long as such variables affect price comparability.

In such situations the exporter's questionnaire requests the exporter to provide the ITAC, where there is a difference in physical characteristics, with some information in respect to such differences that should be listed in the questionnaire; the effect of the differences on the price of the product should be

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[1090] See *Argentina – Definitive Anti-dumping Measures on Imports of Ceramic Floor Tiles from Italy,* WT/DS189/R, 28 September 2001, par. 6.113 and 6.116 [hereafter *Argentina –*

quantified; and the effect of the differences on the costs of production should also be quantified.

7.4.4.4 Level of Trade

Article 2.4 of the URAA explicitly requires that due allowance be made for differences that affect price comparability, including the differences in the level of trade. In order to arrive at an appropriate adjustment, the ITAC also makes comparison at the same level of trade, preferably the ex-factory level.[1091] In the case of *Trichloroethylene – Germany,* for example, the BOTT considered only sales that took place at the same level of trade. In cases where the export price and normal value are not on a comparable basis, allowance is made for any differences. The applicant has a duty to indicate that domestic sales do not allow for a proper comparison with the export to the SACU, and to give reasons for the belief that the sales in the exporter's market do not allow for a proper comparison.[1092]

7.4.4.5 Costs including Duties and Taxes

Article 2.4 of the URAA requires adjustment to be made for costs, including duties and taxes, incurred between importation and resale, and for profits accruing. Similarly, section 11.1(b) of the ADR and section 32.3 of the ITAA require that adjustment be made for differences in taxation. In practice, the ITAC has allowed the exporter who paid customs duties for raw materials at importation to reclaim such duties when exporting the final product on condition that such final product was made from the raw materials on which the duty was imposed.[1093] Other taxes that may be allowed for adjustment may be taxes relating to turnover, sales, value added, stamp and transfer costs and excise duties. It is submitted that, pursuant to the common practice in this area of the

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Ceramic Tiles, Panel Report]. The authorities need not consider all of the identified differences.

1091 See ADR, s 11.3–11.4

1092 See further ADR, s 11.1(c).

law, other costs for adjustment may include delivery costs, after sales costs, inventory holding costs and other ancillary charges. Nothing in the ADR and the ITAA preclude the consideration of these costs.

7.4.4.6 Other Adjustment Factors

The list of adjustment factors in section 11.1 of the ADR is not exhaustive. The ITAC may consider any other factors which affect price comparability when making its adjustments and which are quantifiable and verifiable, particularly those factors previously considered by its predecessor, the BOTT. These other factors may include environmental costs;[1094] difference in production costs;[1095] payment terms;[1096] agents' commission;[1097] technical advice;[1098] and warehousing.[1099]

7.5 DETERMINING "LIKE PRODUCTS"

7.5.1 General

The definition, identification and determination of "like product" are important to the assessment and/or determination of the true normal value of the product in question and injury to the domestic industry. To arrive at a positive determination of an injury, it should be proved that (i) the product being

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1093 See, for example, *Ranbaxy Laboratories*; *Acrylic Blankets – China, Hong Kong, India, Korea and Turkey*, BOTT Report No 3936; *Plasterboard – Thailand*, ITAC Report No 16.

1094 See Hypodermic *Needles – Belgium, Germany, Ireland and Spain*, BOTT Report No 3937; *Syringes – Belgium, Germany, Ireland and Spain*, BOTT Report No 3949.

1095 See, for example, *Supertension Cable II* – Germany, BOTT Report No 4031.

1096 See, for example, *Calcium Propionate – Netherlands*, BOTT Report NO 4062; and *Ceramic Tiles – Italy*, BOTT Report No 3811.

1097 See, for example, *Paperboard – Australia, Germany, Netherlands, and Spain*, BOTT Report No 3808.

1098 See, for example, *Paperboard – Australia, Germany, Netherlands, and Spain*, BOTT Report No 3803; *Circuit Breakers – Frances, Italy, Japan, Spain, and Switzerland*, BOTT Report No 3080.

1099 See, for example, *Paperboard – Australia, Germany, Netherlands, and Spain*, BOTT Report No 3803. The Australian Customs Authority allows warehousing adjustment upon evidence that the costs incurred are associated with the warehousing function and that there is a connection to the sales in question. The *Paperboard – Australia, Germany, Netherlands, and Spain*, BOTT Report No 3803, is one of the exceptional cases where adjustment for warehousing was allowed.

investigated and the product of domestic producers are "like products"; (ii) the domestic producers of the like product who petitioned for anti-dumping measures constitute a "domestic industry"; (iii) the domestic industry is experiencing injury that is attributable to the dumped imports; and (iv) that the domestic interest calls for the anti-dumping measures.

7.5.2 Like Products

The effect of the dumped products is to be analysed with reference to like domestic products, which need to be identified or determined. As correctly argued by Hoekman and Mavroidis, when "like product" is too strictly defined it may lead to the imposition of duties in cases where it should not. On the other hand, if defined too broadly, it may result in anti-dumping duties not being applied when they should be.[1100] Article 2.6 of the URAA defines the term "like product" as meaning a product which is identical, that is, alike in all respects to the products in question, 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 in question.

However, the determination of likeness or of what constitutes "like product" is not as simple a task as it may appear. No single and comprehensive definition of "like products" may be set. According to Bhala, the WTO dispute settlement body has itself acknowledged the difficulty involved in defining the term "like product". There is no precise definition of that term in the GATT, resulting in "likeness" having different meanings when applied in different clauses of the GATT.[1101] The WTO now uses the well-established approach under GATT 1947, which stated that the term "like product" is to be determined on a case-by-case basis. According to the Appellate Body in the *European Communities – Measures Affecting Asbestos and Asbestos-containing Products* dispute, this

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[1100] Hoekman and Mavroidis "Dumping, Anti-dumping and Antitrust" 1996 *JWT* 27–52.
[1101] See Bhala 2001 *International Trade Law* 257.

approach is an assessment that uses "an unavoidable element of individual, discretionary judgment".[1102]

In 1970, a report by the GATT Working Party on Border Tax Adjustment[1103] suggested three criteria for determining likeness of products. In terms of these criteria, in determining whether two products are "like products" one should consider "the products' end-uses in a given market; consumers' tastes and habits, which change from country to country and the products' properties, nature and quality".[1104] The DSB's prevailing approach to "likeness" affirms the approach suggested by the 1970 report of the GATT Working Party. This approach was, for example, confirmed by the WTO panel ruling in the *Dispute Settlement Panel Report on United States Taxes on Automobiles*[1105] dispute, and the Appellate Body rulings in *Japan – Beverages, Appellate Body Report.*[1106] After a careful consideration of the DSB rulings on the concept of "like product" it is submitted that, in general, "likeness" is one concept that has received different determinations in the DSB, and its construction and application depend on the covered agreement. There is a series of interesting likeness rulings, applicable to different provisions of the WTO covered

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1102 *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*. Doc. no. WT/DS135/AB/R (12 March 2001) [hereafter EC – Asbestos, Appellate Body Report] par.101.

1103 *Report of the Working Party on Border Tax Adjustment*, 2 Dec 1970, GATT B.I.S.D. 185/1020(18th Supp, 1972) [hereafter GATT Border Tax Report].

1104 *GATT Border Tax Report* at 102, par. 18. See also, *Swedish Anti-dumping Duties*, GATT Doc. L/328, BISD 3RD Supp. 91(February 26, 1955); and Anti-dumping and Countervailing Duties, GATT Doc. L/978, BISD 8th Supp. 145 (13 May 1957) on the notion of "likeness" in dumping and subsidies cases. For a more detailed discussion on the concept of ""ike product" see, Zedalis "A theory of the GATT 'Like' Product Common Languages Cases" 1994 *Vand. J. Transnat'l L* 33, dealing with the use of like products in Article VI(1) of GATT on anti-dumping; and Bhala "Rethinking Anti-dumping Law" 1995 *Geo. Wash. J Int'l L & Econ* 50–51, discussing the meaning of the term "like product" as it appears under the US anti-dumping law and factors used by the US International Trade Commission to determine whether an item is a "like product".

1105 *Dispute Settlement Panel Report on United States Taxes on Automobiles* (dated 11 October 1987 reprinted in 1994) 33 ILM 1397–1460 [hereafter US – Taxes on Automobiles, Panel Report].

1106 *Japan- Beverages*, Appellate Body Report, par. 8.4.

agreements, from which Members may build their own jurisprudence of "likeness" on a case by case basis.[1107]

It is submitted that the South African position on the determination of "like products" resembles that of the GATT/WTO, and is therefore GATT/WTO consistent. In fact, the South African definition of the term "like product" is a verbatim adoption of the criteria in Article 2.6 of the URAA. The ADR, like its predecessor, the BTT Guide, defines "like product" in terms similar to that of Article 2.6 of the URAA to mean a product which is identical, that is, alike in all respects to the allegedly dumped product or that which, though not alike in all respects, has characteristics that closely resemble those of the allegedly dumped product.[1108] Section 1(f) of the ADR contains seven factors or criteria first developed by the BOTT in the case of *Unmodified Starches – Belgium, Denmark, France, Germany, Netherlands, Portugal, Switzerland and Thailand*,[1109] in its in-depth study and appraisal of the concept of like products, which should be considered in determining whether the product has characteristics resembling those of the product under consideration by the ITAC.[1110] These factors include:

- Physical characteristics and appearance of the products
- Raw materials and other inputs used in producing the products
- End-use of the product
- Substitutability of the product with the product under investigation
- Tariff classification
- Method of manufacture/production process
- Any other factor proven to the ITAC to be relevant

1107 See generally, Hudec *Like Product* (2000) 101–123 critically discussing the GATT/WTO jurisprudence on the concept of "likeness".

1108 See ADR, s 1(f).

1109 *Unmodified Starches – Belgium, Denmark, Portugal, Switzerland and Thailand*, BOTT Report No 3486.

1110 See *Unmodified Starches – Belgium, Denmark, Portugal, Switzerland and Thailand* par. 39.

According to the ITAC's practice, none of these factors can necessarily provide a decisive guidance in the determination of like product. It is submitted that these seven factors identified in the case of *Unmodified Starches – Belgium, Denmark, France, Germany, Netherlands, Portugal, Switzerland and Thailand* for use in determining "like product" cannot be pigeonholed into a particular and distinct category, nor can they be crystallised as a methodology for determining "like product".

Take, for example, the hypothetical case Z and case T. In both cases, the ITAC may use tariff classification and physical characteristics respectively as criteria but arrive at different conclusions. Thus, a striking similarity or resemblance in the physical characteristics of two products may not necessarily mean that they are identical or alike within the meaning and context of anti-dumping determinations. A there can be variations and different models within the like product, some of the variations within the like product may have a significant impact on the final determination of likeness. The placement of the product in the Harmonised Commodity Description and Coding System is also a factor to consider.[1111]

In practice, importers are required, as part of ITAC's investigation into alleged dumping and the identification of their products, to give a detailed description of their products by stating their scientific name and common name, and indicating the raw material/components/inputs used, basic production process used; physical appearance; technical characteristics; manner of application or use; categories of users; and packaging. Furthermore, the importer must explain in detail any similarities and differences of the product in question with the like product manufactured in the SACU region. These submissions and explanations by exporters of the product in question enable the ITAC to acquire

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[1111] *Harmonized Commodity Description and Coding System,* commonly known as *Harmonised System or HS*, is an internationally standardised multipurpose goods nomenclature used as the basis for customs tariffs and for the compilation of trade statistics all over the world. It was developed and is maintained by the World Customs Organization (WCO) based in Brussels, Belgium.

substantial technical knowledge about the products, their uses and the process of manufacture.[1112]

7.5.3 Factors and Methodology for Determining Likeness

The following are two broad methodologies for determining likeness of products:

7.5.3.1 Orange-Orange Methodology

The first and most important step in the consideration of likeness is to determine if the product or good matches in all respects the product or good that is being investigated. This is what we call an orange-to-orange comparison. A good is a like good when it is "identical", that is, "alike" in all respects to the allegedly dumped product. The likeness of one product to another can be discerned from a high degree of similarity in elements of the physical characteristics of the goods under comparison. Such characteristic elements (and/or properties) may include, but are not limited to, nature, quality, use, function, price, contents (ingredients), tariff classification and the methods used in the manufacturing process.

7.5.3.2 An Orange-Lemon methodology

In the absence of the "like product" as sought under an orange-orange methodology, the ITAC may have regard to the good or product that, "although not alike in all respects" to the good under investigation, its use and function characteristics lead to results similar to those of the dumped good. This is what we call an orange-to-lemon comparison. Under the orange-lemon methodology,

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[1112] In the United States the technical knowledge about the product can also be gathered from literature such as product magazines, catalogues and brochures, site visits, internet searches, consultations with technical experts from the State Department and other federal agencies, and information from other sources including trade associations. See, for example, *Final Determination of Sales at Less than Fair Value: Certain Pasta from Italy*, 61 FR 30326, 30346 (14 June 1996); and *Final Determination of Sales at Less than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 FR 52741 (5 September 2003).

the ITAC will have to put less emphasis on the genetic or/and external striking similarity or resemblance of the goods. What is important here is that there is the sharing of significant characteristics or that there is some degree of close resemblance of the goods that falls short of a striking similarity. This close resemblance covers the good used to perform the same functions as those to which they are being compared. As stated in the *Clear Flat Glass – Thailand and Singapore* investigation, of importance is that the goods are, under the circumstances, commercially interchangeable.[1113]

Zedalis[1114] gives some examples of the determination of "like" products that are relevant to the orange-lemon methodology. According to Zedalis, like products that could be identified include: (a) identical or very nearly so, for example top sirloin from cattle fed only organically grown grains and sirloin from cattle fed from hormones are very similar; (b) interchangeable goods that are by nature the same, for example poultry interchangeable with beef as both are by nature meat; and (c) the competitive or substitutable (interchangeable goods that are by nature different), for example tofu (soybean curd) can be used as a substitute for meat, but is by nature different from either beef or poultry.[1115] Thus, the anti-dumping authority will have to consider whether they have characteristics resembling each other by looking at physical likeness, commercial likeness and functional likeness.

Under physical likeness it should be determined to what extent the physical characteristics are similar and to what extent there are differences. Top sirloin from cattle fed organically grown grains and sirloin from cattle fed hormones are very similar, and their differences may not result in different tariff classification.

Interchangeable goods are considered according to the functional likeness, which refers to end-use, and includes assessing the extent to which the

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1113 *Clear Flat Glass –Thailand and Singapore* par.15.
1114 See generally, Zedalis 1994 *Vand. J. Transnat'l L* 59.
1115 See generally, Zedalis 1994 *Vand. J. Transnat'l L* 59, n73.

products in question are functionally substitutable and the extent to which they are capable of performing the same function.

Commercial likeness generally refers to characteristics identifiable from market behaviour. Important aspects for determining the commercial likeness test include direct competitiveness or commercial substitutability or interchangeability in the same market sector. Direct competitiveness or direct substitutability or direct interchangeability has been accepted by the BOTT in the *Clear Flat Glass – Thailand and Singapore* case as one of the approaches to determine whether the products are "like" products.[1116] However, the ITAC has yet to establish clear guidelines or formulate an appropriate test to determine directly competitive or directly interchangeable products.[1117]

It is submitted that the ITAC should follow the test pronounced by the WTO Panel in *Japan – Taxes on Alcoholic Beverages,*[1118] which applies to like products. According to the Panel, the appropriate approach is to consider the "marketplace" to determine whether products are "like" or "directly competitive".[1119] In this regard, the ITAC will have to consider several factors such as whether the goods compete in the same market; the willingness of the consumers or buyers to choose between sources of the products in question; and close price competition, which may indicate that the market does not recognise product differentiation.

In *Unmodified Starches – Belgium, Denmark, France, Germany, Netherlands, Portugal, Switzerland and Thailand*, the likeness of maize starch produced by a South African producer and unmodified maize (corn) starch, potato starch, cassava starch and wheat starch exported from or originating from some EU countries and Thailand was positively determined despite acknowledging their

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1116 See *Imposition of Anti-dumping Duties on Clear Flat Glass exported from Thailand and Singapore* (Clear Flat Glass – Thailand and Singapore), BOTT Report No 3408 (15 September 1993), at 9–10.

1117 Perhaps this is a matter to be left for a case-by-case determination.

1118 *Japan – Taxes on Alcoholic Beverages* WT/DS8/R; WT/DS10/R/WT/DS11/R (Adopted 1 November 1996) (accessed on 20 March 2007).

1119 Panel report, *Japan – Taxes on Alcoholic Beverages,* par. 6.22.

differences, including amongst others, differences in production base materials, properties, composition and gelatinisation. This was because of several factors including similarities in the physical characteristics of the starches and their belonging to the "same general category" of products called starches.[1120] Another case is *Sterile Surgical Sutures – United Kingdom, the United States and Germany,*[1121] which involved surgical absorbable sutures manufactured by the South African industry and exports from or originating in the United Kingdom, the United States and Germany, intended for use when suture or ligature is indicated. In that case the BOTT found that, for the purpose of its investigations, the South African and imported sutures were like products comparable to each other, despite the fact that the South African sutures were of polyglycolic acid while the imported sutures were of polyglyconate acid.

Faced with a similar case, the ITAC may reach a different conclusion, depending on the type of suture used. There are several commercially available types of suture and their variations, which are classified as either absorbable sutures like polyglycologic acid or catgut sutures like processed collagen. The use of absorbable sutures and catgut when an absorbable suture or ligature is indicated may differ in terms of effects. For example, in a study on absorbable sutures and catgut sutures when used for perineal repair in mothers after vaginal delivery, compared with catgut, the absorbable suture group was found to have the effect of less pain in the first days of application, therefore requiring less application of analgesia and less suture dehiscence. Thus, *arguendo* the ITAC may not regard polyglycologic sutures and collagen sutures as like products for the purpose of anti-dumping investigations.

The *Woven Labels – Zimbabwe* case[1122] involved a dispute over labels with woven inscriptions manufactured by a Zimbabwean industry and those

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1120 *Unmodified Starches – Belgium, Denmark, France, Germany, Netherlands, Portugal, Switzerland and Thailand*, 23–24.

1121 *Sterile Surgical Sutures – United Kingdom, the United States and Germany* (BOTT Report No. 3631 (1995)).

1122 In Review of the Anti-dumping Duty on Labels with Woven Inscriptions Imported from or Originating in Zimbabwe (BOTT Report No. 3476). [hereinafter Woven Labels – Zimbabwe, BOTT Report No 3476].

manufactured by a South African industry. Although the two products were alike or comparable, the imported and local labels differed in design; however, the BOTT determined them as like products. This was because both labels were woven on high speed needle looms, manufactured on basically the same type of machinery, used the same raw materials, and had the same physical characteristics and the same end-use.

7.6 Summary

This chapter critically discussed specific substantive issues with respect to the determination of dumping, normal value, the price of the dumped goods and, like products. The relevant South African legislative provisions were analysed in comparison with the URAA in order to determine whether the South African anti-dumping regime is WTO compatible.

The main submission in this chapter is that the South African regime in respect of the determination of dumping and normal value is largely compliant with the URAA, apart from the inconsistencies experienced in the application of the law and related regulations. Admittedly, the South African anti-dumping regime has a long way to go when compared to a jurisdiction like the USA. Furthermore, consolidation of South Africa's anti-dumping laws into a comprehensive statute, preferably incorporating the terminology used in the URAA, would address concerns that South Africa's anti-dumping regime is excessively protective. However, it would be jurisprudentially unsound to judge a country's compliance with its international obligations solely in terms of its verbatim adoption of the substantive and procedural provisions of an international instrument in its implementing statutes.

The next chapter deals with the critical analysis and determination of injury, and with the concept of domestic industry.

CHAPTER 8: ANALYSIS AND DETERMINATION OF INJURY, AND DOMESTIC INDUSTRY

8.1 Introduction

This chapter provides a critical evaluation and appraisal of the determination of injury to the domestic industry, and the determination of the presence of a domestic industry for the purposes of instituting anti-dumping investigations as substantive aspects of the South African anti-dumping law in comparison with the WTO rules on anti-dumping.

The determination and finding of injury to domestic industry is a prerequisite for imposing anti-dumping and other related protective measures. In this instance, Article 4 of the URAA defines the domestic industry as the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

In order to arrive at a proper analysis of injury it is important to note that some exceptions need to be made as to what can be regarded as a "domestic industry" pursuant to Article 4 of the URAA. Domestic producers who are related to exporters or importers, or who themselves import the dumped products, may be excluded from the definition of the domestic industry under Article 4(1)(i) of the URAA. The reason for this is that these producers may benefit from the dumping and this may encourage them to distort the injury analysis.

8.2 Analysis and Determination of Injury

8.2.1 General

The WTO/GATT does not condemn dumping that does not cause injury.

Although Article 3 of the URAA provides a coherent set of rules for the determination of injury, there is no explicit definition of injury except for the provision of Article 3.1 that the determination of injury shall be based on positive evidence and involves an objective examination of economic factors.[1123] However, there is an attempt to define "injury" in footnote 9 of the URAA as follows: "injury shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry, and shall be interpreted in accordance with the provision of [Article 9]".

Generally, anti-dumping measures can only be introduced if it is determined that the dumped imports are causing material injury or threatening to cause material injury to an established domestic industry, or if they materially retard the establishment of a domestic industry.[1124] In situations where there is a mixture of dumped and non-dumped goods, the notion of "dumped imports" brings into question a conceptual issue. This issue came to light in the *EC – Bed Linen* dispute when India unsuccessfully argued that non-dumped transactions ought to be excluded from the injury analysis. Accordingly, the Panel viewed India's submission as requiring specificity, which is not required by the provisions of the URAA. The Panel subsequently ruled on a technicality because it felt that while the treatment of imports attributable to producers or exporters found not to be dumping is an interesting question, it was not an issue before it and, therefore, they reached no conclusions in that regard.[1125] Like the URAA, the South African anti-dumping legislation does not expressly define the term "injury".

It is submitted that the South African law also established possible generic definition(s) of injury. Notwithstanding the absence of a definition of "injury", the ITAC may only impose anti-dumping duties if it is satisfied that the circulation of the merchandise under investigation causes injury to the South African

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1123 See Raju WTO *Agreement on Anti-dumping* 298.

1124 See GATT Art. VI(6)(a).

1125 *EC – Bed Linen, Panel Report*, par. 6.138. However, the Panel agreed with India's submission in its obiter statement.

manufacturer (and/or SACU industry) producing a like product to the product that is imported. In this regard, the South African law is WTO compliant. In reality, the URAA leaves it to national authorities to formulate precise guidelines and indications for the assessment of "injury". This state of affairs regarding the absence of definite standards in the URAA is a major concern that opens the anti-dumping discipline to inappropriate interpretations, including subjective consideration.[1126]

8.2.2 Actual Material Injury

Article VI of GATT, read with the URAA, makes dumping actionable when 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. The phrase "causes material injury" refers to actual material injury. Actual material injury is harm or loss that the domestic industry is currently experiencing, or what it previously experienced based on positive evidence such as evidence of an increase in inventories of the domestic producer and import surges with price suppression and depression effects, loss of profits and a drop in sales,[1127] all of these being as a result of the allegedly dumped like product.

There is no precise definition of the concept of "material injury", which is permissively couched under the WTO and South African jurisprudence.[1128] The South African law defines the term "material injury" similar to the term "injury", which is defined in footnote 9 of the URAA. According to section 1(b) of the

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1126 Raju WTO *Agreement on Anti-dumping* 299, points out that the Indian authorities have in many cases not evaluated the factors in Art. 3.4 to assist in the determination of injury, and that the wide interpretation of injury has created a loophole which members have the tendency to manipulate and misuse. The ADP Committee of the WTO has recommended that injury should preferably be analysed over a period of at least three years. This is as a result of the long period causation determination can take in order to examine relevant factors, such as those mentioned in Art. 3.4 and 3.5 of the URAA. See, WTO Committee on Anti-dumping Practices – Recommendations Concerning the Periods of Data Collection for Anti-dumping Investigations – Adopted by the Committee on 5 May 2000, G/ADP/6.

1127 See *Acetaminophenol – -China, Hong Kong, India, Singapore*, 15–-19.

1128 It would seem that the lack of a definition of "material injury" is commonplace globally.

ADR, material injury, unless the opposite is clear from the context, refers to actual material injury, a threat of material injury or the retardation of the establishment of an industry. It is submitted that this definition offers little assistance in understanding the import of the phrase "material injury" and in determining when injury can be deemed material. In the United States, material injury is defined as the "harm which is not inconsequential, immaterial or unimportant".[1129] However, a circular definition such as this is also of little assistance, particularly since it implies a very high injury threshold. All this definition carries is the potential to throw into confusion the standard of injury pertaining to dumped products and that pertaining to safeguard measures – additional tariffs against non-dumped imports – under GATT Article XIX. The latter refers to "serious injury," which according to Staiger, has been interpreted within the WTO/GATT as requiring a higher injury threshold than the material injury requirement in anti-dumping investigations.[1130]

The provision in the BOTT Guide that directed how to determine whether the injury was material has not been retained in the ITAC regulations. In terms of the BOTT Guide, an injury would be regarded as material if the "decline and negative effects" were so "substantial" to the extent that the affected domestic industry could not combat the impact of the dumped imports using its own resources.[1131] The Guide's test for material injury suggested that the injury should relate to the degree of severity of the harm that is caused or is about to be caused by dumping and how the domestic industry is able to respond to such injury. The investigating authorities should have considered how significant and/or important the injury complained of is or how serious the injury is or will be compared to other possible causes of injury.

1129 Tariff Act, §1677(7)(A).
1130 Staiger 2005 *World Economy* 740.
1131 See BOTT Guide section 2.6.

8.2.2.1 Proof of Actual Material Injury and Actual Material Injury Factors

In the light of the absence of a precise definition of "material injury", it is important that the URAA enjoins the investigating authorities to base their injury determinations on positive evidence and objective examination of the volume and impact of dumped imports on the domestic market for like products. Article 3 of the URAA also sets out a myriad of factual situations that national authorities must examine and consider in determining injury. As confirmed by the Appellate Body in the *Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland* dispute, Article 3.1 requires an investigating authority to make an injury evaluation and determination based on all the relevant reasoning and facts before it.[1132] The injury determination should be based on "positive" evidence, which is examined objectively. According to the Appellate Body, the determination based on "positive" evidence is not to be restricted to reasoning or facts disclosed to, or discernible by, the interested parties. This determination may also be based on the confidential case file.

Article 3.2 of the URAA sets out factors concerning the examination of the volume of dumped imports and their effect on the domestic market and on prices. According to Article 3.2 of the URAA, the investigating authorities must consider if there has been a significant increase in dumped imports by looking either at the increase in the quantum of imports or their production in the importing country, or consumption in the importing country. With regard to the effect of dumped imports on prices, the authorities are enjoined to determine if there has been any significant price undercutting by the dumped imports, or if the imports have had the effect of significantly depressing prices or preventing price increases.

[1132] See *Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-alloy Steel H-beams from Poland* WT/DS141/AB/R (12 March 2001) [Thailand-Steel, Appellate Body Report] par.111.

Article 3.4 of the URAA provides a non-exhaustive list of economic factors and indices which should be appropriately evaluated to consider the consequential impact of dumped imports on the domestic industry. The ideal situation in practice is that the investigating authority must explicitly indicate in its investigation report that it has considered all the stated factors. The economic factors and indices not specifically enumerated in Article 3.4 must also be examined if they are "relevant" to the inquiry. The URAA does not quantify the decline necessary in the sales, profits, output, productivity, market share and investment return to arrive at a determination of injury; nor does it specify whether a certain percentage decrease falls short of the required injury. The issue will be considered based on the specific facts of the case.

The ITAA does not contain similar provisions to those contained in Articles 3.2 and 3.4 of the URAA, except for section 13 of the ADR, which contains a provision on injury factors; nor did the BTTA carry such a provision. Be that as it may, the anti-dumping investigating authority merely adopted and added to a list of non-exhaustive factors that are clearly stated in the URAA, and that should be objectively considered in order to establish material injury.[1133] The factors and indices that have been considered include the import volumes of dumped goods; the price and effects of imports; and the economic impact of the dumped goods on the domestic industry, in particular with relation to a decline in profits and an increase in inventories.[1134] However, it would not be proper or WTO/GATT compliant if the ITAC were to fail to consider injury factors that appear in the URAA but not in the ITAA and the ITAC Regulations. Put differently, the ITAA may not exclude recourse to factors specifically listed in the URAA by relying solely on the new factors added by the ITAC Regulations.

The provisions of Article 3 of the URAA are now in part adopted in section 13 of the ADR, which requires the ITAC, in determining material injury to the SACU industry, to consider if there has been a significant depression and/or

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1133 See, *Unmodified Starches – Belgium, Denmark*, 27–34.
1134 See, *Clear Flat Glass – Thailand, Singapore*, par. 91–92.

suppression of prices in the SACU industry.[1135] The ITAC is further required to consider if there have been significant changes in the domestic performance of the SACU industry in respect of sales volume; profit and loss; output; market share; productivity; return on investments; capacity utilisation; cash flow; inventories; employment; wages; growth; ability to raise capital or investments; and any other relevant factors placed before it.[1136]

The South African investigating authorities prefer a holistic consideration of all the factors mentioned in Article 3 of the URAA and section 13 of the ADR. Accordingly, the investigating authority considers all factors that could indicate material injury.[1137] This is done on a case-by-case basis, since the approach in one case may not necessarily be appropriate in another. In addition to the above-stated material injury factors, there are other factors outside the domestic industry that should be considered here that may have an impact on the decision as to whether an injury was caused by the dumping. These include other "economic factors and other indices having a causal bearing on the state of the industry", but not related to the dumped imports,[1138] such as the state of the economy and industrial boycotts. These other factors might be the real cause of material injury or a threat of injury to the domestic industry. Generally, cheap imports must precede these other factors or prevailing circumstances to establish injury on the basis of imports. In other words, cheap imports must be a more important cause of injury than other possible causes or factors.

In pre-ITAA case law, in *Roller Bearings – United States,* the tribunal acknowledged that the economic depression had some impact on the demand for roller bearings, but considered the loss of two large tenders for bearings to the importer as the major cause of the complete loss of the petitioner's market share, thus the main and substantial cause of injury.[1139] In determining import

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1135 ADR, s 13.1.
1136 ADR, s 13.2.
1137 See *Unmodified Starches – Belgium, Denmark*, 27–34.
1138 See *Korea – Anti-dumping Duties on Imports of Polyacetal Resins from the United States* ADP/92, dated April 2, 1993 [hereafter *Korea* – Polyacetal Resins, Panel Report].
1139 *Roller Bearing – United States,* 26.

volumes of the subject product entering the SACU from the country under investigation and from other relevant countries, the ITAC normally uses audited import statistics from SARS.[1140]

8.2.3 Threat of material injury

In determining the threat of material injury, authorities involve themselves in a prediction of what is likely to occur in the foreseeable future and in taking a preventive measure. This is a fall-back protection in the event there is no "actual material injury" or the investigating authority cannot find a causal link between the alleged dumped imports and injury. The complaint of "threat" of injury is a difficult complaint that may lead to abuse. This, the URAA sets stringent requirements in determining threat of material injury. In terms of Article 3.7 of the URAA, a "determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent".

It is submitted that with regard to "threat of material injury" the WTO provisions and South African law are almost identical. Article 3.7 is reproduced and expanded in section 14 of the ADR.[1141]

Section 14.2 of the ADR provides that the ITAC, in considering a threat of material injury to a SACU industry, in addition to the injury factors indicated under section 13, may consider other factors including:

> (a) a significant rate of increase of dumped imports into the domestic market of the SACU;
> (b) sufficiently freely available, or an imminent substantial increase in, capacity of the exporter;
> (c) The availability of other export markets to absorb additional export volumes;

1140 This was confirmed in *Gypsum Plasterboard – Thailand*, ITAC Report No 16, 26.
1141 A similar provision was found in the BOTT Guide.

(d) whether products are entering or will be entering the SACU market at prices that will have a significant depressing or suppressing effect on SACU prices; and
(e) the exporter's inventories of the product under investigation.

Notwithstanding the threat of material injury factors in Article 3.7 of the URAA and section 14.3 of the ADR, there is no clear approach to implementing either of the two provisions. Be that as it may, it is submitted that in implementing these provisions the investigating authority shall ask and receive positive answers to three questions, namely: (a) whether there is positive evidence suggesting that a change in circumstances regarding the dumped imports is happening or has happened; (b) whether the change is foreseen or imminent; and (c) whether the foreseeable and imminent change causes material injury to the domestic industry. The DSB panel in *Korea – Anti-dumping Duties on Imports of Polyacetal Resins from the United States* held that the change in circumstances obligation requires a prospective analysis of the present situation in order to determine if a "change in circumstances" was "clearly foreseen and imminent".[1142]

The essence of a threat lies in its ability to act imminently or develop into actual material injury, directly or by diversion in the Republic of South Africa. A survey of the pre-ITAA anti-dumping determinations shows that, more often than not, a threat of material injury will be found to exist in combination with the finding of actual material injury. For example, in the case of *Calcium Propionate – Netherlands, Canada, United States,*[1143] the BOTT investigations revealed that the petitioner, Chempro, the erstwhile agent of the importer Verducht, had been subject to unfair and disadvantageous business practice by Verducht. When Chempro started the production of calcium propionate, Verducht immediately dropped its price. Consequently, Verducht continued to increase and decrease its prices. In order to match Verducht's prices and to retain its dwindling market

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1142 *Korea – Polyacetal Resins from the United States, Panel Report,* par. 271.

1143 *Imposition of Anti-dumping Duty on Calcium Propionate Imported from or Originating in The Netherlands, Canada or the United States of America, and on Calcium Acentrate Imported from or Originating in the Netherlands* BTT Report No. 3283 (19 March 1993), [hereafter Calcium Propionate – Netherlands, Canada, United States, BTT Report No. 3283].

share, Chempro was forced to reduce its prices until it was selling at a loss. The lowering of prices resulted in Chempro having to temporarily close one of its production plants,[1144] which meant that Chempro suffered actual material injury. In this case a threat of material injury manifested itself in the form of threat of permanent closure of the plant by Chempro should it be required to reduce its selling prices further.[1145]

Threat of material injury was also found to exist in *Roller Bearings – United States,* through the loss of two large tenders to the importer that threatened the cessation of operations by the petitioner at one of its plants.[1146] Similarly, in the *Acetaminophenol – China, Hong Kong, India, Singapore* case, injury to the domestic industry was determined to be actual material injury in the form of loss of profit, foreseeable workers lay-offs and possible plant closure, and a decrease in the market share of the domestic industry.[1147] The ruling in *Italie – Aansoek of Pasta* is interesting because it set a "reasonable probability" test to determine the threat of material damages or actual material injury, which also should be determined based on consideration of public interests. It is submitted that South African law in this period was one of the few in the world that set higher and more stringent requirements for the determination of dumping based on the allegation of threat of material injury.

8.2.3.1 Proof of Threat of Material Injury and Threat of Material Injury Factors

The determination of "threat of material injury" is a factual determination under both South African law and WTO rules, and should not be based on allegations, conjecture or remote possibility. As indicated in 6.6.3 above, both the URAA and the South African anti-dumping regulations prescribe factors as illustrative of what should be considered in determining "threat of material injury". These

1144 *Calcium Propionate – Netherlands, Canada, United States,* 6–7.
1145 *Calcium Propionate – Netherlands, Canada, United States,* 7.
1146 *Calcium Propionate – Netherlands, United States,* 23–27.
1147 *Acetaminophenol – China, Hong Kong, India, Singapore*, 15–19.

factors are the likely increase of imports, imports entering the home market with the potential of depressing or suppressing domestic prices, and inventories of the product being investigated.[1148] Therefore, no single factor will necessarily be decisive. These injury factors must be considered in totality when determining that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.[1149]

8.2.4 Material Retardation

The concept of injury through the material retardation of the domestic industry is less developed under both GATT/WTO rules and South African law. Unlike "actual material injury" and "threat of material injury", a clear test of "material retardation" has yet to be established.

It is submitted that the "material retardation" requirement should be applied with great circumspection. In this regard, South African investigating authorities place the onus to provide the ITAC with detailed industry establishment on the petitioning party. However, no similar provision can be found in the URAA. Section 15.1 of the ADR provides that no investigation must be initiated on the basis of the material retardation of the establishment of an industry unless the industry or proposed industry has supplied the ITAC with a comprehensive business plan indicating the establishment of such industry in the absence of dumping.

Neither the South African law nor the WTO rules give directives as to factors for consideration in determining "material retardation" or delay in the establishment of an industry. Material retardation injury factors that have been considered in other jurisdictions include the negative effects on the development and

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1148 See URAA, Art. 3.7; ADR s 14.2.

1149 The WTO Panel in *Mexico – Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States WT/DS132/R,*) [hereinafter Mexico – Corn Syrup, Panel Report] par. 7.127 held that a threat analysis must also include evaluation of the Article 3.4 factors.

production activities of the domestic industry;[1150] feasibility studies, project finance negotiations and undertakings for the financing and procurement of machinery related to new projects or the expansion of existing plant;[1151] the effective capacity under construction and the general financial situation;[1152] and any other factor or circumstance that may be deemed relevant.

Although the GATT/WTO rules and the South African rules do not adequately deal with the "material retardation" requirement, there has been an attempt to infuse essence and meaning into the concept. For instance, in the *Korea – Polyacetal Resins from the United Sates* dispute, the Panel preferred to construe the word "establishment" in a relative and highly technical sense. Firstly, there may be a positive determination of a material retardation of the establishment of an industry when the present plant for the like product is being expanded. Therefore, establishment should not be narrowly understood in the sense of an erection of a new industry or plant. Secondly, the fact that the said industry had reached normal operation may not necessarily support the finding that an industry was established. South Africa appears to take the WTO approach in interpreting "establishment". In *Semi-Refined Paraffin Wax – PRC,*[1153] the BOTT considered an argument for material retardation of the expansion of an industry, and ruled against it on the ground that such an injury was not provided for by the URAA.

8.2.5 Injury Margins

Normally, after reaching an affirmative determination, the investigating authority that applies a lesser duty rule pursuant to Articles 8.1 and 9.1 of the URAA will proceed to calculate the injury margin. The URAA, however, does not give any guidance on the calculation of injury margins. Thus, it would seem that the investigating authorities have broad discretion in calculating the margins. The common approach is to determine if, after a fair comparison of prices of

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1150 United States, for example.
1151 Ecuador.
1152 See, Argentina, Decree 2121/94, Art. 10, Bolivia, Bi-ministerial Decision, Art .2 and 32.

imported and domestically produced like products, there is no undercutting of domestically produced like products. Price undercutting is the extent to which the price of the imported product is lower than the price of the SACU product.

8.2.6 Margin of Dumping

According to Article 2.2 of the URAA, the margin of dumping shall be determined by comparing the price of the dumped product with the price of the like product when exported to an appropriate third country. When determining the margin of dumping, the national authority must consider the cost of the products compared in their countries of origin, plus a reasonable amount for administrative, selling and general costs, and for profits.

The dumping margin is normally described as the difference between the normal value and the export price after allowance has been made for any difference affecting price comparability. The dumping margin can be calculated, for example, by subtracting the *ex-factory* export price from the *ex-factory* normal value for the products in question, and the difference will be expressed as a percentage of the free-on-board export price.

Raju is of the view that the calculation of the margin of dumping is one of the controversial areas of the discipline, both under the URAA and at domestic level. He points to the Indian experience, which follows the EU practice of considering the landed costs of the product in question, where the Indian Anti-dumping Authority has often reached an "artificial dumping margin". This has been due to several factors, including non-response or incomplete response to questionnaires by the domestic industry, and also the national authority's failure to consider the preconditions prescribed in the URAA for determination of the dumping margin.[1154]

[1153] In *Semi-refined Paraffin Wax – PRC*, BOTT Report No. 3492 and 3283.

[1154] See Raju *World Trade Organization* 308.

8.2.7 *De Minimis Dumping Margin*

In accordance with Article 5.8 of the URAA, the South African anti-dumping authority has disregarded *de minimis* dumping margins,[1155] and recommended termination of investigations. In South Africa, the dumping margin is the difference between the domestic selling price and the export price to South Africa. It is, therefore, the subtraction of the export value from the normal value (comparable price), calculated on a transaction-by-transaction basis. Article 5.8 of the URAA states that "there shall be immediate termination [of dumping investigations] in cases where the authorities determine that the margin of dumping is *de minimis*. The margin shall be *de minimis* if this margin is less than 2 percent of the export price". It is submitted that in this regard the authority's actions and procedures were GATT/WTO consistent. For instance, in *Trichloroethylene from the Netherlands*, the BOTT found that trichloroethylene from the Netherlands was exported to South Africa at a dumped price, but, following Article 5.8 of the URAA, recommended that investigations into the alleged dumping be terminated because the margin of dumping was *de minimis,* being less than 2 per cent of the export price.[1156]

8.3 Causation

8.3.1 General

Causation is a requirement under both the WTO rules and the South African law, but both contain no specific definition of "causation". Causation has econometrically been explained as a concept of precedence, according to which if X precedes Y, then Y should be considered as having been caused by X.[1157] Clearly, one of the most important issues in the imposition of anti-dumping duty is to establish that dumping is causing material injury to domestic industry. In other words, for the imposition of anti-dumping duties, it is not enough to

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1155 See *Trichloroethylene – Netherlands,* par. 29–30; and Acetaminophenol – *China, Hong Kong, India and Singapore,* par. 22–23.

1156 See *Trichloroethylene – Netherlands.*

establish dumping alone. The importing country also has to determine that these dumped imports are causing material injury to domestic industry. The issue of causation therefore becomes important. Article 3.5 of the URAA requires causation to be established through the demonstration of a causal relationship between the dumped imports and the injury to the domestic industry based on all relevant evidence before the authorities.

Article 3.5 further recognises the need to examine any "known" factors other than the dumped imports, which are, at the same time, causing material injury to the domestic industry. The fact that the URAA does not expressly state how such factors should become "known" to the investigating authority, may pose a complication in determining whether the provisions of Article 3.5 are complied with. Be that as it may, finding out these factors other than dumped imports is important in order to ensure that injury caused by factors unrelated to dumping is not attributed to the dumped imports. Attributing injury caused by non-dumped imports to dumped imports will not establish a causal link between dumping and material injury, which is one of the prerequisites for imposing an anti-dumping duty.

8.3.2 "Known" Injury Factors and Causation

While Article 3.4 of the URAA provides a list of non-exhaustive factors to be considered in determining injury to the domestic industry, Article 3.5 enjoins the investigating authorities also to examine any "known" factors that could be the cause of the injury in question. However, it should be asked what are the factors that can be said to be "known" to the investigating authorities in the sense in which the word "known" is described in Article 3.5, and how do these factors become "known" to the investigating authorities? In the *Thailand H Beams, Panel Report,*[1158] the WTO panel held that there was no express requirement in Article 3.5 that investigating authorities, on their own, find out the effects of all possible injury factors other than imports that may be causing injury to domestic

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[1157] See, generally, Granger *Causal Inference* (1978).

industry. In other words, if the interested parties do not raise a particular issue before the investigating authorities and do not make a prima facie case, the investigating authorities are under no obligation to examine that particular factor. This implies that if there is a factor other than dumped imports which is not raised by the parties to the dispute, then the investigating authority need not examine that factor. Hence, the impact of a factor, other than dumped imports, which may be causing injury will go unexamined.

The Appellate Body in the *EC – Malleable Cast Iron Tube*[1159] dispute held that there is no need for the investigating authority to examine the collective effects of other known factors, in addition to the individual impact of these factors. This implies that if there are five factors other than dumped imports and if individually these factors are not causing injury to domestic industry, then there is no need to find out the collective impact of these factors. Be that as it may, these factors collectively may cause injury to the domestic industry and, if their collective impact is not taken into account, then factors other than dumping that are causing injury will not be taken into account and the injury will be attributed to dumped imports.

There is a need to have clarity on Article 3.5 of the URAA. The Article should make it clear whether it is the collective impact of the non-dumped imports or other factors only that should be taken into account, or whether the individual impact of the factors is also to be examined. However, the draft URAA amendment does not give clarity in this regard. It rather proposes that the investigating authorities need not quantify the injurious effects attributable to dumped imports and to other factors. The draft Article 3.5 also explicitly states that the investigating authorities do not require weighing the injurious effects of dumped imports against those of other factors. In other words, in accordance with draft Article 3.5, the causal link between dumped imports and material injury to domestic industry will not be fully established. Further, there may be

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[1158] *Thailand H Beams*, Panel Report, par. 2.273.

certain factors unrelated to dumping that may be causing injury, but that injury may be attributed to dumped imports. Hence, the non-attribution of injury requirement will not be fully met.

Furthermore, the draft Article 3.5 has deleted the specific factors that are currently set out in Article 3.5 of the URAA to determine whether there are other factors that are causing injury to domestic industry. In terms Article 3.5 of the URAA, the investigating authorities are under an obligation to at least examine these other factors, even if these factors are not raised by the parties to the dispute. The draft Article 3.5, by deleting these factors, actually does not give any clue to the investigating authorities in terms of which factors that they need to consider to segregate factors other than dumping from dumped imports to determine material injury to domestic industry. In this regard, it is important to recall the submissions made by countries like India. India has made a submission to the negotiating group on rules that Article 3.5 needs to be elaborated on so that appropriate guidance is provided to the investigating authorities while separating and distinguishing the injurious effects of other factors from the injurious effects caused by dumped imports.[1160] Further, the Indian submission argued that there is a need to specify an appropriate standard for establishing causality between dumped imports and material injury.[1161] The submission made by the "friends of anti-dumping negotiations" (hereafter FAN)[1162] group of countries requires the development of procedures and criteria so as to ensure that a causal relationship will be established only

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1159 *European Communities – Anti-dumping Duties on Malleable Cast Iron Tube or PIPE Fittings from Brazil,* WT/DS219/1B/R (22 July 2003) [hereafter EC – malleable Cast Iron Appellate Body Report].

1160 Young and Wainio "The Antidumping Negotiations: Proposals, Positions and Antidumping Profiles" 2005 *The Estey Centre J of Int'l and Trade Pol'y* 30.

1161 Young and Wainio 2005 *The Estey Centre J of Int'l and Trade Pol'y* 32.

1162 Friends of Anti-dumping Negotiations (FAN) is a group of developed and developing country Members that wanted the Doha Round negotiations to result in tighter disciplines on the use of antidumping measures. The FAN coalition includes Brazil, Chile, China, Columbia, Costa Rica, Hong Kong, Israel, Japan, Korea, Norway, Mexico, Singapore, Switzerland, Thailand, Turkey, and some Separate Customs Territories.

when there is a clear and substantial link between the dumped imports and the injury, notwithstanding the presence of other factors.[1163]

The finding of material injury (and dumping) is not dispositive of the matter of anti-dumping duties. The national authority cannot make a definitive decision unless it is demonstrated on the basis of relevant and objective evidence that there is a causal relationship between the conduct of dumping and the resultant injury to domestic industry. Dumping should be a *sine qua non* of the alleged material injury. This qualification, simply referred to as causation, is important in discouraging the use of dumping actions to disguise mere protectionism by parties, while at the same time protecting and preserving harmless trade practices.

8.3.3 Nexus between Dumping and Material Injury

It would seem that the ITAC would consider the econometric causality test as a method of assessment of the complaint that the state of the domestic industry was caused by imports. This would not be contrary to the WTO tradition since Member states are declared free to determine an appropriate method of assessing causation in other disciplines such as safeguard measures. [1164]

The pre-ITAA South African anti-dumping legislation contained no explicit reference to the "injury" and "causality" qualification either in defining dumping, or for the imposition of dumping duties, except in cases of "disruptive competition".[1165] Nonetheless, the BTT Guide appealed for a similar

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1163 However, the draft Art. 3.5 does not elaborate or clarify the procedures that are to be used by the investigating authorities to segregate non-dumping factors from dumped imports to identify or determine material injury. In light of the above discussion, there is a need for developing countries to oppose the present draft Art. 3.5 and ensure that it is made clearer.

1164 See WTO, *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, WT/DS98/R, dated 21 June 1998 par. 7.96; WTO – *United States – Definitive Safeguard Measures on Import of Wheat Gluten from European Communities*, WT/DS166/R, dated 31 July 2000, par. 8.140.

1165 S 1 of the BTTA as amended defined "disruptive competition" as:

consideration of "injury" and "causality" as the URAA in dumping determinations. The guide required that action only be taken against those foreign imports having the potential to cause or threatening to cause material injury to the domestic industry of the Republic or against imports that materially retard the establishment of a domestic industry in the importing country.

However, it is submitted that it would not be correct to say that the injury and causation elements are new concepts to South African anti-dumping law and practice. Causation as an important requirement in anti-dumping investigations in South Africa can be traced back to the Customs and Tariffs Act of 1924, which provided for the imposition of anti-dumping duties only when "*by reason of ... a sale* [of imported goods in the Union [of South Africa] at less than the wholesale price in the country of manufacturer a *Union industry was threatened.*[1166]

By the use of the language "by reason of such a sale a Union industry was threatened", reference was for the first time made to injury and causation in dumping determinations.[1167] Furthermore, several of the pre-ITAA anti-dumping determinations were characterised by consideration of the "injury" qualification. The BOTT followed a two-pronged process in anti-dumping investigations.

> the export of goods to the Republic or the common customs area of the Southern African Customs Union in such increased quantities, absolute or relative to domestic production in the Republic or in the common customs area of the Southern African Customs Union, and under such conditions as to cause or threaten to cause serious injury to the industry in the Republic or the common customs area of the Southern African Customs Union which produces like or directly competitive products.

It is submitted that dumping itself is a trade-disruptive practice. It can therefore be argued that by implication the implementing legislation also requires evidence of serious (material) injury to be adduced by petitioners in anti-dumping cases. Selling foreign goods at a price lower than the price of like or similar domestic goods would inevitably result in the increased import of such foreign good into the domestic stream of commerce and losses to similar or like domestic goods. This would be a clear case of an importer engaged in disruptive competition.

1166 See, Customs and Excise Act, s 55. See also Customs Act, s 82. Emphasis added. See generally, Sibanda 2001 CILSA 250 fn47.

1167 Brink *South African Anti-dumping and Countervailing Investigations* 124 erroneously states that the Customs Tariff Act of 1925, s 15(2) was the first South African statute to contain an 'injury' reference.

Firstly, that there should have been a finding that a product is sold at a price lower than the home market price; and, secondly, a domestic industry should have sustained harm or loss (injury) as a result of the dumped product, or that harm or loss is reasonably foreseeable.

The South African anti-dumping determinations have been based on the finding or otherwise of "injury" and "causality" even before the coming into operation of the URAA. In the *Aansoek om Anti-dumpingreg op Pasta Ingevoer vanaf of Afkomstig uit Italie* case,[1168] (hereafter Italie – Aansoek of Pasta, BTI Report) it was held that:

> For the institution of an anti-dumping action, the Board on Tariffs and Trade must be convinced that first, the particular product is being imported at a price which is lower than the local market price; secondly, that the local trade suffered material damages or that the Board is of the opinion that there is a reasonable probability that material damages will occur, and thirdly, that it is in the public interest that anti-dumping action is instituted.

In the *Clear Flat Glass – Thailand, Singapore case*, the BOTT recommended the imposition of anti-dumping duties only because a threat of material injury was found to exist.[1169] In the case of *Imposition of Anti-dumping Duty on Hydrogen Peroxide Imported from or Originating in India* (Hydrogen Peroxide – India),[1170] the BOTT recommended anti-dumping duty because of material injury and a causal link between dumping and the injury was found to exist.[1171]

1168 *Ansoek om Anti-dumpingreg op Pasta Ingevoer vanaf of Afkomstig uit*, Verslag No: 2827 (27 December 1989 BTI), p. 5 par. 14 [hereafter Italie – Ansoek of Pasta, BTI Report No 2827]. Note that the report was originally in Afrikaans and that the quote has been translated from Afrikaans.

1169 For a further example, see *Dumping of Knives from Czechoslovakia* BTI Report No: 1097 (March 8 1965) [hereafter Knives – Czechoslovakia BTI Report No: 1097].

1170 *Imposition of Anti-dumping Duty on Hydrogen Peroxide Imported from or Originating in India*, BOTT Report No: 3688 (15 November 1996) [Hydrogen Peroxide – India, BOTT Report No: 3688].

1171 However, see *Investigations into the Alleged Dumping of Trichloroethylene (TCE) Imported from the Netherlands and Originating in Germany*, BOTT Report No: 3615 (20 June1995) [hereafter Trichloroethylene – Netherlands, BOTT Report No. 3615] where dumping was found to exist but duties could not be imposed because the margin of dumping was too *de minimis* to translate into injury to the domestic market.

8.3.4 Attribution of Injury from Other Factors

Dumped goods may not be the principal cause of injury. Some other factors may be material in relation to injury compared to dumped goods. In such cases, the injury to a domestic industry should be attributed to such other factors. The WTO system and the South African system contain similar provisions on attribution of injury. Article 3.5 of the URAA states, in part:

> The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter alia, 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.

Section 16.5 of the ADR states:

> The Commission shall consider all relevant factors other than dumping that may have contributed to the SACU industry's injury and injury caused by such other factors shall not be attributed to the dumping provided that an interested party has submitted, or the Commission otherwise has, information on such factor or factors. Factors that may be relevant in this respect include, but not limited to: the volume and prices of imports not sold at dumped prices; contraction in demand or changes in the patterns of consumption; trade with the rest of the SACU producers; developments in technology; other factors affecting the SACU prices; the industry's export performance; and the productivity of the SACU industry.

Clearly, both WTO rules and the South African law require that injury attributable to factors other than dumped imports should not be attributed to such imports.[1172] In the light of WTO case law under both Article 3.5 of the

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[1172] During the Uruguay Round, Korea unsuccessfully advocated the use of a "margins analysis" approach in determining causation. Thus, where the margin of price undercutting is significantly larger than the margin of dumping, no anti-dumping duty may be imposed, because that would indicate that factors other than dumping caused the

URAA and section 16.5 of the ADR, investigating authorities should separate, distinguish and assess the nature and effect of injury from other factors. What is required under Article 3.5 is to ensure that injurious effects from other unrelated known factors are not attributed to the product under investigation. In the *US – Hot-rolled Steel* dispute the Appellate Body succinctly described the non-attribution obligation in anti-dumping proceedings as follows:

> In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve *separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports*. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, *in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which,* under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.[1173]

In the *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*[1174] dispute, the WTO Panel considered the non-attribution complaint against the United States International Trade Commission in its safeguard determinations pursuant to Article 4.2 of the Agreement on Safeguards. In this case the Panel opined that the non-attribution requirement in terms of Article 4.2(b)(ii) read with Article 4.2(b)(i) "requires that

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injury. Korea and the Nordic countries also unsuccessfully proposed that where exporters lowered their prices in order to "meet competition" among domestic producers in the importing market, that "follow down" dumping, or "price adaptation" should not be deemed to cause material injury. It was agreed by the Parties that anti-dumping duties may not be imposed for lack of a causal link only where the injury suffered cannot at all be attributed to dumping. See Stewart, Markel and Kerwin "Anti-dumping", in Stewart, ed., *The GATT Uruguay Round: A Negotiating History* 1572–1573.

1173 *US – Hot-rolled Steel*, Appellate Body Report, par. 223 and 226 [emphasis added].

1174 *United States – Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities* WT/DS166/R, July 31, 2000 [hereafter US – Wheat Gluten, Panel Report].

a Member demonstrates that the ... imports, under conditions extant in the market place, in and of themselves, cause injury".[1175] However, on review, the Appellate Body rejected the Panel's view in the *US – Wheat Gluten* dispute that imports "in and of themselves" must cause injury.[1176]

The sources of injury should be distinguished and separated. This distinction and separation assists in determining whether the effects of the imports concerned have a "genuine and substantial" link to the injury.[1177] However, such distinction and separation should not be understood to mean that injury from other sources should be excluded from the determination of injury.[1178] It should be considered and evaluated as "all relevant evidence" under Article 3.5 of the URAA and as "all relevant factors" under section 16.1 of the ADR.

The need to distinguish and between separate injury resulting from alleged imports and injury owing to other factors was emphasised by the Appellate Body in *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia.*[1179] In this case the Appellate Body stated that:

> In a situation where several factors are causing injury "at the same time", a final determination about the injurious effects caused by ... imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated ... The non-attribution language ... requires that the competent authorities assess appropriately the injurious effects of ... imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between ... imports and ... injury.[1180]

1175 *US – Wheat Gluten*, Panel Report, par. 8.138.

1176 *United States – Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities Safeguards* WT/DS166/AB/R, December 22, 2000 [US – Wheat Gluten, Appellate Body Report], par. 70.

1177 See *US – Wheat Gluten*, Appellate Body Report, par. 168.

1178 See *US – Wheat Gluten*, Appellate Body Report, par. 70 & 72.

1179 *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia* WT/DS177/AB/R, WT/DS178/AB/R (1 May 2001) [hereafter United States – Lamb Import, Appellate Body Report], reversing the Panel decision in *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australian* WT/DS177/R,WT/DS178/R (21 December 2000) [hereafter United States – Lamb Safeguard].

1180 *United States – Lamb Safeguard (AB)* Ibid. par. 179.

The Appellate Body's approach confirms the approach of the panel in the *United States – Atlantic Salmon Anti-dumping Duties* dispute.[1181] According to this approach, anti-dumping authorities are not required to "isolate" and "exclude", or to "quantify", the effects of other causes from the effects of imports. However, they must examine other causes to ascertain that injury caused by those other factors is not attributed to dumped imports. There is no adequate evidence from reports indicating that BOTT/ITAC in decision making complies with the non-attribution requirements of the WTO, despite the specific injury attribution provision of section 16.5 of the ADR. It is submitted that the verbatim adoption of a rule does not necessarily mean compliance in practice.

8.3.5 Cumulation

Cumulation refers to the practice of combining exporting countries in order to determine the combined effect of the dumped imports that allegedly caused injury to the domestic industry. According to Horlick, "being injured in many nibbles at once is just as bad as being injured in one large bite".[1182] The URAA legitimises the practice, which developed in the United States[1183] and the European Union,[1184] of the cumulation of imports from different countries to determine injury. According to the provisions of Article 3.3 of the URAA, cumulation is permitted on two conditions: first, where imports are simultaneously subject to investigations, the margins of dumping for each country is more than *de minimis*, and the volume of imports is not negligible;

1181 *United States – Atlantic Salmon Anti-dumping Duties*, BSID41S (27 April 1994), [hereafter United States – Atlantic Salmon, Panel Report], par. 229.

1182 Cited in Jackson and Vermulst *Anti-dumping Law and Practice* 162. Tharakan 1999 *Is Anti-dumping Here?* 182 is critical of cumulation as a biased methodology which "strikingly increases the likelihood of affirmative finding". See also Hansen and Prusa 1996 *Economic Enquiry* 747, who argue that "cumulated imports have a super-addictive effect" on decision-making bodies and that in the United States "cumulated cases are 20–40 percent more likely to result in duties than non-cumulated cases". Tharakan even goes to the extent of calling for the abolition of cumulation in injury determination through the revision of Art. 3.3 of the URAA dealing with cumulation. See Tharakan 1999 *The World Economy* 192.

1183 See Jackson and Vermulst *Anti-dumping Law and Practice* 162. See also Prusa 1998 *The World Economy* 1021 for an illustrative discussion of cumulation in the United States, including the so-called mandatory cumulation.

1184 Bellis *The EEC Anti-dumping System* 93–94.

and second, where a determination is made that the cumulation of imports is appropriate in the light of competition between imported products and like domestic products.

A similar provision is contained in the ADR, and the South African anti-dumping authority has cumulated allegedly dumped imports in a few cases.[1185] The ADR empowers the ITAC to cumulatively assess the effect of the dumped imports only if it finds that cumulation is appropriate in light of (a) competition between imports from different countries; (b) competition between the imported products and the SACU like products; (c) if the imports from the countries are not negligible as contemplated in subsection 3; and (d) the margin of dumping is two per cent or more when expressed as a percentage of the export price. This requirement reflects that contained in the URAA.

Under the ADR's cumulative assessment of injury, (a) imports should simultaneously be subject to anti-dumping investigations; (b) the margin of dumping of imports from each country is more than *de minimis*; *and* (c) it is determined that in the light of competition, cumulative assessment of injury is appropriate.[1186]

Under the URAA, the volume of imports is negligible for the purposes of anti-dumping investigations if it is less than three per cent of imports of the like product into the importing country.[1187] As pointed out earlier in 8.2.7 above, the margin of dumping is *de minimis* if it is less than two per cent of the export

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1185 See for example, *Acetaminophenol – China, Hong Kong, India, Singapore*, BOTT Report No 3366; *Aluminium Hollowware China, Hong Kong, Zimbabwe*, BOTT Report No. 3722; *Calcium Propionate – Canada, Netherlands, US & Calcium Acetate – Netherlands*, BOTT Report No. 3283; *Carbon Black – Egypt, India, Korea*, BOTT Report No 3988; *Hypodermic Needles – Belgium, Germany, Ireland, Spain*, BOTT report No 3949; *Nuts and Bolts – Australia, China, Hong Kong, Malaysia, Saudi Arabia, Spain, Taiwan, Zimbabwe*, BOTT Report No. 3983; *Woodfree Paper – Brazil, Indonesia, Poland, Sweden*, BOTT Report No. 3824.

1186 ADR, s 16.3.

1187 See Jackson and Vermulst *Anti-dumping Law and Practice* 162.

price.[1188] The South African law similarly expresses the margin of dumping as being *de minimis* if less than two per cent of the export price.[1189]

However, it is submitted that the South African law is not clear as to the threshold of negligible imports. Section 16.3(c) of the ADR only provides that imports are negligible as "contemplated in subsection 3". The question is which subsection 3 of which section is referred to? To this extent the law is broad and uncertain.

8.3.6 Zeroing

According to Cho, "zeroing" refers to "an asymmetrical calculative methodology in obtaining final dumping margins which omits any *negative* results occurring when export prices exceed normal values (such as home prices) and instead includes only positive results occurring when home prices exceed export prices".[1190] The WTO Panel in the *United States – Carbon Steel Sunset Review* dispute described zeroing as the methodology that "has the potential of increasing the dumping margin – in relation to a dumping methodology that gives full credit to negative dumping margins – because it does not allow for an offset for negative dumping margins in the calculation of the overall margins".[1191] The URAA does not have a general provision permitting zeroing as dumping methodology, neither did the pre-URAA position, unless applied in sampling cases in the determination of residual anti-dumping duty.[1192] Likewise, the URAA does not have a provision explicitly prohibiting zeroing.[1193] The

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1188 Jackson and Vermulst *Anti-dumping Law and Practice* 162.

1189 ADR s 16.3(d).

1190 For more information see Cho "The WTO Appellate Body Strikes down the US Zeroing Methodology Used in Anti-dumping Investigations" 2006 *ASIL Insights*, http://www.asil/org/insights080311.cfm. Cho has written extensively on zeroing and surveyed WTO cases that dealt with zeroing. See generally Cho "Constitutional Adjudication in the World Trade Organization" 2008 Jean Monnet Working Paper, www.JeanMonnetProgram.org.

1191 *US – Carbon Steel Sunset Review,* Panel Report, par. 7.159.

1192 See URAA, Art 9.4.

1193 It is for this reason there was a dissenting opinion by one member of the Panel in *Final Dumping Determination on Soft Lumber from Canada* WT/DS264/R (31 August 2004), [hereafter US – Soft Lumber from Canada, Panel Report], par. 174–181, strongly arguing for zeroing.

current Article 2.4.2 of the URAA provides that the dumping margins during the investigating phase can be calculated by either comparing the weighted average normal value with a weighted average of prices of all comparable export transactions; or by comparing the normal value with export prices on a transaction to transaction basis; or by comparing a normal value established on a weighted average basis to prices of individual export transactions.

Consider the following transaction-to-transaction methodology demonstrated in the table below: A Zimbabwean producer has three domestic sales and three export sales of corrugated iron sheets. The domestic sales and exports take place at the same time and comprise the same sheets and the same sales conditions. Assume that all the prices of the domestic sales are four South African rand (R4) per corrugated iron sheet, and the export price is different. Transaction-to-transaction methodology operates under the assumption that both exports and imports are comparable and equal in numbers. The export price of the first sale is R5, the export price of the second sale is R4 and the export price of the third sale is R3. When each domestic price is compared with each export sale price the results will be as follows:

Table 8.1: Example of zeroing[1194]

	Domestic price	Export price	Calculation for each transaction
Sale 1	R4	R5	-1
Sale 2	R4	R4	0
Sale 3	R4	R3	+1

Some WTO members, including the European Union and the United States, have used zeroing methodology as a standard practice. Other members like Japan, which unsuccessfully challenged the European Union before the GATT

[1194] Table adapted from: Anderson EU *Dumping Determination and the WTO Law* 6.

Panels,[1195] have never been happy about the use of this methodology. The Appellate Body in the *United States – Softwood Lumber from Canada*[1196] dispute ruled against zeroing because it "inflates the margin of dumping for the product as a whole"[1197] by preventing negative margins from off-setting positive margins.[1198]

In an earlier decision in the EC – *Bed Linen* dispute, the Appellate Body held that the zeroing methodology violates the WTO Member's obligation of "fair comparison between export price and normal value, as required by Articles 2.4 and by 2.4.2" of the URAA.[1199] In this investigation, the Appellate Body specifically upheld the Panel's findings against inter-model zeroing. Inter-model zeroing is a type of zeroing within the weighted average methodology under which the investigating authority is required to compare the weighted average normal value with the average prices of all comparable export transactions.

The recent ruling in 2010 by the Panel in the *United States – Thailand Polyethylene Bags* dispute confirmed the now accepted approach by the Appellate Body against zeroing methodology. The methodology used in the case constituted a *prima facie* nullification or impairment of benefits under Article 3.8 of the DSU.[1200] The Panel considered and explicitly acknowledged the Appellate Body's reasoning in *US – Softwood Lumber from Canada* and the the apparent consistent line of Appellate Body Reports finding that "zeroing" in

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1195 See GATT Panel Report, *European Communities – Anti-dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136 (28 April 1955), unadopted [hereafter EC – Japan Audio Tapes].

1196 *United States – Final Dumping Determination on Softwood Lumber from Canada* WT/DS264/AB/R, 31 August 2004, [hereafter US – Softwood Lumber from Canada, Appellate Body Report].

1197 *US – Soft Lumber from Canada*, Appellate Body Report, par. 98 & 101.

1198 Cho 2006 *ASIL Insights* 1.

1199 *European Communities – Anti-dumping Duties on Imports of Cotton-Type Linen from India*, WT/DS141/AB/R, par. 55 (adopted 12 March 2001), [hereafter EC – Bed Linen from India, Appellate Body Report].

1200 *United States – Anti-dumping Measures on Polyethylene Retail Carrier Bags from Thailand,* WT/DS383 (circulated on 22 January 2010) par. 8.2 [hereafter United States – Thailand Polyethylene Bags, Panel Report]. The dispute concerned the United States' alleged zeroing of negative dumping margins in the United States' determination of certain margins of dumping in its anti-dumping investigation of polyethylene retail carrier bags from Thailand.

the context of the weighted average-to-weighted average methodology in original investigations is inconsistent with Article 2.4.2.[1201]

Indeed, the Appellate Body rulings on zeroing have consistently been accepted by the DSB, with the exception of the WTO panel in *United States – Stainless Steel from Mexico,* which rejected the Appellate Body's rulings on zeroing[1202] and justified its rejection by drawing a distinction between "simple zeroing" and "inter-model zeroing", stating that panels "are not, strictly speaking, bound by previous Appellate Body or panel decisions that have addressed the same issue".

Simple zeroing determines a weighted average margin based on transaction-to-transaction comparisons of export and home prices. It appears that the Panel's rejection of the Appellate Body's ruling was more technical than otherwise sound. The Panel was of the view that the Appellate Body over-reached its powers and mandate.[1203] In rejecting the Panel's position on this issue, the Appellate Body emphasised that the fact of the non-binding nature of its reports per se did not absolve the Panels from observing previous reports. In fact, the Panels are legitimately expected to observe the rulings of the Appellate Body.[1204] In particular, the Appellate Body highlighted the fact that, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members must take into account the legal interpretation of

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1201 See *United States – Thailand Polyethylene Bags*, Panel Report, par. 7.24.

1202 *United States – Final Anti-dumping Measures on Stainless Steel from Mexico, WT/DS344/R* (20 December 2007) par. 7.101–7.115 [hereafter *US – Stainless Steel from Mexico*, Panel Report. The Panel ruling was later appealed by Mexico to the Appellate Body. See United States – *Final Anti-dumping Measures on Stainless Steel from Mexico, Notification of an Appeal by Mexico,* WT/DS344//7, and 4 February 2008. As expected, the Appellate Body overturned the panel's decision; *United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, Appellate Body Report (circulated on 30 Apr. 2008) [hereafter US – Mexico Zeroing, Appellate Body Report].

1203 *See* Alford "Reflections on US – Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body" 2006 *Column J Transnat'l L* 200–202. The Appellate Body's ruling against zeroing also attracted some political dissatisfaction and an unceremonious label of a kangaroo court. See Yerkey *"Sen. Baucus Calls WTO 'Kangaroo Court with Strong 'Bias' Against the United States"* 2002 *Intl'l Trade Rep* (BNA) 1679.

1204 *US – Mexico Zeroing, Appellate Body Report*, par. 158–159.

the covered agreements developed in adopted panel and Appellate Body reports.[1205]

South African anti-dumping law does not contain an explicit provision on zeroing, nor does the ITAC practice apply zeroing methodology. In fact, in its rules negotiation document, circulated in the WTO, South Africa stated that it did not apply zeroing under any of the methodologies. [1206] This is a deviation from its earlier practice where the BOTT used zeroing methodology. The case in point, for example, is the investigation in *Tyre Tubes – Korea*[1207] and *Surgical Sutures – Germany*. The BOTT had in *Surgical Sutures – Germany* applied the zeroing methodology after the weighted average-to-weighted average assessment failed to show any dumping, when the domestic public healthcare sector suffered injury as a result of imports.

In *Tyre Tubes – Korea,* the BOTT explained the zeroing methodology used and the reasons for this. The BOTT, while explicitly acknowledging that it was following the European Community and the United States jurisdictions' practice of zeroing, held that "a margin of dumping was firstly calculated for each product item after which the respective line item dumping margins were weighted by the export volumes to obtain a single dumping margin. All dumping margins resulting in negative figures were 'zeroed'". [1208]

Unless the proposed provision of Article 2.4.3 of the URAA is adopted by the WTO, it is submitted that the ITAC should maintain the status quo against zeroing, as it would seem that the proposed Article 2.4.3(ii) is a political compromise in terms of the uproar against the Appellate Body's jurisprudence

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1205 *US – Mexico Zeroing*, Appellate Body Report, par. 160.

1206 See *WTO (2006) TN/RL/GEN/137* par 1B. In fact, South Africa has co-signed a paper with Taiwan, China, Colombia, Indonesia, Korea, Hong Kong, Switzerland, Chile, India, and Japan arguing for the modification of the URAA to explicitly prohibit zeroing under all circumstances. See *TN/RL/W/214/Rev.3.*

1207 See *Tyre Tubes – Korea, BOTT Report 4031.*

1208 *Tyre Tubes – Korea, BOTT Report 4031,* par.

on zeroing. The Appellate Body's ruling against zeroing brought into collision, on the one hand issues of the sovereignty of Members[1209] to implement international trade remedies, particularly in cases where the rules are broadly couched to allow the exercise of discretion by Members; the practice of deferring to domestic anti-dumping authorities and the obligation of Panels pursuant to Article 19.2 of the URAA not to "add to or diminish the rights and obligations provided in the covered agreements" and, on the other hand, the prerogative of decision making by the Appellate Body with a view to shaping the WTO's jurisprudence and commitment to notions of constitutional adjudication.

The proposed Article 2.4.3(ii) allows zeroing by stating that, in aggregating the results found after the use of the transaction-to-transaction methodology and the weighted average methodology, countries may discard those results where the export price exceeds the normal value. In other words, the negative dumping margins will not be allowed to offset positive dumping margins. Acceptance of the zeroing methodology finds further support in Article 2.4.3(iii) of the URAA, which provides that countries may disregard the results where the export price exceeds the normal value in the anti-dumping review cases conducted pursuant to Articles 9 and 11 of the URAA. Article 2.4.3(i) simply states that for the weighted average to weighted average comparisons in original investigations, zeroing is not permitted. Article 2.4.3(ii) states that for transaction-to-transaction comparisons and weighted average to transaction comparisons in original investigations, zeroing is permitted. On the other hand, Article 2.4.3(iii) states that in reviews, zeroing is permitted for any type of comparison.

When adopted, the proposed Article 2.4.3 will reverse the Appellate Body decisions on zeroing. However, there may be some merit to the application of the zeroing methodology to address the problem of targeted dumping. It is submitted that the South African anti-dumping legislation and regulations may have to be accordingly amended for consistency with the WTO, if Article 2.4.3

1209 See Bekker *The Determination of Dumping* 112.

of the URAA amendment is adopted by the WTO. The South African provision should indicate that zeroing is a methodology that should only be used in exceptional and special circumstances. Be that as it may, it would appear that South Africa is ready to discard zeroing so as to be in line with the current Article 2.4 of the URAA and to maintain some certainty with respect to this methodology.

8.3.7 Sampling

The fact that too many exporters have given a questionnaire response to an anti-dumping investigation may make it difficult, or even impossible, to make an individual margin determination for each cooperating exporter. Article 6.8 of the URAA permits the sampling of exporters in cases where the number of cooperating producers, exporters, importers or types of product is too large to include in the investigation process.[1210] Cooperating sampled producers should generally be awarded their individual dumping margins[1211] and, unless such an individual determination is too burdensome, individual anti-dumping duties so as to avoid inconsistency with Article 9.4 of the URAA.[1212]

In South Africa, sampling, which is largely consistent with the provisions of Article 8.6 of the URAA, is now permitted by the ADR. Indeed, the ITAC has, to date, applied sampling to exporters[1213] and products.[1214] Accordingly, the ITAC is allowed to determine dumping by considering only the largest percentage of exports that can reasonably be investigated; or considering samples that are statistically valid in light of the information available to the ITAC at the time of selecting the exports in question.

1210 See URAA, Art. 8.6.

1211 See Bekker *The Determination of Dumping* 113.

1212 See *US – Hot-rolled* Steel, Appellate Body Report, par. 129 confirming the Panel's finding that a provision in the US Tariff Act of 1930 was not discriminating between cooperating and non-sampled producers cooperating when imposing margins of dumping.

1213 For example, *Ceramic Tiles – Italy*, BOTT Report No. 3811.

1214 For example, *Circuit Breakers – France and Italy*, ITAC Report No. 18; and *Optical Fibre Cable – Korea*, BOTT Report No. 4029.

However, it does not always follow that sampling is required whenever there are many exporters. For example, the ITAC might decide it can only investigate 11 out of 23 exporters that cooperated and are prepared to take part in the investigation. For a further example, if there are 43 exporters and none of them want to take part in the investigation, no sampling is required to be made by the ITAC.

8.4 Domestic Industry

8.4.1 Definition of Domestic Industry

WTO Members can only resort to anti-dumping measures if imports have the effect of causing injury to a "domestic industry". It is thus important that the investigating authority identify the domestic industry allegedly injured or threatened with injury from the dumped imports.

According to Article 4.1 of the URAA, "domestic industry" should be interpreted as referring to:

> the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:
>
> (i)when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;
>
> (ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an

isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

4.2. When the domestic industry has been interpreted as referring to producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such basis, the importing Member may levy the anti-dumping duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

4.3 Where two or more countries have reached under provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1.

Section 7 of the ADR contains, in part, the provision of Article 4.1(i) of the URAA, and states in 7.1 that "other than investigations initiated in terms of section 3.3, any application for anti-dumping action shall be brought by or on behalf of the SACU industry". What does the term "domestic industry" mean? Although the pre-ITAA legislation did not define it, the BTT Guide explained "domestic industry" in the same manner as Article 4.1 of the URAA.

The present South African anti-dumping legislation also does not contain a composite definition of "domestic industry", as under Article 4.1 of the URAA. In terms of Article 4.1(i) of the URAA, the term "domestic producer" may be understood to also refer to "the rest of the producers" when producers are related to the exporters or importers or when domestic producers are themselves importers of the allegedly dumped product. The South African law does, however, contain provisions that give meaning to the term "domestic industry" in different sections of the ADR. For instance, section 7.2 of the ADR provides that where a SACU producer is related to the importer, exporter or foreign producer; or is itself an importer of the products under investigation, the

term "SACU industry" may be interpreted as referring to the rest of the SACU producers, who form a single market pursuant to Article 4.3 of the URAA. The ADR further defines "domestic industry", in line with Article 4.1 of the URAA, as domestic producers in the SACU as a whole of the like products, or those producers whose collective output of the products constitutes a major proportion of the total domestic production of those products.[1215]

In the pre-ITAA period, the phrase "producers in South Africa" was used instead of "South African producers". The significance of the use of the former phrase is the emphasis that not only industries owned or invested in by South African citizens (or juristic persons) were protected by the anti-dumping regime, even foreign wholly-owned companies or subsidiaries not established (incorporated) under South African corporate law were protected. It suffices that such a foreign entity is doing business in the South African stream of commerce.

It is submitted that, in determining who a domestic producer is, the practice in South Africa has been in conformity with WTO rules. Accordingly, the practice is to inquire: (a) whether the producers are in anyway related to or associated with the exporters of the allegedly dumped product; (b) whether the producers are themselves exporters (and/or distributors) of the allegedly dumped product; and (c) with regard to the rules of origin, consider the origin and characteristics of the inputs of the like goods by the industry concerned. South African producers who are either related to importers of allegedly dumped goods or who are themselves importers of the allegedly dumped goods may be excluded from comprising the "domestic industry".

It is not clear from either the South African law or the WTO rules what meaning should be attached to the phrase "the rest of the producers" vis-à-vis the phrase producers "as a whole". The South African position has been that the producers "as a whole" requirement will be satisfied in a situation whereby there is only one local manufacturer of the product concerned, who therefore represents the

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[1215] See ADR, s 1(j).

South African industry.[1216] An important reading of this provision would be that a domestic producer will still be regarded as part of the domestic industry injured by dumping even though the said producers themselves import the product allegedly dumped for the purpose of investigation. This would mean that there may be no contributory harm disqualification for the purpose of the investigations. Nevertheless, the investigating authority may (but need not) disqualify the domestic producer who is an importer of the dumped product from consideration as part of the domestic industry.

8.4.1.1 Industry Market-share Threshold

Some countries use a percentage benchmark to determine whether a producer constitutes a major proportion of the total domestic production and, as a result, can individually and distinctly from the participation of other interested producers be considered an industry qualifying for governmental intervention and protection against dumping. For instance, in Trinidad and Tobago, a producer's production output or market share should at least constitute 20 per cent of the production of the product under consideration.[1217] Venezuela sets its benchmark at 30 per cent, with an allowance to vary it upward to forty per cent or downward to 20 per cent depending on the special circumstances of the domestic industry in question.[1218] The South African legislation does not make provision for such a benchmark.

However, having regard to the total domestic production of a producer to come to the conclusion that such a producer is an interested party who rightfully represent the South African domestic industry has been considered by the BOTT/ITAC. For example, in the *Woven Labels – Zimbabwe* case, one firm with a label manufacturing production output constituting 50 per cent of the total domestic production, was considered to constitute the domestic industry for the purposes of the proceedings.

1216 See *Unmodified Starches*, BOTT Report, par. 24.
1217 Trinidad and Tobago setting the benchmark at 25%.
1218 Regulation of 1993, Art. 47.

Section 15 of the PADR introduces a clear definition of "SACU industry"[1219] with regard to the ITAC's assessment of material injury, a definition which is not materially different from the definition in the ITAA. Section 8.5 of the PADR, read with section 15 of the PADR, attempts to formalise the industry market share threshold approach in both the industry standing determination for the filing of an anti-dumping action, and in the determination of material injury.[1220]

It is submitted that section 8.5 of the PADR is supported by the complementary reading with Article 5.4 of the URAA. The relevant part of Article 5.4 of the URAA provides that:

> The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for

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1219 In terms of s 51.2 of the PADR, with regard to the Commission's assessment of material injury, the "SACU industry" means –

> (a) the domestic producers in the SACU as a whole of the like product;
> (b) the domestic producers in the SACU whose collective output of the like product constitutes more than 50 per cent of the total domestic production of that product; or
> (c) provided the Commission accepts a detailed explanation from the applicant why examining domestic producers whose collective output of the like product constitutes 50 per cent or less of the total domestic production of those products is appropriate, the domestic producers in the SACU whose collective output of the like product constitutes a major proportion of the total domestic production of that product.

1220 The relevant part of section 8.5 of the PADR provides that:

> An application shall be regarded as brought "by or on behalf of the SACU industry" if –
> (a) at least 25 per cent of the SACU producers by domestic production volume support the application; and
> (b) of those producers that express an opinion on the application, at least 50 per cent by domestic production volume support such application.
> 6. In the case of industries involving an exceptionally large number of producers, the Commission may determine support and opposition by reference to the largest number of producers that can be reasonably included in the investigation or by using statistically valid sampling techniques based on the information available to the Commission at the time of its finding.

less than 25 per cent of total production of the like product produced by the domestic industry.

It would seem that the proposed amendment to Article 4.1 of the URAA attempts to fully integrate the complementary construction of Articles 4.1 and 5.4 of the URAA, whilst at the same time retaining the current provisions of both Articles.[1221] It is submitted that sections 8.5 and 15.2 of the PADR are an attempt to reflect the URAA provisions. The main problem with section 8.5 is that it purports to further define and clarify "domestic industry" in Article 4.1 of the URAA by compartmentalising the determination of domestic industry in anti-dumping applications into 25+ per cent and 50+ per cent thresholds. The Panel in the *Argentina – Poultry* dispute succinctly stated that Article 4.1 of the URAA "does not require Members to define the 'domestic industry' in terms of domestic producers representing the majority, or 50+ percent, of the total production".[1222] The Panel did not rule against the inclusion of thresholds in national instruments purporting to give effect to Article 4.1 of the URAA. It is submitted that such provisions, which are common cause globally, should not, prima facie, be considered to be inconsistent with the WTO.

It is further submitted that the 50+ per cent threshold in injury determination contained in the provisions of section 15.2 of the PADR poses no problem of inconsistency with the URAA. Section 15.2 is couched in flexible terms and makes provision for the ITAC to exercise discretionary powers. The ITAC may, however, still be seized with the issue even though the collective output of the domestic producers constitutes less than 50 per cent of the total domestic production. The applicant just has to provide an acceptable "detailed explanation" and justification why the matter should be heard by the ITAC despite not meeting the 50+ per cent requirement. In this regard, the South

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1221 On the other hand, the consolidated proposal of Art. 4.1 of the DURAA calls for a threshold of domestic producers as a whole of the like products of a high proportion possible, but not less than those whose collective output of the products constitutes more than 50% of the total domestic production of the products in question. The consolidated proposal to Art. 5.4 calls for the scrapping of 25+ percentage threshold in injury determination.

1222 *Argentina – Poultry*, Panel Report, par. 7.341.

African law, though not entirely in line with the URAA and the DSU rulings, is in practice not incompatible with the URAA.

8.4.1.2 Outward Processing and Assembling Industries

By reference to "producers in South Africa", it is not clear which interested parties are included. Does the phrase "producers in South Africa" include both the interested parties based in South Africa and those whose manufacturing processes take place outside South Africa in a country that is not a member of the SACU, but who have an interest in the anti-dumping investigations undertaken? The latter refers to an industry engaged in an outward-processing or assembly of its goods. McGovern is of the view that, in principle, there seems to be no reason why outward processing industries may not be considered with manufacturers as domestic producers for the purposes of industry determination.[1223]

8.4.2 Exclusions to the Domestic Industry Rule

8.4.2.1 Producers of Raw Materials as Part of the Domestic Industry

Does the term "domestic industry" refer to both the raw material producer and the finished product producer, as they may both be in the same line of production, or does it refer only to the latter? In the United States, the Trade and Tariff Act of 1984 introduced the raw material special provision into the United States.[1224] In 1986, the GATT Panel had an opportunity to determine

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[1223] See McGovern, *International Trade Regulation* 375.

[1224] The law defined domestic industry as follows:

> The term "industry" means the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product: except that in the case of wine and grape products subject to investigation under this title, the term also means domestic producers of the principal *raw agricultural product* ... which is included in the like domestic product, if those producers allege material injury, or threat of material injury, as a result of imports of such wine and grape products [emphasis added].

whether the aforementioned United States law and practice of considering producers and growers of raw products as part of the industry producing the processed agricultural product to constitute "domestic industry" was consistent with Article 6 of the then GATT subsidies code. The petition was brought by the European Economic Community (EEC) in *United States – Definition of Industry Concerning Wine and Grape Products* (United States Wine and Grapes Report).[1225] The EEC argued that the "product 'grape' and the product 'wine' could under no circumstances be considered as 'like' products within the meaning of the Code".[1226] In a counter-argument the United States stated that its law should not be construed as "providing that the wine-grape growers were by themselves the industry in a case involving wine, but rather stipulated that such growers were part of the US wine industry, along with wineries (some of which also grow grapes)".[1227]

Having considered the arguments of the Parties and the USITC previous determination before the Act was amended that it was inappropriate to include grape growers within the scope of the domestic wine industry, the Panel concluded that Article 6.5 of the Code was precise in its definition of "domestic industry" and there could be no extensive or broad interpretation of this definition.[1228] According to the Panel, by grouping wine-grape growers as one industry with the winery, the United States had not acted in conformity with its obligations under the Code.[1229] The United States therefore had to change its definition of "domestic industry" to be GATT compliant and consistent with its obligations under the GATT.[1230]

See s 626(b)(2) of the Trade and Tariff Act of 1984.

1225 *United States – Definition of Industry Concerning Wine and Grape Products*, SCM/71 – 39S/436 (adopted on 28 April 1992) [hereafter US – Wine and Grape Products, Panel Report].

1226 US – *Wine and Grapes, Panel Report*, par. 3.10.

1227 *US – Wine and Grapes*, Panel Report, par .3.12.

1228 *US – Wine and Grapes*, Panel Report, par. 4.6.

1229 Art. 19(5)(a).

1230 The United States legislation now maintains a conditional special provision for producers and growers of raw agricultural products. In terms of Art. 1677(4)(E) of the Tariff Act, producers and growers of raw agricultural products may be considered part of the industry producing the processed agricultural product for the purposes of determining who constitutes "domestic industry". This special condition will remain until its application

In the light of the GATT panels' rulings on the issue, and bearing in mind the unofficially declared system of precedent between GATT panels and the WTO panels, it is submitted that it is unlikely that the ITAC would interpret "domestic industry" to include producers of raw materials. In fact, the definition of SACU industry in section 7 of the ADR does not permit, expressly and impliedly, the reading into the definition of domestic industry the inclusion of producers of raw materials.

8.4.2.2 Related Parties

The determination of the presence of related parties is an important aspect of anti-dumping proceedings in South Africa. Thus, for example, section 6A of the new exporter's questionnaire clearly requires new exporters to name and provide addresses of the related firms that provide inputs for their processing/manufacturing and to give details of these inputs. When domestic producers are related to the exporters or importers, or are themselves the importers of a dumped foreign product, the term "domestic producers" will be taken to relate to the "rest of the producers". The "rest of the producers" must be construed as referring to the entire group of producers in South Africa (and/or in SACU) of the good produced in the same line of production.[1231]

It is submitted that the position in South Africa is that related entities may be excluded from the consideration of domestic industry. One of the reasons for

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is considered by the United States Trade Representative (USTR) as inconsistent with the United States' international obligations. The relevant provision states that the raw material industry will only be regarded as part of the industry if:

> (I) the processed agricultural product is produced from the raw agricultural product through a single continuous line of production; and
>
> (II) there is a substantial coincidence of economic interest between the producers or growers of the raw agricultural product and processors of the processed agricultural product based upon relevant economic factors, which may, in the discretion of the Commission, include price, added market value, or other economic interrelationships (regardless of whether such coincidence of economic interest is based upon any legal relationship.

[1231] See ADR s 7.2.

such an exclusion is that they may not have been injured or threatened to be injured by the alleged dumping because the relationship might have shielded them from competition from the dumped imports.

Producers are related and/or associated when one directly or indirectly controls the other(s); when all of them are separately directly or indirectly controlled by a third party; or all of them jointly directly or indirectly control a third person who, compared with non-related producers, behaves differently. An example of a situation where parties are related or associated directly or indirectly with one another is where a holding and subsidiary corporate structure exists. For instance, Johnson and Johnson Professional Products (Pty) Ltd (Johnson and Johnson) is a subsidiary of Ethicon (Pty) Ltd, a South African company that is a wholly-owned subsidiary of Johnson and Johnson Corporation of the United States (Johnson Corporation). As a result, Johnson Corporation directly controls Ethicon Ltd and indirectly Johnson and Johnson. Having found the existence of dumping and injury and the causal connection, the next step is for the ITAC to impose anti-dumping duties, whether provisional or definitive. However, sometimes the interest of the domestic industry may direct otherwise.

8.5 Summary

This chapter provided a critical analysis of the determination of "injury" and "domestic industry" affected by dumped products under the South African anti-dumping regime. In doing so, several flaws have been revealed. These include, among others, the fact that there is no clear provision or practice on zeroing and that the position on negligible imports is uncertain. Be that as it may, the study also revealed that South Africa is moving rapidly in the direction of making its anti-dumping regime WTO-compatible with respect to the determination of "injury" and "domestic industry". In particular, the PADR attempts to incorporate fully the provisions of the URAA by introducing, among other things, the threshold percentage in injury determination.

The next chapter summarises the research and presents the conclusions and recommendations of the study undertaken in this thesis.

CHAPTER NINE: SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

9.1 Introduction

This chapter provides a summary of this study and presents the major conclusions and, consequently, the recommendations and proposals for reform. This thesis undertook a juridical analysis of the South African anti-dumping law and practice. Central to the analysis was the question of whether South African anti-dumping law and practice comply with GATT/WTO rules. As South Africa is one of the original signatory countries of the GATT/WTO, it is therefore expected that the country's trade regime would be consistent with the WTO regulatory framework. Accordingly, in order to implement the WTO anti-dumping rules, South Africa has enacted the ITAA and the ADR.

The main hypothesis of this thesis was that the South African anti-dumping law and practice is generally consistent with the GATT/WTO and only minor, sometimes inconsequential, changes may need to be effected in the provisions of the ITAA and/or the ADR. It was submitted that the GATT/WTO anti-dumping regime does not require verbatim compliance with set anti-dumping rules; moreover, that the treatment of the applicable anti-dumping regulations as separate from the ITAA is legally incorrect and that the ADR largely renders South African anti-dumping law WTO compliant.

9.2 Summary of the Main Arguments, Findings and Submissions

This study began by stating that anti-dumping measures are increasingly becoming the preferred tools for combating injurious imports. Moreover, it gave an account of how the academic literature has explained the phenomenon of dumping and provides arguments for and against anti-dumping measures.

It has also been indicated that the URAA, officially known as the Agreement on Implementation of Article VI of the GATT 1994, allows WTO Members to

impose an anti-dumping duty to offset the dumping of imports by foreign exporters, where such practices are causing, or threatening to cause, material injury to the domestic industry producing like goods.

It has been stated that anti-dumping law began to be seriously regulated under international law after the adoption of the GATT 1947, which incorporated the basic conditions for adopting anti-dumping measures.

The study has provided a chronological account of the WTO anti-dumping regime, and highlighted the fact that the URAA was designed to improve on the pre-1994 anti-dumping codes. This has been achieved by the formulation of clearer and more detailed rules on anti-dumping. For instance, the URAA outlines the methodology for determining when a product is dumped; the criteria to be taken into account in a determination that dumped imports are causing injury to a domestic industry; the procedures to be followed in initiating and conducting anti-dumping investigations; and the implementation and duration of anti-dumping measures.

The study has also demonstrated the role played by the DSB relating to the anti-dumping actions taken by national authorities that have been provided with the right to apply anti-dumping measures as long as they are WTO compliant.

It has also been shown that the URAA establishes clear-cut procedures on how anti-dumping cases are to be initiated and how such investigations are to be conducted. Accordingly, the URAA sets out conditions for ensuring that all interested parties are given an opportunity to present evidence. The URAA also provides for situations when anti-dumping investigations may be terminated and/or withdrawn, and when definitive determinations may be reviewed.

It is, in this study, argued that the URAA and other agreements do not automatically become applicable in South Africa. Although South African courts have confirmed that WTO rules and agreements apply de facto in South Africa,

it has been submitted that these rules and agreements are to be observed in order for the country to observe international best practices. Be that as it may, it is indicated that the ITAC is committed to acting in accordance with the URAA within the framework of South African law.

It has also been shown that the current anti-dumping law in South Africa is one of the oldest in the world, despite the fact that this area of the law has received little academic research interest over the years. Our account of the South African anti-dumping law regime has indicated that its evolution is largely the result of South Africa trying to honour its obligations as a WTO Member. In keeping with the WTO anti-dumping rules, the South African anti-dumping regime has been revised several times, and continues to be so revised.

Furthermore, it has been highlighted that important legal and policy questions about the conformity of the South African law and practice with WTO obligations have been raised, particularly regarding the application and interpretation of the South African anti-dumping law and regulations by the ITAC. At least three of the definitive anti-dumping rulings rendered by the ITAC were notified to the WTO for possible challenge in the DSB for allegedly not being consistent with the URAA.

It has been argued that erroneous interpretations and application of the South African anti-dumping law and of the URAA has led to some commentators maintaining that the South African law is not consistent with the URAA.

It has further been argued that the pre-ITAA anti-dumping law and practice were generally compliant with WTO rules. However, we have also argued that consistency with the requirements of the WTO is not achieved and measured through the approach of verbatim enactment or restatement of the URAA and that functionally equivalent anti-dumping law and practice will suffice when discharging South Africa's obligations under the WTO.

The findings in this study have been that the South African anti-dumping law and practice are largely WTO compliant or to some extent reflect the URAA provisions. Several of the commentators arguing that South African anti-dumping law is WTO-inconsistent are largely guilty of not observing the elementary principle that the meaning of a statute should preferably be sought in the language in which the statute is framed, and that the function of judicial tribunals is to enforce it according to its plain meaning and terms. It is suggested that the legalistic approach is far too narrow; perhaps the purposive approach would be more relevant when determining the correctness of the interpretation and the application of the anti-dumping regime by the ITAC. Although the ITAA provision on anti-dumping is not self-contained compared with the URAA and with other jurisdictions like the United States legislation,[1232] this deficiency has been addressed by the ITAC's anti-dumping regulations, which are couched in plain language. It is submitted that South Africa does not have to make major changes in order to conform to the GATT and the URAA, although a few critical areas need urgent attention.

This thesis has identified several positives in the South African anti-dumping law and practice, including the broad definition of the concept of "like product", which allows for the determination of what constitutes a like product not only to be centred on the physical characteristics of the goods in terms of likeness and a high degree of close resemblance, but also on whether the products are directly interchangeable, having regard to various indicia including end-use, price, manufacturing process and raw materials.

The thesis has also shown some deficiencies in the South African anti-dumping law and practice. Notable among these is the capacity of the ITAC to meet some of the deadlines set by the URAA and by the South African law, such as the conclusion of anti-dumping investigations within a period of twelve months

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[1232] Tariff Act of 1930, §§1673–1677 (19 U.S.C 11673 – 1677)

from the day of commencement, unless special circumstances exist to warrant a deviation from the twelve-month period.

9.3 Recommendations

The analysis in this thesis has revealed few areas of concern and deficiency in respect to the South African anti-dumping law and practice. In the light of findings and submissions made in this study, and in the light of national and international developments in the discipline of anti-dumping law and practice, the following recommendations are made for the reform of the South African anti-dumping instruments:

9.3.1 Broaden the Meaning of "Interested Parties"

It has been submitted in this study that the ambit of persons who are interested parties in anti-dumping actions needs to be broadened to include labour unions and trade federations. Dumping practices, anti-dumping investigations and determinations may have some serious ramifications for the labour market. Pursuant to this submission, which this study agrees with, the following definition of "interested parties" in the definition section of both the ADR and the ITAA is recommended:

> **"Interested parties"** may include known –
>
> .....
>
> (g) registered trade unions and trade union federations with members in the SACU industry, for the purposes of initiation of anti-dumping investigations and provided that such an initiation is in the public interest.
>
> (h) The list of "interested parties" is not exhaustive, and does not preclude the Commission from accepting other parties as interested parties at the behest of the Commission in an anti-dumping investigation.

The latter part of the above recommended provision is important to avoid any claims of automatic entitlement by trade union federations to be involved in every step of the investigation process. The danger here is that such an involvement by trade unions and trade union federations would deeply politicise South African anti-dumping investigations and related processes. Politicisation of the process and the combative tendencies of the South African trade union movements would not augur well for the outlook of South African trade remedies, and would act as a disincentive for direct foreign investment in the country.

9.3.2 Introduce an Explicit and Mandatory "Public Interests" Provision

It is recommended that the ADR provision allowing the Minister of Trade and Industry to give a directive for the consideration of public interests in the determination of anti-dumping duties be amended to entrust the power of considering public interests directly to the ITAC and to indicate the circumstances under which "public interests" may be considered to exist. This would help discard the political trappings of the involvement of the Minister of Trade and Industry and avoid the uncertainty that can result from vesting such an important decision-making power in political office-bearers.

The following "public interests" provision is proposed:

> X(1) A determination as to whether the SACU interest calls for intervention by third parties acting in the public interest shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry, users and consumers; and a determination pursuant to this section shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade-distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as may be determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the SACU and national interest to apply such measures.

X(2) In determining whether an anti-dumping investigation is in the public interest, ITAC may consider the following factors:

(a) whether goods of the same description are readily available from countries or exporters to which the order or finding does not apply;
(b) whether the imposition of the full duties has had or is likely to have the following effects:
(i) substantially lessen competition in the domestic market in respect of like goods;
(ii) cause significant damage to producers in South Africa that use the goods as inputs in the production of other goods and in the provision of services;
(iii) significantly impair competitiveness by limiting access to goods that are used as inputs in the production of other goods and in the provision of services, or technology,
(iv) significantly restrict the choice or availability of goods at competitive prices for consumers or otherwise cause them significant harm; or
X(3) whether a reduction or elimination of the anti-dumping or countervailing duty is likely to cause significant damage to domestic producers of inputs, including primary commodities, used in the domestic production of like goods; or
X(4) any other factors that are relevant in the circumstances".

9.3.3 Allow Anti-dumping Initiation by Labour Movements

Pursuant to our submission in 6.2.1.1, regarding broadening the ambit of interested persons for the purposes of initiation of anti-dumping actions to include trade unions and trade union federations, the following is the recommended section 31*bis* of the ADR:

A registered trade union or trade union federation with members in the SACU industry may, if it is in the public interest, request the initiation by the ITAC of anti-dumping investigation, notwithstanding the provision of section 31.

9.3.4 Setting Procedural Guidelines for Initiation by the ITAC

There is a need for clear procedural guidelines for the initiation of anti-dumping investigations by the ITAC. It is recommended that section 3 of the ADR be amended to provide, in detail and with clarity, as to when and under what circumstances the ITAC may initiate investigations and reviews *sua sponte*.

9.3.5 Increase Transparency

South African constitutional and administrative law requires transparency of decisions as an essential element to ensuring just and equitable decision making. Therefore, anti-dumping proceedings and related processes should be underscored by transparency, in particular on issues related to access to relevant information and the publication of a statement of reasons at the initiation, preliminary and final determination stages, including undertakings accepted by the investigating authorities.

The ITAC website publishes policies, legislation, procedures, regulations and other relevant documents on trade remedies including anti-dumping measures. Moreover, the ITAC publishes its preliminary and final determinations on anti-dumping and issues up-to-date notifications. However, the major concern is the general template-like and brief reports the ITAC publishes, which sometimes do not divulge much about the relevant substantive legal and factual issues. Accordingly, the manner in which the reports are presented affects transparency and has the effect of denying access by interested parties and academic researchers on anti-dumping law and practice.

The presentation of the ITAC reports must be improved. Currently, the reliance on public files as a source of information does little to enhance the transparency of the ITAC. The main concern with the public file is that it is only available to interested parties for inspection at the ITAC's offices by appointment.

9.3.6 Foster Strict Compliance with Timeframes

WTO members are generally allowed discretion in setting timeframes for anti-dumping processes, provided such time limits are consistent with WTO rules. Under special circumstances, the URAA allows national authorities to exceed the period of 12 months in finalising anti-dumping investigations. However, long investigation timeframes have been a course of concern in South Africa. For example, by 2008 the ITAC had only managed to complete one investigation

within this prescribed time. This clearly calls for a revision of investigation timeframes. Be that as it may, it should be kept in mind that unreasonably short timeframes may put a severe strain on anti-dumping investigations and can also compromise the adequacy and integrity of the ITAC's decision making.

Nevertheless, it is recommended that the ADR should be amended to explicitly oblige the ITAC to avoid delays and to adhere strictly to set timeframes as far as is possible and reasonable. It is also proposed that the impact of other factors needs to be considered, including the availability of non-confidential summaries of information on the public files for early inspection by interested parties.

9.3.7 Improve the ITAC's Institutional and Functional Capacity

The inability of the ITAC to meet the deadlines set by the URAA is very concerning. As stated earlier, the URAA provides that anti-dumping cases should be finalised within 12 months of initiation and that this may only be exceeded in special circumstances. However, the ITAC has managed to complete only one investigation within this prescribed time between 2004 and 2009. This shows challenges in the capacity of the ITAC to administer trade remedies, and the responsiveness of the ITAC to legal prescripts. It is therefore recommended that the institutional and functional capacity of the ITAC be improved through skills and capacity development programmes.

9.3.8 Introduce Entering, Search and Seizure Powers Provision

Section 18.3 of the ADR should be amended to allow the ITAC to conduct search and seizure operations pursuant to the provisions of the CPA and/or the Customs and Excise Act to enable information verification in cases of uncooperative parties. This can be done through the insertion of a section 18.3*bis* provision into the ADR or incorporate it by reference to chapter 2 of the

CPA, which contains provisions regulating the search, seizure and disposal of articles (and evidence).

9.3.9 Introduce a Clear Verification Visits Confidentiality Provision

The following provision on verification visits and the confidentiality thereof is recommended either as section 8.2*bis* of the ITAA or section 18.2*bis* of the ADR:

> 1. Investigators, commissioners, and any persons holding office under, or employed by, the Commission, may not directly or indirectly make a record of any protected information; nor disclose to any other person any protected information, unless so authorised in the course of performing his or her duties, or in compliance with any other mandatory law.
>
> 2. Any investigator, commissioner or any person holding office under, or employed by, the Commission, who discloses, publishes or communicates, except to some person to whom he or she is authorized to disclose, any fact or document which comes to his or her knowledge, or into his or her possession during the course of his or her duties shall be guilty of a punishable offence.

9.3.10 "Producer Knowledge" Provision

Section 10 of the ADR may be amended to include a clear provision on "transhipment" and on "producer knowledge." The "producer knowledge provision" will help avoid the abuse of the application of market condition treatment by corporations in NMEs. It will also help combat the circumvention practices of importers.

9.3.11 Introduce Clear Provisions on Zeroing

The current South African position on the zeroing methodology is unclear, as South African anti-dumping law does not contain an explicit provision on zeroing, and the country has committed itself, before the WTO, to not applying

zeroing under any of the methodologies it uses.[1233] However, the earlier practice in which zeroing was used, such as in the *Tyre Tubes – Korea* and *Surgical Sutures from Germany* investigations, calls for a clear position on zeroing methodology.

In the light of the proposed Article 2.4.3(ii) of the URAA, which allows zeroing, it is recommended that the ADR be amended to include an explicit provision on zeroing indicating that zeroing methodology should only be used in exceptional circumstances.

9.3.12 Establish Clear Refund Procedures

It is submitted that the ADR be amended to include a clear provision on refund procedures. In particular, section 65*bis* should be inserted setting out appropriate and reasonable timeframes for refund applications and refunds by the SARS. Furthermore, section 65*bis* should contain all other material requirements that are part of the refund process, thereby providing some level of certainty on how parties will get their refunds.

It is proposed that the ITAC should consider the Pakistani approach in establishing the South African refund procedure to inform the provisions of section 65*bis*, as the Pakistani refund procedures are more accessible, clearer and simply couched. These procedures are contained in section 55(2) of the Pakistani Anti-dumping Duty Ordinance of 2000,[1234] amplified through the refund secular of 2006,[1235] which set out clear procedures for anti-dumping duty refunds. To begin with, the applications for refunds should be made to the Secretary of the National Tariff Commission within fifteen days of publication of the notice of final determination, supported by the original documents confirming that the Applicant has paid the anti-dumping duty at a provisional

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1233 See *WTO (2006) TN/RL/GEN/137* par. 1B.
1234 Anti-dumping Duties Ordinance 2000, which became effective on 22 December 2000.
1235 Circular No. 001/2006/NTC/Refunds (21 June 2006).

anti-dumping duty rate.[1236] Once the claims are verified the duty paid will be transferred into a designated account of the Commission. The Pakistani Anti-dumping Directorate will then issue a sanction letter to the appropriate accounts division for the payment of the refund. The latter will eventually issue cheque/cheques to the parties in the amount sanctioned by the Anti-dumping Directorate.

9.4 Summary

This thesis has presented a comprehensive comparative and critical analysis of South African anti-dumping law and practice. In particular, the thesis considered whether the South African anti-dumping regime is WTO compliant or not. Through thoughtful analysis of one of the world's trade remedies, which considered relevant views of both proponents and opponents of anti-dumping as a trade remedy, this thesis provides a foundation for an improved South African anti-dumping regime by discussing critical areas of concern with particular reference to the URAA and the DURAA, and suggests possible remedial measures and best practice for the imposition and implementation of anti-dumping measures.

The strength of this thesis lies with its possible positive and meaningful contribution to our existing store of knowledge on anti-dumping, and in being of practical value to law students, academics, judges and, in particular, architects of trade policy in the South African Department of Trade and Industry. The knowledge contributed by this thesis may assist the policy and legislative interventions in the anti-dumping regime immensely. Most importantly, it is hoped that this thesis will bring about a shift in the country's approach to implementing its obligations under the WTO, and in acknowledging that the functional equivalence approach is sufficient in ensuring that the South African anti-dumping regime is WTO compliant. Finally, it is hoped that the

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[1236] The relevant supporting documents may include the importer's copy of the Customs Declaration, cash receipt, invoice, letter of credit; or any other supporting document.

recommendations made in this thesis, which are in the form of suggested legislative interventions required to make certain areas of South African anti-dumping law and practice fully WTO compliant, will influence the introduction of a suitably crafted anti-dumping legislation in South Africa.

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