

A comparative analysis on the requirements to impose anti-dumping duties on goods imported into the European Union and South Africa

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ABSTRACT

International trade plays a vital role in the functioning of our world today and is important for a country's economic development. However, without clear rules and regulations, countries may engage in unfair trading practices which can be detrimental to other countries' economic development. To ensure fair trading practices, the World Trade Organization (hereafter WTO) sets out multilateral trade agreements that regulate international trade. When dumping occurs, WTO members have an obligation to follow the provisions laid down by the *Agreement on Implementation of Article VI of The General Agreement on Tariffs and Trade* (1994), known as the Anti-Dumping Agreement (hereafter the *ADA*). South Africa (hereafter SA) and the European Union (hereafter EU), who are both WTO members, have an obligation to follow the provisions of the *ADA*.

For a country to impose anti-dumping duties, certain requirements first have to be met in accordance with the *ADA* as well as that country's own anti-dumping national legislation. SA and the EU both follow the *ADA* and their own national legislation regarding the imposition of anti-dumping duties. The EU's legislation contains four requirements to consider before imposing anti-dumping duties during the anti-dumping investigation where SA's legislation contains three requirements. The steps SA's legislation follows during the anti-dumping investigation are mostly aligned with the EU's legislation. However, a noticeable difference is the inactiveness of the Tariff Board in SA which is supposed to assist during the investigation process. The EU has the Union Trade Defence Instrument Committee to assist with the investigation process where, in SA, the Tariff Board is supposed to fulfil this role. Overall, there are differences and similarities between the EU's legislation and SA's legislation when it comes to the requirements to impose anti-dumping duties. This study compares the requirements to impose anti-dumping duties on goods imported into the EU and SA by analysing how SA's legislation aligns with the EU's legislation.

Keywords:

Dumping; anti-dumping; International Trade Administration Commission; European Commission

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LIST OF ABBREVIATIONS

ADA	Agreement on Implementation of Article VI of The General Agreement on Tariffs and Trade (1994)
ADC	Anti-dumping Code
AJDS	African Journal of Development Studies
AJIL Unbound	American Journal of International Law
AU	African Union
COVID-19	Coronavirus disease 2019
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (1994)
DTIC	Department of Trade, Industry and Competition
EC	European Commission
ECIPE	European Centre for International Political Economy
EEC	European Economic Community
EFTA	European Free Trade Association States
EPA	Economic Partnership Agreement
EU	European Union
GATT 1947	General Agreement on Tariffs and Trade (1947)
GATT 1994	General Agreement on Tariffs and Trade (1994)
HFCS	High-Fructose Corn Syrup
ICJ	International Court of Justice
ITA	International Trade Administration
ITAC	South Africa's International Trade Administration Commission
Minister of Trade	South Africa's Minister of Trade, Industry and Competition

OHCHR	Office of the High Commissioner for Human Rights
OJEU	Official Journal of the European Union
SA	South Africa
SACU	Southern African Customs Union
SALJ	South African Law Journal
SAPA	The South African Poultry Association
SARS	South African Revenue Service
SPS	Sanitary and phytosanitary measures
TBS	Technical barriers to trade
TDI	Union Trade Defence Instrument
TRIMS	Trade-related investment measures
TRIPS	Trade-related aspects of intellectual property rights
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
World Bank	International Bank for Reconstruction and Development
WHO	World Health Organization
WTO	World Trade Organization
WTO Agreement	Agreement Establishing the WTO (1994)
ZAR	South African Rand

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CHAPTER 1 INTRODUCTION

1.1 Background

On 10 November 2021, the director-general of the WTO, Ngozi Okonjo-Iweala, stated that “trade is a significant driver for economic growth and poverty reduction and ultimately for development”.¹ In order to strengthen economic development, international trade should operate in terms of multilateral trade agreements.²

The WTO regulates international trade amongst countries through multilateral trade agreements, and it has mechanisms to settle disputes amongst WTO member states.³ There are currently 164 members of the WTO that represent 98 per cent of global trade.⁴ Over the years, international trade has increased, considering that most countries emphasise trade liberalisation to promote economic development.⁵ However, barriers to trade, such as import tariffs, can restrict free trade.⁶ The multilateral trading system underpinned by the WTO aims to reduce barriers to trade.⁷

If international trade causes material injury, or threat of material injury, to a country’s own domestic industry, a country may use trade remedies to protect its economy.⁸ Trade remedies are an important tool available to WTO members and are set out in WTO legal instruments that regulate international trade between member countries.⁹ Trade remedies are trade defence measures that a country may use against imports stemming from unfair practices such as dumping, subsidies or sudden surges in the importation of foreign goods.¹⁰ A trade remedy can take the form of subsidies and countervailing

¹ WTO 2022 https://www.wto.org/english/news_e/news21_e/devel_10nov21_e.htm.

² Wolff 2018 https://www.wto.org/english/news_e/news18_e/ddgra_09feb18_e.htm.

³ WTO 2022 https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.

⁴ The WTO is a member-driven organisation that governs through its members’ decisions based on their common agreements. See Sucker and Vickers “WTO decision making under pressure: African perspectives” 231; Lester, Mercurio and Davies *World Trade Law* 53; WTO 2022 https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm.

⁵ Lester, Mercurio and Davies *World Trade Law* 6 and 13.

⁶ A tariff is a tax on an imported product. See Gruni *The EU, World Trade Law and the Right to Food* 2; Lester, Mercurio and Davies *World Trade Law* 10.

⁷ Gruni *The EU, World Trade Law and the Right to Food* 2; Lester, Mercurio and Davies *World Trade Law* 10.

⁸ WTO 2013 https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_adp_e.htm.

⁹ WTO 2021 https://www.wto.org/english/news_e/spno_e/spno13_e.htm.

¹⁰ WTO 2013 https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_adp_e.htm.

measures, anti-dumping duties and safeguards.¹¹ The focus of this study is specifically on anti-dumping; subsequently subsidies and countervailing measures and safeguards fall outside the scope of this study.¹²

The aim of the WTO is to strengthen international trade between countries by providing a clear legal framework while promoting fair and open trade.¹³ However, when a product is imported into a country at a price that is lower than its normal value in the country from which it is exported, to the extent that it causes material injury to a specific domestic industry of the importing member state, that member state can implement anti-dumping duties to protect its domestic industry.¹⁴ Article VI of the *General Agreement on Tariffs and Trade* (1994) (hereafter the *GATT*) contains provisions for anti-dumping. The *ADA* clarifies and expands on Article VI of the *GATT*.

If a member country has a complaint regarding anti-dumping duties imposed in respect of certain of its exported goods by another WTO member, the aggrieved country can refer the matter to the WTO for adjudication in terms of the Dispute Settlement Mechanism (hereafter the DSM).¹⁵ The *Understanding on Rules and Procedures Governing the Settlement of Disputes* (1994) (hereafter the *DSU*) sets out the WTO procedure that member countries should follow to initiate complaints.¹⁶ The process starts once a member requests consultation with another member to discuss the complaint with the view to potentially negotiate a resolution to the matter.¹⁷ If the consultation proves unsuccessful, the members can refer the matter to the Dispute Settlement Body (hereafter the DSB).¹⁸ The DSB will then establish a panel with expert individuals who will

¹¹ Lester, Mercurio and Davies *World Trade Law* 449, 513 and 579.

¹² Dumping is discussed in chapter 4 of this study.

¹³ Articles 1 and 2 of the *Marrakesh Declaration* (1994).

¹⁴ Lester, Mercurio and Davies *World Trade Law* 513.

¹⁵ Kugler "WTO dispute settlement and the participation of African countries in international trade disputes" 115-117.

¹⁶ Disputes are resolved between member countries as complainant and respondent. Interested third parties can participate in disputes as third parties who have substantial interest in the dispute. See articles 3(7) and 10 of the *DSU*; Kugler "WTO dispute settlement and the participation of African countries in international trade disputes" 119.

¹⁷ Lester, Mercurio and Davies *World Trade Law* 154.

¹⁸ Lester, Mercurio and Davies *World Trade Law* 155.

assess the matter.¹⁹ The panel will issue a report which can be appealed by either of the parties or adopted by the DSB.²⁰

According to the former WTO director-general Roberto Azevêdo,²¹ “the rule of law and the dispute settlement system are at the heart of everything we do here at the WTO.” From the above observations, a central element of the WTO is to promote a country’s economic development while keeping in mind trade remedies and maintaining fair international trade through the DSM.²²

1.2 Keywords

This comparative study uses various legal texts, case law and other documents from different legal frameworks. To avoid confusion and for the sake of consistency, the study uses the following keywords:

- **WTO disputes:** when referring to a WTO dispute, the words “WTO dispute” will precede the case. For example, WTO dispute: *China Broiler Products US*.
- **WTO texts:** when referring to relevant WTO legal instruments, the word “WTO” will precede the relevant text. For example, WTO: *Decision on Anti-circumvention*.
- **EU case law:** when referring to EU case law, the words “EU case” will precede the case. For example, EU case: *Acron*.
- **European Commission (hereafter EC) anti-dumping investigations:** when referring to EU anti-dumping investigations, the words “EC investigation” will precede the investigation. For example, EC investigation: *Certain footwear China*.
- **SA case law:** when referring to SA case law, the words “SA case” will precede the case. For example, SA case: *Scaw*.

¹⁹ Lester, Mercurio and Davies *World Trade Law* 153.

²⁰ Lester, Mercurio and Davies *World Trade Law* 156; Mathieu “Settling NAFTA and WTO Disputes: A Net of Parallel and Contradictory Commitments?” 244.

²¹ Roberto Azevêdo was the director-general of the WTO from 1 September 2013 to 31 August 2020. See WTO 2015 https://www.wto.org/english/news_e/spra_e/spra63_e.htm.

²² Júnior, Pires and Carneiro *The WTO Dispute Settlement Mechanism* 4.

- **The International Trade Administration Commission (hereafter ITAC) anti-dumping investigations:** when referring to ITAC anti-dumping investigations, the word "ITAC" will precede the investigation. For example, ITAC: *Investigation Plaster Indonesia*.

1.3 Problem statement

1.3.1 WTO and anti-dumping

Before the WTO came into existence, the *General Agreement on Tariffs and Trade* (1947) (hereafter the *GATT* 1947) provided certain international trade rules to member countries, mainly relating to the trade in goods.²³ However, the *GATT* 1947 had certain shortcomings and weaknesses as trade between countries increased over time.²⁴ The WTO was established on 1 January 1995 by the *Agreement Establishing the WTO* (1994) (hereafter the *WTO Agreement*) and expanded on existing trade rules through its agreements and created new procedures for dispute settlement.²⁵ The member countries of the WTO have undertaken to comply with the obligations as set out in these WTO agreements.²⁶

A member state that wants to enact domestic legislation to investigate alleged dumping within its territory must ensure that its laws comply with Article VI of the *GATT*, the *ADA* and its own legislation.²⁷ When dumping occurs, it is possible that the domestic producers of those goods may have trouble competing with the imported products, which can lead to economic harm.²⁸ In order to prevent domestic producers from suffering such economic harm, anti-dumping measures can be imposed by the government of the importing member, usually in the form of import duties.²⁹ The government can then charge an import duty in order to bring the imported products closer to the normal value of the

²³ WTO 2022 https://www.wto.org/english/thewto_e/history_e/history_e.htm.

²⁴ Some members were dissatisfied with the settlement of disputes since it was rather slow. See Lester, Mercurio and Davies *World Trade Law* 56. Chapter 2 of this study further discusses the *GATT* 1947.

²⁵ Article 1 of the *WTO Agreement*; WTO 2022 https://www.wto.org/english/thewto_e/history_e/history_e.htm.

²⁶ Srivastava *Modern Law of International Trade* 15.

²⁷ Lester, Mercurio and Davies *World Trade Law* 517.

²⁸ Lester, Mercurio and Davies *World Trade Law* 513.

²⁹ Lester, Mercurio and Davies *World Trade Law* 513.

domestic products and remove any material injury to the domestic producers of the relevant goods in that country.³⁰ This will prevent unfair competition and protect the domestic producers from facing a foreign monopoly.³¹

Before a member state can impose anti-dumping duties, an anti-dumping investigation should be conducted by the relevant authority in that member state in order to determine if certain requirements have been met.³² As discussed comprehensively later in this study, there are essentially three requirements in terms of Article VI of the *GATT* and the *ADA*, namely (1) dumping, (2) injury and (3) causation.³³ Dumping occurs when a product is imported into a country at a price that is lower than its normal value in the export country.³⁴ The dumped imports must cause material injury or threat of material injury, or materially retard the domestic country's industry.³⁵ If all the requirements to impose anti-dumping duties have been met, the investigation has been concluded and all required processes have been followed, member states may impose anti-dumping duties.³⁶ Members can challenge the imposition of anti-dumping duties by other members in terms of the DSM.³⁷

The EU and SA are trading partners and have both been members of the WTO since it was established.³⁸ The EU has been a complainant to 110 disputes where 18 of those disputes are related to anti-dumping.³⁹ The EU has been a respondent to 93 other disputes where 17 of those disputes are related to anti-dumping.⁴⁰ SA initiated its first

³⁰ WTO 2022 https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm.

³¹ Lester, Mercurio and Davies *World Trade Law* 513.

³² This will ensure fair competition in trade for the relevant goods in a country. See Lester, Mercurio and Davies *World Trade Law* 65, 517, 521.

³³ Chapters 4 and 5 of this study discuss dumping, injury and causation.

³⁴ Article 2(1) of the *ADA*.

³⁵ Article 3 of the *ADA*; Article VI (6)(a) of the *GATT*; Brink "Anti-dumping in southern Africa" 327.

³⁶ Krüger "Moving Ahead While Standing Still: Dynamics of Institutional Evolution in a Gridlocked WTO" 130; WTO 2022 https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm.

³⁷ Members can also approach their national courts for adjudication on procedural aspects. See WTO 2022 https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm.

³⁸ WTO 2022 https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm; WTO 2022 https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm; EC 2022 https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/south-africa_en.

³⁹ WTO 2022 https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm; WTO 2022 https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm.

⁴⁰ WTO 2022 https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm; WTO 2022 https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm.

dispute before the WTO on 29 July 2022.⁴¹ In this case, SA challenged import restrictions that the EU had placed on citrus fruit from SA due to certain changes in the EU's phytosanitary requirements.⁴² Even though this is not an anti-dumping dispute, it is still a noteworthy milestone for SA.⁴³ SA has been a respondent in five cases before the WTO, all relating to anti-dumping measures.⁴⁴

The WTO distinguishes between developed and developing countries.⁴⁵ The WTO does not provide clear-cut definitions for these terms. Instead, the WTO leaves it to member states to announce themselves as developed or developing.⁴⁶ SA identified itself as a developing country in WTO dispute: *EU Citrus Fruit SA*.⁴⁷ Furthermore, developed countries can grant preferential tariffs on imports from developing countries.⁴⁸ SA is a beneficiary and not a provider of this preferential treatment and can be seen as a developing country.⁴⁹ The EU is a provider and not a beneficiary of the preferential tariffs and can be seen as a developed region.⁵⁰ A country's status of being either developed or developing adds further to this study's comparison between a developed region (EU) and a developing country (SA).

⁴¹ WTO 2022 https://www.wto.org/english/news_e/news22_e/ds613rfc_29jul22_e.htm.

⁴² WTO dispute: *European Union – Measures Concerning the Importation of Citrus Fruit from South Africa*, WT/DS613/1 G/L/1430 G/SPS/GEN/2056 (2022) (hereafter WTO dispute: *EU Citrus Fruit SA*).

⁴³ This case deals with sanitary and phytosanitary measures and not anti-dumping.

⁴⁴ WTO dispute: *South Africa – Provisional Anti-Dumping Duties on Portland Cement from Pakistan*, WT/DS500/1 G/L/1139 G/ADP/D112/1 (2015); WTO dispute: *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil*, WT/DS439/1 G/L/990 G/ADP/D92/1 (2012); WTO dispute: *South Africa – Anti-Dumping Measures on Uncoated Woodfree Paper*, WT/DS374/2 (2008); WTO dispute: *South Africa – Definitive Anti-Dumping Measures on Blanketing from Turkey*, WT/DS288/1 G/L/621 G/ADP/D48/1 (2003); WTO dispute: *South Africa – Anti-Dumping Duties on Certain Pharmaceutical Products from India*, WT/DS168/1 G/L/303 G/ADP/D17/1 (1999) (hereafter WTO dispute: *SA Pharmaceutical Products India*).

⁴⁵ Interestingly, imposing anti-dumping measures is one of the most popular trade remedies used by both developing and developed countries. See Michalopoulos *Aid, Trade and Development: 50 years of Globalisation* 142-143; Wolf *Why Globalisation Works* Chapter 10; WTO 2022 https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm.

⁴⁶ WTO 2022 https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm.

⁴⁷ WTO dispute: *EU Citrus Fruit SA* 3-4.

⁴⁸ WTO 2022 https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm.

⁴⁹ WTO 2022 <http://ptadb.wto.org/SearchByCountry.aspx>.

⁵⁰ WTO 2022 <http://ptadb.wto.org/SearchByCountry.aspx>.

1.3.2 The EU and anti-dumping

The EU is an economic and political union between 27 European countries.⁵¹ In terms of the WTO, the EU is seen as a single customs union with a single trade policy and is a WTO member.⁵² The EC represents the 27 EU member states at WTO meetings.⁵³ The EC is the EU's main executive body and is responsible for proposing and enforcing legislation and policies throughout the EU region.⁵⁴ The EC is the investigating authority that investigates dumping claims in the EU in accordance with the *Regulation on Protection Against Dumped Imports from Countries Not Members of the European Union* (hereafter the *EU's Anti-Dumping Regulation*).⁵⁵ Since the EU is a member of the WTO, the EU is bound by the provisions laid out by Article VI of the *GATT*, the *ADA* as well as its own EU law, specifically the *EU's Anti-Dumping Regulation*.⁵⁶

The anti-dumping investigation laid out by the *EU's Anti-Dumping Regulation* follows the same three requirements as laid out by the *ADA*, referred to as dumping, injury and

⁵¹ The European Economic Community (hereafter EEC) was created in 1957 by the *Treaty Establishing the European Economic Community* (1957). In 1992, the EU was established by the *Treaty on European Union* (1992) and the EEC was renamed the European Community. In 2009, the *Treaty on the Functioning of the European Union* (2009) came into force, dealing with the functioning of the EU. The treaty has been amended multiple times and is now referred to as the *Treaty on the Functioning of the European Union* (2016). In 2016, the term European Community fell away, and the EU was simply referred to as the EU. The *Treaty on European Union* (1992) was amended in 2016, marking this change and is now referred to as the *Treaty on European Union* (2016). The *Treaty on the Functioning of the European Union* (2016) was consolidated in 2020. For treaties that are currently in force and updated versions, see EU 2023 <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html>; see also EU 2022 https://european-union.europa.eu/principles-countries-history/country-profiles_en.

⁵² WTO 2022 https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm; EU 2022 https://european-union.europa.eu/principles-countries-history/country-profiles_en.

⁵³ The EU member states are also WTO members in their own right. See WTO 2022 https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm; EU 2022 https://european-union.europa.eu/principles-countries-history/country-profiles_en.

⁵⁴ EU 2022 https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies_en; EU 2022 https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/european-commission_en.

⁵⁵ *Regulation (EU) of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union*, Reg 2016/1036 in *OJEU* L176/21. In 2016, the *EU's Anti-Dumping Regulation* replaced the previous regulation of 2009, and the 2016 regulation was amended in 2020. The *Delegated Regulation (EU) 2020/1173* has applied since 11 August 2020 and has been codified within the *EU's Anti-Dumping Regulation*.

⁵⁶ Perisin 2015 *European Constitutional Law Review* 99; EC 2022 https://policy.trade.ec.europa.eu/enforcement-and-protection/trade-defence/anti-dumping-measures_en.

causation.⁵⁷ There is, however, an additional fourth requirement in terms of the *EU's Anti-Dumping Regulation*. The fourth requirement stipulates that the anti-dumping measures should not be against the Union interest.⁵⁸ The EC follows very strict procedures regarding anti-dumping measures which require balancing the interests of all the parties involved and assessing very complex economic, political and legal situations.⁵⁹ The EC conducts the investigation to impose anti-dumping measures with the cooperation of its member states.⁶⁰

After the EC has conducted an investigation and all the requirements to impose anti-dumping duties are met, the EC will publish an affirmative finding in the form of a regulation that anti-dumping duties are to be imposed in the Official Journal of the European Union (hereafter *OJEU*).⁶¹ This regulation directs national customs authorities of the EU member states to impose and collect anti-dumping duties determined by the EC in their respective countries.⁶² The EC has conducted over a hundred investigations relating to anti-dumping.⁶³ In 2007, the EC imposed anti-dumping duties against manganese dioxides originating in SA, which have since expired.⁶⁴

1.3.3 SA and anti-dumping

As a member of the WTO, SA has an international obligation to follow the provisions laid out by the WTO, specifically Article VI of the *GATT* and the *ADA*.⁶⁵ Currently, SA's anti-dumping legislation is the *International Trade Administration Act 71* of 2002 (hereafter

⁵⁷ Articles 2(1), 3(1), 3(5) of the *ADA*; articles 2-3 of the *EU's Anti-Dumping Regulation*.

⁵⁸ Article 21 of the *EU's Anti-Dumping Regulation*. The Union interest is discussed in chapter 6 of this study.

⁵⁹ EU case: *T.KUP SAS v Belgium*, C-349/16 (2017) para 44 (hereafter EU case: *T.KUP*); EU case: *SolarWorld AG v Commission*, T-783/14 (2017) para 55.

⁶⁰ Article 6(1) the *EU's Anti-Dumping Regulation*.

⁶¹ Articles 7(1) and 14(5) of the *EU's Anti-Dumping Regulation*.

⁶² Korkea-aho and Sankari 2017 *European Papers* 555. This is done in accordance with *Regulation (EU) of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code*, Reg 952/2013 in *OJEU* 269/1 (hereafter *EU Customs Code*).

⁶³ The investigations are published on the EC's website. See EC 2022 <https://tron.trade.ec.europa.eu/investigations/search>.

⁶⁴ EC investigation: *Commission Implementing Regulation (EU) of 17 September 2007 imposing a provisional anti-dumping duty on imports of certain manganese dioxides originating in South Africa*, Reg 1066/2007 in *OJEU* L243/7.

⁶⁵ Brink 2021 *De Jure Law Journal* 15. This was confirmed in SA case: *Progress Office Machines CC v SARS* 2007 4 SA 1358 (SCA) para 6.

the *ITA Act*).⁶⁶ The *Anti-Dumping Regulations* 2003 (hereafter *SA's Anti-Dumping Regulation*) were promulgated in terms of the *ITA Act*.⁶⁷ The ITAC is a public entity with the aim to foster economic growth and development in SA through the administration of international trade.⁶⁸ ITAC is the authority responsible for investigating the alleged dumping of goods in SA.⁶⁹

As with the EU member states, SA is one of five member states of the Southern African Customs Union (hereafter SACU).⁷⁰ Today, SACU links the five member states to each other as a single customs territory through a single import tariff and where no customs duties are payable.⁷¹ Contrary to the EU, SACU is not a member state of the WTO.⁷²

The *SACU Agreement* makes provision for the establishment of, *inter alia*, a Tariff Board which will be responsible for making recommendations regarding anti-dumping duties to the SACU Council.⁷³ To date, however, the Tariff Board has not yet been established.⁷⁴ On this basis, the SACU Council has delegated its decision-making power to ITAC to investigate anti-dumping on behalf of the SACU industry.⁷⁵ As a result, a domestic industry

⁶⁶ Brink "Anti-dumping in southern Africa" 312.

⁶⁷ The Minister of Trade published *SA's Anti-Dumping Regulation* in terms of section 59 of the *ITA Act* in GN 3197 in GG 25684 of 14 November 2003.

⁶⁸ Section 2 of the *ITA Act*.

⁶⁹ Sections 16 and 30(2) of the *ITA Act*. The Constitutional Court has held in SA case: *International Trade Administration Commission v Scaw South Africa (PTY) LTD* 2012 4 SA 618 (CC) para 6 (hereafter SA case: *Scaw*) that ITAC bears specialist responsibility to conduct a conclusive and fair investigation regarding anti-dumping duties.

⁷⁰ The other members are Botswana, Lesotho, Namibia and Eswatini (formerly known as Swaziland) who are also WTO members. The *Southern African Customs Union Agreement* (2002) (hereafter the *SACU Agreement*) aims to enhance the economic development of its member states. SACU was established in 1910 and administered by SA through the 1910 *SACU Agreement* and the 1969 *SACU Agreement*. SACU members started new negotiations in 1994, which culminated in the current *SACU Agreement* of 2002. SA, with the other SACU members, signed the *SACU Agreement* on 21 October 2002, making it part of SA law. See SACU 2022 <https://www.sacu.int/show.php?id=471>; WTO: *Trade Policy Review South Africa: Report by the Government*, WT/TPR/G/34 (1998) 95-97; SACU 2022 <https://www.sacu.int/show.php?id=471>.

⁷¹ SACU 2022 <https://www.sacu.int/show.php?id=471>.

⁷² SACU has observer status to follow discussions on matters of direct interest to them. See WTO 2022 https://www.wto.org/english/thewto_e/igo_obs_e.htm.

⁷³ Article 7(a)-(f) of the *SACU Agreement*.

⁷⁴ SACU 2023 <https://www.sacu.int/category.php?cat=Tariff%20Board>; SACU 2023 <https://www.sacu.int/show.php?id=398>.

⁷⁵ The Tariff Board will act as the national body for SA when it is established. See SACU 2023 <https://sacu.asylum.com.na/about-sacu/sacu-institutions/tariff-board>; Brink "Anti-dumping in southern Africa" 311; Article 14 of the *SACU Agreement*; Joubert 2005 https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm.

in the SACU region will approach ITAC to conduct an anti-dumping investigation for the whole SACU industry in terms of the *ITA Act* and *SA's Anti-Dumping Regulation*.⁷⁶ In September 2023, the WTO clarified the position in a trade policy review and stated that ITAC is to investigate dumping for the whole SACU region.⁷⁷ Other than SA, however, no other SACU member states have been involved in any anti-dumping disputes before the WTO.⁷⁸ On this basis, and for the other reasons set out below, this comparative study focuses on SA and the EU.⁷⁹

After ITAC has conducted an investigation and if all the requirements to impose anti-dumping duties are met, ITAC will make final recommendations to SA's Minister of Trade, Industry and Competition (hereafter Minister of Trade) regarding the implementation of anti-dumping duties.⁸⁰ If the Minister of Trade makes an affirmative finding, he or she will request the South African Revenue Service (hereafter SARS) to impose customs duties in terms of the *Customs and Excise Act* 91 of 1964 (hereafter the *Customs and Excise Act*).⁸¹ SARS will publish a notice in the Government Gazette regarding the imposition of anti-dumping duties.⁸² The final determination is then implemented through publication in the Government Gazette.⁸³

While the EU has previously imposed anti-dumping duties against SA, the reverse is also true.⁸⁴ Of specific relevance to this study is when ITAC made a final determination that dumping had taken place with regard to frozen bone-in chicken meat imports from four countries in the EU in ITAC: *Investigation 695 Frozen Chicken*.⁸⁵

⁷⁶ Furthermore, section 3(1) of the *ITA Act* contains provisions that the *ITA Act* applies to economic activity within SA.

⁷⁷ WTO: *Trade Policy Review Report by the Secretariat SACU*, WT/TPR/S/447 (2023) 5, 16, 26, 33.

⁷⁸ WTO 2022 https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

⁷⁹ See limitations in para 1.7 of this study.

⁸⁰ Brink "Anti-dumping in southern Africa" 312.

⁸¹ Section 30(5)(a) of the *ITA Act*; s 56(1) of the *Customs and Excise Act*; SARS 2022 <https://www.sars.gov.za/customs-and-excise/duties-and-taxes/>.

⁸² Section 56(1) of the *Customs and Excise Act*.

⁸³ ITAC 2011 <http://www.itac.org.za/pages/services/trade-remedies>.

⁸⁴ ITAC has initiated 23 anti-dumping investigations and the EU were involved in five of those investigations. See ITAC 2022 <http://www.itac.org.za/pages/services/trade-remedies/investigation-reports>.

⁸⁵ ITAC: *Investigation into the Alleged Dumping of Frozen Bone-In Portions of Fowls of the Species Gallus Domesticus Originating in or Imported from Brazil, Denmark, Ireland, Poland and Spain: Final Determination*, Report No 695 (2022) (hereafter ITAC: *Investigation 695 Frozen Chicken*). Between

On 20 July 2020, the South African Poultry Association (hereafter SAPA) submitted an application to ITAC on behalf of the SACU industry to investigate the alleged dumping of frozen bone-in portions of chicken originating in or imported from four EU states (Denmark, Ireland, Poland and Spain) and Brazil.⁸⁶ ITAC initiated the investigation after establishing that the application contained *prima facie* information that the product was imported at dumped prices which caused material injury to the SACU industry.⁸⁷ After considering representations made by interested parties, ITAC made a preliminary determination that the product had been dumped in the SACU market causing material injury to the SACU poultry industry.⁸⁸ As a result, SARS imposed provisional anti-dumping duties against the importation of frozen bone-in chicken for six months ending on 14 June 2022.⁸⁹

After receiving comments from the interested parties, ITAC made a final determination that dumping had taken place and made a recommendation to the Minister of Trade that definite anti-dumping duties should be imposed.⁹⁰ To the domestic poultry industry's surprise, the Minister of Trade suspended the anti-dumping duties for twelve months due to the fact that the imposition of duties would have a negative impact on the poor citizens in SA.⁹¹ In the Government Gazette issued on 1 August 2022, the notice, undersigned by the Minister of Trade, stated the reasons as:

2014 and 2021, ITAC also made several determinations that dumping had taken place regarding frozen bone-in chicken imported from certain countries within the EU. See ITAC: *Investigation into the Alleged Dumping of Frozen Bone-In Portions of Fowls of the Species Gallus Domesticus Originating in or Imported from Germany, the Netherlands and the United Kingdom: Preliminary Determination*, Report No 479 (2014) (hereafter ITAC: *Investigation 479 Frozen Chicken*); ITAC: *Investigation into the Alleged Dumping of Frozen Bone-In Portions of Fowls of the Species Gallus Domesticus Originating in or Imported from Germany, the Netherlands and the United Kingdom: Final Determination*, Report No 492 (2015) (hereafter ITAC: *Investigation 492 Frozen Chicken*); ITAC: *Investigation into the Alleged Dumping of Frozen Bone-In Portions of Fowls of the Species Gallus Domesticus Originating in or Imported from Brazil, Denmark, Ireland, Poland and Spain: Preliminary Determination*, Report No 678 (2021) (hereafter ITAC: *Investigation 678 Frozen Chicken*).

⁸⁶ ITAC: *Investigation 695 Frozen Chicken* para 1.5.

⁸⁷ ITAC: *Investigation 695 Frozen Chicken* para 1.5.

⁸⁸ ITAC: *Investigation 695 Frozen Chicken* para 1.8; Berkhout 2022 <https://www.poultryworld.net/poultry/s-africa-anti-dumping-duties-against-bone-in-chicken-imports/>.

⁸⁹ ITAC: *Investigation 695 Frozen Chicken*.

⁹⁰ ITAC: *Investigation 695 Frozen Chicken* para 1.9.

⁹¹ GN 1179 in GG 47156 of 1 August 2022; Breitenbach 2022 <https://www.sapoultry.co.za/announcement-on-anti-dumping-duties-disappoints-south-african-poultry-association-members/>.

the current rapid rise in food prices in the SACU market and globally and the significant impact this has, especially on the poor, as well as the impact that the imposition of the anti-dumping duties may have on the price of chicken as one of the more affordable protein sources.⁹²

SA has a high poverty rate and a rise in food prices will negatively impact the poor citizens.⁹³ Considering SA's high poverty rate, the Minister of Trade correctly took into consideration that chicken is one of the more affordable protein sources in SA and a rise in chicken prices due to the imposition of anti-dumping duties will have a negative impact on the poor citizens.⁹⁴

In a recent development, on 2 August 2023, the Minister of Trade resumed the imposition of anti-dumping duties and requested SARS to impose anti-dumping duties against the four EU member states.⁹⁵ However, the Minister of Trade stated that the anti-dumping duties can be suspended again in the future. In the Government Gazette issued, it was noted that:

"The Minister [of Trade] will be requesting the Competition Commission to closely monitor the prices of frozen bone-in portions and if there are price increases aimed at taking advantage of the introduction of the anti-dumping duties, the Minister may request the Minister of Finance to suspend the anti-dumping duties for a period."⁹⁶

It appears, therefore, that the government currently considers the interests of consumers when deciding whether to impose or maintain anti-dumping duties in SA.

Against this background, this study compares the requirements for imposing anti-dumping duties in the EU and SA, respectively. To comply with Article VI of the *GATT* and the *ADA*, domestic anti-dumping legislation in both jurisdictions require the EC and ITAC, respectively, to consider (i) dumping, (ii) injury and (iii) causation during the

⁹² GN 1179 in GG 47156 of 1 August 2022.

⁹³ Poverty is usually when a person's basic human rights are not being met, such as right to food and having sufficient quantity of food. See OHCHR *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* 2, 28; Mbajorgu and Odeku 2022 *Obiter* 467; World Bank 2023 <https://www.worldbank.org/en/country/southafrica/overview>.

⁹⁴ GN 1179 in GG 47156 of 1 August 2022.

⁹⁵ The Minister of Trade in the Government Gazette did not expand on reasons for resuming the imposition of anti-dumping duties, just that it is warranted under the "circumstances". See GN 1925 in GG 49065 of 2 August 2023.

⁹⁶ GN 1925 in GG 49065 of 2 August 2023. The domestic poultry industry was of course delighted by the resumed anti-dumping duties. See Marais 2023 <https://www.bizcommunity.com/Article/196/742/241009.html>.

investigation process. This warrants a comparison of these requirements as investigated in terms of each member's relevant domestic legislation and case law principles. Chapter 6 of this study contemplates if it would be beneficial to align SA's legislation with that of the EU and include a possible fourth requirement, namely to consider SA's interests (and by extension SACU's interests) during anti-dumping investigations.

Based on the abovementioned problem statement, the research question is: When comparing the requirements for imposing anti-dumping duties in the EU and SA, respectively, how does SA legislation align with EU legislation?

1.4 Research aim and objectives

The study aims to consider and make recommendations on the requirements to impose anti-dumping duties by comparing the requirements set out in SA's *ITA Act* and *SA's Anti-Dumping Regulation* and the requirements set out in the *EU's Anti-Dumping Regulation* against the backdrop of Article VI of the *GATT* and the *ADA*. This comparison will assist in establishing how SA legislation aligns with EU legislation regarding the requirements to impose anti-dumping duties.

The objectives of this study are to:

- Discuss the history and background of anti-dumping within the WTO, the EU and SA.
- Compare the anti-dumping investigation process by the EC in terms of the *EU's Anti-Dumping Regulation* with the investigation process by ITAC in terms of *SA's Anti-Dumping Regulation* and the *ITA Act*.
- Compare the requirements of dumping in the EU and SA against the backdrop of relevant WTO legal provisions.
- Compare the requirements of injury and causation, respectively, in terms of relevant EU and SA legislation and authority.

- Examine the EU's requirement of Union interest to determine if it may be beneficial to consider developing SA's *ITA Act* and *SA's Anti-dumping Regulation* to include a similar requirement.

1.5 Premises, assumption and hypothesis

The proposed study takes the following premises into account: there is a difference between the requirements to impose anti-dumping duties as reflected in SA's anti-dumping legislation and the EU's anti-dumping legislation; this can be determined by comparing legislation, regulations, case law and anti-dumping investigations.

The proposed study takes the following assumption into account: dumping is unlawful in WTO member states, indicating that member states should follow certain steps to act against dumping where justified. The study compares the requirements to impose anti-dumping in the EU and SA, respectively, against the backdrop of Article VI of the *GATT* and the *ADA*.

The hypothesis of this study is that certain parts of the fourth requirement of "Union interest", as provided in the *EU's Anti-Dumping Regulation*, can potentially be incorporated into SA's anti-dumping legislation, as the interests of SA's producers and consumers should be a factor to consider during the investigation to impose anti-dumping duties. In August 2022, when the Minister of Trade suspended the anti-dumping duties on imported frozen bone-in chicken, the decision was justified by the fact that the duties would have a negative impact on the poor citizens. This decision by the SA government suggests that the interests of consumers are relevant and should potentially be assessed during the anti-dumping investigation.

1.6 Research method

The research method consists of a critical comparative study of the legislation and other authority of the EU and SA relating to the requirements for the implementation of anti-dumping duties in these respective WTO member states. This comparative study analyses the similarities and differences between SA's and the EU's requirements to impose anti-dumping duties while considering the relevant WTO legal texts.

Sources consulted in the comparative study include WTO disputes relating to anti-dumping, specifically those involving the EU and SA, respectively. In addition, WTO legal texts relating to the requirement to impose anti-dumping duties are studied, specifically Article VI of the *GATT* and the *ADA* as well as the *EU's Anti-Dumping Regulation* and the *ITA Act* and *SA's Anti-Dumping Regulation*. Other sources are SA and EU case law, academic journal articles, other literature and government publications.

1.7 Scope and limitations

The study focuses on anti-dumping and there will be no discussion regarding the other trade remedies. The study is further limited to specifically investigating and comparing the anti-dumping requirements applicable to SA and the EU.

The selection of SA is based on it being a member country of the WTO and because only a few African countries currently have their own anti-dumping legislation, SA being one of them.⁹⁷ The reason behind limiting the study to SA and not SACU is that the SACU council delegated their powers to ITAC to investigate dumping on behalf of the whole SACU region. ITAC is seen as the anti-dumping investigation authority throughout the SACU region during anti-dumping investigations and ITAC is situated in SA where most of the anti-dumping applications originate. As other countries in the SACU region do not have separate investigating authorities and have not been direct parties in WTO disputes relating to anti-dumping measures, it is submitted that it will not significantly add to this comparative study to include those countries. Including all SACU member states would also make this study too broad. The focus on SA (as opposed to the whole SACU) is further justified by the fact that SACU, unlike SA and the EU, is not an independent member of the WTO.

The reason behind the selection of the EU is that it is seen as one of the big world trade powers and is a member of the WTO.⁹⁸ The study is limited to the EU and does not relate to individual countries within the EU. The reason is that within the WTO, the EU is seen as a single customs union and member state. SA is currently the EU's largest trading

⁹⁷ Brink "Anti-dumping in southern Africa" 370.

⁹⁸ EC 2022 https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_and_main_world_traders.

partner in Africa, and both have initiated anti-dumping investigations against each other.⁹⁹ Investigating authorities in both jurisdictions have also initiated numerous anti-dumping investigations. The comparison of a developed country (EU) with a developing country (SA) also highlights challenges developing countries face.

1.8 Framework

Chapter 2 that follows sets out the history and background of anti-dumping in the WTO, EU and SA. Chapter 3 sets out the anti-dumping investigation process in the EU and SA, respectively. Chapter 4 is an analysis of the first requirement of dumping in the anti-dumping investigation followed by an analysis of the second and third requirements of injury and causation in the anti-dumping investigation in chapter 5. Chapter 6 is an analysis of the EU's fourth requirement of the Union interest in the anti-dumping investigation and considers if this requirement may be relevant to include in SA's anti-dumping legislation and investigations in the future. Chapter 7 sets out concluding remarks and recommendations.

⁹⁹ EC 2022 https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/south-africa_en.

CHAPTER 2 HISTORY AND BACKGROUND OF ANTI-DUMPING

2.1 Introduction

Taking a few steps back, this chapter discusses the history and background of anti-dumping before the chapters that follow analyse and compare the requirements to impose anti-dumping duties. The establishment of the WTO on 1 January 1995 was not a straightforward process, and this chapter explores international trade law before and after the establishment of the WTO.¹⁰⁰ In order to understand the history of anti-dumping in SA, the chapter discusses SA's economic position as a developing country and the EU as a developed country.

2.2 WTO

2.2.1 Background

Cross-border trade has existed between countries for centuries.¹⁰¹ The period between World War I and World War II saw a rise in protectionist measures crippling trade liberalisation.¹⁰² After the two world wars, many countries wanted to reverse the effect of protective measures and believed that a freer international trade would promote economic development.¹⁰³ In 1945, the United States of America (hereafter US) took lead in this movement and proposed the creation of the International Trade Organisation.¹⁰⁴ A few years later, on 30 October 1947, 23 countries signed the *GATT* 1947.¹⁰⁵ The *GATT* 1947 was a big step towards free trade and multilateralism.¹⁰⁶ That being said, the *GATT* 1947 alone did not have an institutional function and rather functioned as an international

¹⁰⁰ Marceau, Porges and Baker "Introduction and overview" 43.

¹⁰¹ Lester, Mercurio and Davies *World Trade Law* 54.

¹⁰² World War I lasted from 1914 to 1918 and World War II lasted from 1939 to 1945. The rise in protectionist measures were from 1914 to 1945. See Lester, Mercurio and Davies *World Trade Law* 54; Ray 2018 <https://www.britannica.com/list/timeline-of-world-war-i>; Hughes, Graham and Smith 2023 <https://www.britannica.com/event/World-War-II>.

¹⁰³ Lester, Mercurio and Davies *World Trade Law* 54.

¹⁰⁴ The *United Nations Conference on Trade and Employment Havana Charter* (1948) was created, dealing with certain trade aspects. See also Lester, Mercurio and Davies *World Trade Law* 54.

¹⁰⁵ SA was one of these signatories as well as some of the EU member states. See WTO 2017 https://www.wto.org/english/news_e/news17_e/gen_30oct17_e.htm.

¹⁰⁶ Simo "Developing countries and special and differential treatment" 234.

trade forum.¹⁰⁷ There were limited provisions available for dispute settlement and limited instructions on how disputes should be resolved.¹⁰⁸

Between 1947 and 1994, the basic framework of the *GATT* 1947 stayed relatively the same and there were eight negotiating rounds of further trade liberations and agreements.¹⁰⁹ Anti-dumping measures were introduced for the first time during the Kennedy round (sixth round) from 1964 to 1967.¹¹⁰ The most notable negotiating round was the eighth and final round, the Uruguay round from 1986 to 1994, which resulted in the establishment of the WTO and the DSB.¹¹¹

According to Azevêdo,¹¹² the establishment of the WTO can be regarded as a milestone in international trade law. With the establishment of the WTO came 20 new trade agreements.¹¹³ The *GATT* 1994 incorporated most of the provisions in the *GATT* 1947.¹¹⁴ A notable difference from the *GATT* 1947 is that dispute settlement under the WTO is binding and enforceable.¹¹⁵

When the *WTO Agreement* established the WTO, the multilateral trading system finally gained a formal international organisation.¹¹⁶ The *WTO Agreement* broadened the scope of international rules that were historically focused on goods to also include services, investments and intellectual property rights.¹¹⁷ Of specific importance to this study is that

¹⁰⁷ Lester, Mercurio and Davies *World Trade Law* 56.

¹⁰⁸ The dispute resolution panels under the *GATT* 1947 functioned merely as advisory groups and for mediation purposes. See Marceau, Porges and Baker "Introduction and overview" 5, 8; Lovett, Eckes and Brinkman *U.S. Trade Policy: History, Theory, and the WTO* 5. In any case, between 1947 and 1959, anti-dumping duties were generally not subject to disputes amongst countries and only one case was brought for dispute settlement between Sweden and Italy. See *Swedish Anti-dumping Duties*, GD/23 L/328 (1955).

¹⁰⁹ The first five rounds from 1947 to 1961 dealt primarily with reducing tariffs. See Lester, Mercurio and Davies *World Trade Law* 57.

¹¹⁰ Rounds one to five had an average of 25 participating countries where the Kennedy round had doubled with 62 participating countries. See Lester, Mercurio and Davies *World Trade Law* 57.

¹¹¹ The Uruguay round had 123 participating countries. See Lester, Mercurio and Davies *World Trade Law* 57.

¹¹² Azevêdo "Foreword" xxv.

¹¹³ Michalopoulos *Aid, Trade and Development: 50 years of Globalisation* 129; WTO 2023 https://www.wto.org/english/docs_e/legal_e/legalexplgatt1947_e.htm.

¹¹⁴ Lester, Mercurio and Davies *World Trade Law* 72; WTO 2023 https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

¹¹⁵ Lester, Mercurio and Davies *World Trade Law* 71.

¹¹⁶ Lovett, Eckes and Brinkman *U.S. Trade Policy: History, Theory, and the WTO* 84; Marceau, Porges and Baker "Introduction and overview" 4.

¹¹⁷ Michalopoulos *Aid, Trade and Development: 50 years of Globalisation* 127.

with the establishment of the WTO, there were also new agreements relating to trade remedies including the *ADA* that expanded on Article VI of the *GATT* in relation to anti-dumping duties.¹¹⁸ Four annexes to the *WTO Agreement* set out various trade obligations.¹¹⁹ Annex 1 contains multilateral trade agreements that member countries are obliged to follow, including the anti-dumping provisions from the *ADA*.¹²⁰ With the establishment of the WTO came more explicit rules and transparent application of anti-dumping measures.¹²¹

2.2.2 Anti-dumping law: pre-GATT to ADA

Canada was the first country to pass anti-dumping legislation in 1904.¹²² A decade later, SA implemented anti-dumping provisions in 1914.¹²³ By the 1920s, more countries had started to pass anti-dumping legislation.¹²⁴ Much later, the EU established its first anti-dumping regulation in 1968.¹²⁵ Since some European countries already had national anti-dumping regulations, it was a hefty task to establish common anti-dumping rules during the initial *GATT* negotiations in the 1940s.¹²⁶ Following the implementation of the *GATT*, trade tariffs were lowered and anti-dumping duties were increasingly imposed.¹²⁷ Even

¹¹⁸ Michalopoulos *Aid, Trade and Development: 50 years of Globalisation* 129.

¹¹⁹ Lester, Mercurio and Davies *World Trade Law* 70-71.

¹²⁰ Annex 1A contains 13 agreements related to goods, such as the *ADA*, *GATT* 1994, *WTO: Agreement on Agriculture* (1994), *WTO: Agreement on Subsidies and Countervailing Measures* (1994), and *WTO: Agreement on Safeguards* (1994). Annex 1B contains one agreement related to services, the *WTO: General Agreement on Trade in Services and Annexes* (1994). Annex 1C contains the one agreement related to intellectual property rights. See *WTO: Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994). Annex 2 sets out the rules and procedures of dispute settlement. Annex 3 sets out the trade policy review mechanism. Annex 4 sets out plurilateral trade agreements that are optional for members to follow since it targets specific industries. See *WTO: Agreement on Trade in Civil Aircraft* (1994) and *WTO: Agreement on Government Procurement* (1994).

¹²¹ Michalopoulos *Aid, Trade and Development: 50 years of Globalisation* 153; Grey *States and Non-Participatory Memberships in the WTO* 45.

¹²² Lester, Mercurio and Davies *World Trade Law* 518.

¹²³ Blumberg "South African trade policy and regulation in the 1990s: The late years of the Uruguay Round and the early days of the WTO" 44.

¹²⁴ Lester, Mercurio and Davies *World Trade Law* 518.

¹²⁵ *Regulation (EEC) of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community*, Reg 459/68 in *OJEU* L93/1 (hereafter the *EU's first Anti-Dumping Regulation*).

¹²⁶ Lester, Mercurio and Davies *World Trade Law* 518.

¹²⁷ WTO 2023 https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

though Article VI of the *GATT* stipulated provisions relating to anti-dumping duties, it was rather vague at that time and there was a need for more specific provisions.¹²⁸

Thus, during the Kennedy round in 1967, the first *GATT* code regarding anti-dumping duties was created.¹²⁹ The *Kennedy Round Anti-dumping Code* (1967) (hereafter the *Kennedy ADC*) was created and signed by 18 countries.¹³⁰ The *Kennedy ADC* was the first attempt to codify the rules on anti-dumping practices.¹³¹ However, it was seen as a “side code” and if countries wanted to be participants they had to sign the *Kennedy ADC* for it to be binding.¹³² The *Kennedy ADC* included rules relating to the determination of dumping and injury and stipulated that dumping should be the “principal cause of material injury”.¹³³

During the subsequent Tokyo round in 1973, further negotiations took place regarding anti-dumping duties.¹³⁴ The *Tokyo Round Anti-dumping Code* (1979) (hereafter the *Tokyo ADC*) was established. Interestingly, there was no reference to the principal cause of material injury in the *Tokyo ADC*.¹³⁵ Nonetheless, the *Tokyo ADC* provided more guidance on the determination of dumping and investigations than the *Kennedy ADC*.¹³⁶

During the late 1980’s there was a rise in the complexity of anti-dumping disputes.¹³⁷ As a result, questions arose regarding the relationship between the *Tokyo ADC* and the *GATT* 1947.¹³⁸ Between 1980 and 1987, only one dispute regarding anti-dumping duties was

¹²⁸ Lester, Mercurio and Davies *World Trade Law* 518.

¹²⁹ Marceau, Porges and Baker “Introduction and overview” 22.

¹³⁰ Lester, Mercurio and Davies *World Trade Law* 518.

¹³¹ Marceau, Porges and Baker “Introduction and overview” 22.

¹³² Marceau, Porges and Baker “Introduction and overview” 22.

¹³³ Article 3(a) of the *Kennedy ADC*.

¹³⁴ Marceau, Porges and Baker “Introduction and overview” 31.

¹³⁵ Only a few countries signed the *Tokyo ADC*. See article 3(1) of the *Tokyo ADC*; Marceau and Baker “A Short History of the Rules Division” 120.

¹³⁶ WTO 2023 https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

¹³⁷ Koulen “Evolving dispute settlement practice with respect to anti-dumping in the late 1980s and early 1990s” 208.

¹³⁸ Koulen “Evolving dispute settlement practice with respect to anti-dumping in the late 1980s and early 1990s” 208.

instituted in terms of the *GATT* 1947.¹³⁹ This picked up between 1987 and 1992, resulting in nine disputes relating to anti-dumping lodged in terms of *GATT* 1947.¹⁴⁰

Finally, with the Uruguay round in 1994 came the establishment of the *ADA*.¹⁴¹ The *ADA* clarifies the application of Article VI of the *GATT*.¹⁴² Currently, the *ADA* is still applied in accordance with Article VI of the *GATT*.¹⁴³ Since the establishment of the WTO, member countries have initiated over 6500 anti-dumping investigations.¹⁴⁴ The *GATT* and *ADA* are flexible when it comes to anti-dumping procedures and members have different approaches to the procedures based on their own domestic legislation.¹⁴⁵ However, all WTO members must align their anti-dumping legislation with the *ADA* and notify the Committee on Anti-Dumping Practices about promulgated anti-dumping legislation.¹⁴⁶ The Committee will then review the legislation and members can discuss its conformity with the *ADA*.¹⁴⁷

¹³⁹ Koulen "Evolving dispute settlement practice with respect to anti-dumping in the late 1980s and early 1990s" 211; *New Zealand – Imports of Electrical Transformers from Finland*, GD/150 L/5814 (1985).

¹⁴⁰ Koulen "Evolving dispute settlement practice with respect to anti-dumping in the late 1980s and early 1990s" 211; *EEC – Regulation on Imports of Parts and Components*, GD/205 L/6657 (1990); *United States – Imposition of Anti-dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, GD/204 ADP47 (1990); *Australia – Anti-dumping Duties on Power Transformers from Finland*, GD/212 L/6764 (1990); *United States – Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, GD/251 ADP/87 (1992); *United States – Anti-dumping Duties on Grey Portland Cement and Cement Clinker from Mexico*, GD/237 ADP/82 (1992); *Korea – Anti-dumping Duties on Imports of Polyacetal Resins from the United States*, GD/254 ADP/92 (1992); *United States – Anti-dumping Duties on Imports of Stainless Steel Plate from Sweden*, GD/247 ADP/117 (1994); *Canada – Anti-dumping Duties on Imports of Beer from the United States*, GD/261 ADP/83 (1992); *EEC – Imposition of Anti-dumping Duties on Imports of Audio Cassettes from Japan*, GD/253 ADP/136 (1995).

¹⁴¹ Lester, Mercurio and Davies *World Trade Law* 57.

¹⁴² Lester, Mercurio and Davies *World Trade Law* 518.

¹⁴³ Article 18(1) of the *ADA*.

¹⁴⁴ WTO 2023 https://www.wto.org/english/tratop_e/adp_e/adp_e.htm.

¹⁴⁵ Lester, Mercurio and Davies *World Trade Law* 516.

¹⁴⁶ The Committee on Anti-Dumping Practices consists of member state representatives who meet at least twice a year to discuss matters related to the *ADA*. The Committee can discuss the operation of national anti-dumping laws and regulations and their consistency with the *ADA*. Members must report to the Committee any anti-dumping actions that were taken. The Committee will then review these anti-dumping actions and its consistency with the *ADA*. A separate body, the Ad Hoc Group on Implementation, focuses on the technical aspects of the implementation of anti-dumping actions. See articles 16(1)-(2) of the *ADA*; WTO 2023 https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

¹⁴⁷ WTO 2023 https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

2.2.3 Developed and developing status

Simo¹⁴⁸ notes that the *GATT* was initially created by and for developed countries to address the protectionist measures that prevailed before and during World War II. During this time, certain developing countries were still colonies and could not actively take part in the creation of the *GATT*.¹⁴⁹ The decolonisation of these developing countries around the 1960s led to considerations for these developing countries in the multilateral trading system and the formation of provisions relating to special and differential treatment.¹⁵⁰ Around 1980, developing countries wanted to improve their access to developed country markets.¹⁵¹ During this time, the International Bank for Reconstruction and Development (hereafter the World Bank) promoted more open policies and some developing countries wanted to be part of trade liberation.¹⁵²

With the establishment of the WTO, years later, more consideration was given to the status of developing countries. The *Marrakesh Declaration* emphasised the need for “differential and more favourable treatment for developing economies”.¹⁵³ The preamble to the *WTO Agreement* states that there is a need to ensure that developing countries share in the growth of international trade in accordance with their economic development.

Following the above, various WTO agreements contain provisions for developing countries regarding special and differential treatment.¹⁵⁴ These special and differential treatment provisions allow developed countries to treat developing countries more favourably through certain provisions, such as longer time periods to implement agreements.¹⁵⁵ This means that special and differential treatment is an exception to the principle of non-discrimination under the WTO multilateral trading system.¹⁵⁶ Special and

¹⁴⁸ Simo “Developing countries and special and differential treatment” 234.

¹⁴⁹ Simo “Developing countries and special and differential treatment” 234.

¹⁵⁰ Simo “Developing countries and special and differential treatment” 235.

¹⁵¹ Michalopoulos *Aid, Trade and Development: 50 years of Globalisation* 128.

¹⁵² Michalopoulos *Aid, Trade and Development: 50 years of Globalisation* 128.

¹⁵³ Article 5 of the *Marrakesh Declaration* (1994).

¹⁵⁴ Simo “Developing countries and special and differential treatment” 234.

¹⁵⁵ WTO 2023 https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm.

¹⁵⁶ Simo “Developing countries and special and differential treatment” 237.

differential treatment aims to create equality between WTO members by filling the economic development gap between developed and developing countries.¹⁵⁷

2.2.4 Dispute settlement

WTO members have an obligation to resolve disputes through the *DSU* and not through unilateral action.¹⁵⁸ According to former WTO director-general Pascal Lamy,¹⁵⁹ “[t]he dispute settlement system is widely considered to be the jewel in the crown of the WTO”. The DSM has become one of the most important and widely used international tribunals.¹⁶⁰ Since the establishment of the DSB in 1995, over 600 disputes have been brought to the WTO and over 350 rulings have been issued.¹⁶¹ In comparison, since the establishment of the International Court of Justice in 1945, just over 180 cases have been instituted before the International Court of Justice.¹⁶² All this being said, there are currently concerns about the DSM, especially regarding the inactiveness of the Appellate Body.¹⁶³ However, according to Lester, Mercurio and Davies,¹⁶⁴ most members recognise that the overall benefits of the DSM outweigh the concerns. The fact that there have

¹⁵⁷ WTO dispute: *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (2004) para 14; Simo “Developing countries and special and differential treatment” 257.

¹⁵⁸ WTO dispute: *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R (2000) para 111 (hereafter WTO dispute: *US Products EC*). This is confirmed in article 23 of the *DSU* which emphasises the strengthening of the multilateral trading system. This means that the DSB has jurisdiction to hear disputes arising out of the WTO agreements in accordance with article 1 of the *DSU*.

¹⁵⁹ Pascal Lamy was the director-general of the WTO from 2005 to 2013. See WTO 2009 https://www.wto.org/english/news_e/pres09_e/pr578_e.htm; WTO 2023 https://www.wto.org/english/thewto_e/dg_e/pl_e.htm.

¹⁶⁰ Lester, Mercurio and Davies *World Trade Law* 149.

¹⁶¹ WTO 2023 https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

¹⁶² ICJ 2023 <https://www.icj-cij.org/cases>.

¹⁶³ During 2019, WTO members could not agree on how to address certain problems related to the functioning of the Appellate Body. As a result, the Appellate Body has had no members since 30 November 2020 and is currently unable to review appeals. In any case, most disputes are resolved during consultations. However, there is still a backlog of appeals that were brought to the WTO. This is indeed something that the WTO should address. However, since this study focuses on the implementation of the anti-dumping requirements between the EU and SA, the inactiveness of the Appellate Body and the implications thereof fall outside the scope of the study. To read a more detailed discussion regarding the inactiveness of the Appellate Body, see Davey 2022 *World Trade Review*; Creamer 2019 *AJIL Unbound*; WTO 2019 https://www.wto.org/english/news_e/news19_e/gc_09dec19_e.htm; WTO 2023 https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.

¹⁶⁴ Lester, Mercurio and Davies *World Trade Law* 150.

been over 600 disputes brought to the DSB since 1995 demonstrates that members have a sense of confidence in the DSM.

For illustrative purposes, figure 2-1 below sets out the number of consultations, panel establishments and appellate reviews during the period of 1995 to 2022:

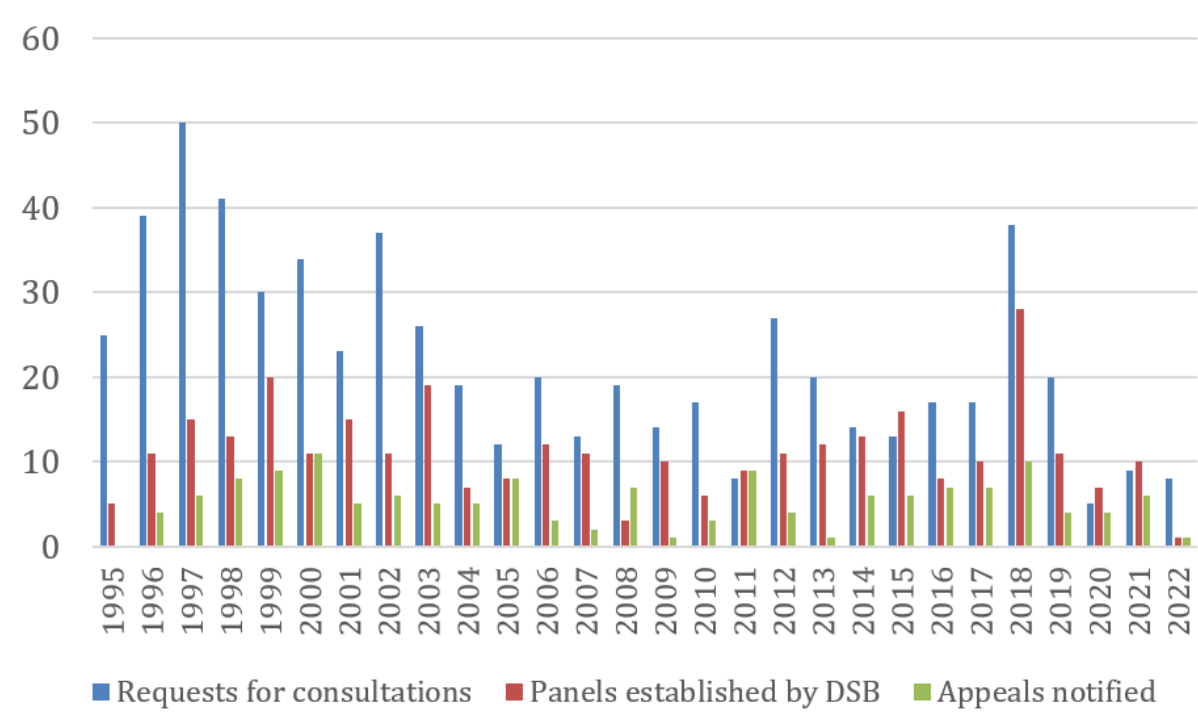


Figure 2-1: Consultations, Panels and Appellate Reviews (1995-2022).¹⁶⁵

There are different stages in the *DSU* process and only a few cases reach the final compensation or suspension stage as many disputes are settled during the consultation stage between members.¹⁶⁶ The *ADA* confirms that anti-dumping disputes are subject to the rules laid down by the *DSU*.¹⁶⁷ An aggrieved member can request consultations with another member relating to anti-dumping matters.¹⁶⁸ If the relevant members are unable to settle the matter during consultations, the dispute can be referred to the DSB.¹⁶⁹ The

¹⁶⁵ WTO 2021 https://www.wto.org/english/tratop_e/dispu_e/disputats_e.htm.

¹⁶⁶ Lester, Mercurio and Davies *World Trade Law* 154-160.

¹⁶⁷ Article 17(1) of the *ADA*.

¹⁶⁸ The process starts when a member requests consultations with another member in accordance with article 4 of the *DSU*. The goal is that the members negotiate a resolution to resolve the matter. See articles 17(2)-(3) of the *ADA*.

¹⁶⁹ Article 17(4) of the *ADA*.

DSB will then establish a panel at the request of the complaining party to consider the matter.¹⁷⁰ Figure 2-2 below shows that the *ADA* has been the second most raised agreement in WTO disputes.¹⁷¹

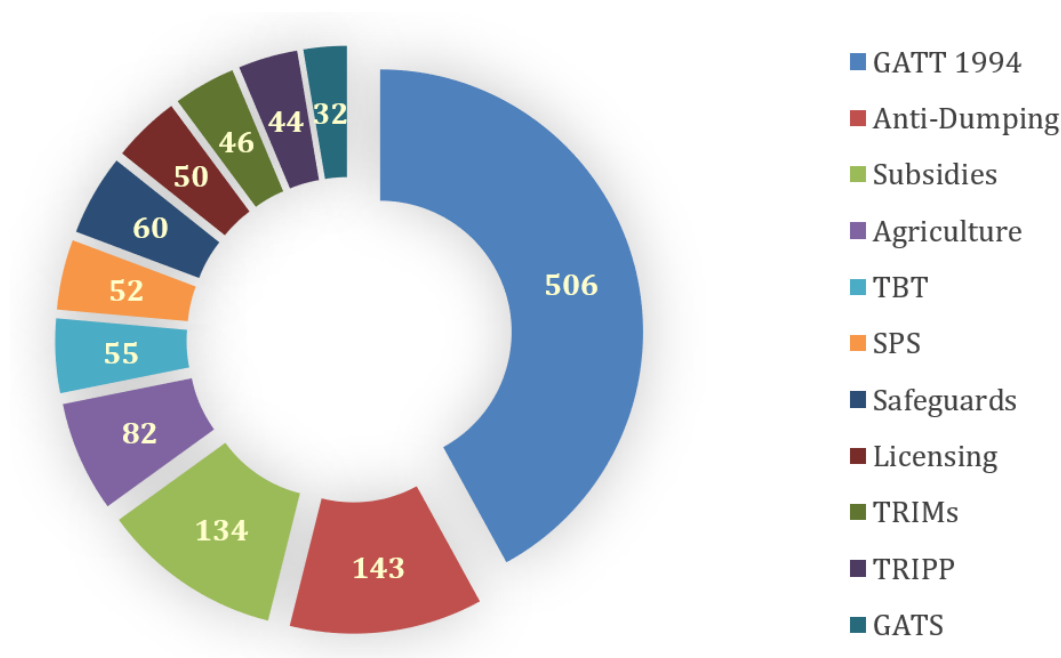


Figure 2-2: WTO agreements raised in WTO disputes (1995-2022).¹⁷²

2.3 EU

2.3.1 Background

The EU is committed to deepening multilateral trade relations with trade partners.¹⁷³ In 1960, the European Free Trade Association States (hereafter EFTA) was established by the *EFTA Convention*¹⁷⁴ to promote free trade between the member states. In 1994, the

¹⁷⁰ The panel will issue a final report with its findings after it has conducted an assessment and has considered comments made during an interim review. Once the DSB adopts the final report, the final report has legal force and the member countries involved must implement the panel's findings. See articles 11, 15(2)-(3) and 17(5) of the *ADA*.

¹⁷¹ The reason the *GATT* has been raised the most in disputes, is that all agreements refer to the *GATT*. Apart from the *GATT*, the *ADA* is the most used agreement in disputes.

¹⁷² TBS means technical barriers to trade. SPS means sanitary and phytosanitary measures. TRIMS means trade-related investment measures. TRIPS means trade-related aspects of intellectual property rights. See WTO 2021 https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm.

¹⁷³ Duina and Viju-Miljusevic *Standardizing the World: EU Trade Policy and the Road to Convergence* 259.

¹⁷⁴ *Convention Establishing the European Free Trade Association* (1960) (hereafter the *EFTA Convention*). The *EFTA Convention* was revised in 2001 and came into force on 1 June 2002. There have been several amendments since then. See EFTA 2023 <https://www.efta.int/Legal-Text/EFTA-Convention->

Agreement on the European Economic Area (1994) (hereafter the *European Economic Area Agreement*) came into force between the EU and EFTA to ensure the free movement of goods between them.¹⁷⁵ Article 26 of the *European Economic Area Agreement* stipulates that anti-dumping duties that are attributable to third party countries should not be imposed between the EU and EFTA.¹⁷⁶ Protocol 13 of the *European Economic Area Agreement* limits article 26 to the areas and products covered in the *European Economic Area Agreement*.¹⁷⁷ The protocol further stipulates that anti-dumping duties may be introduced by the contracting parties to avoid circumvention of anti-dumping duties to third-party countries.¹⁷⁸ This means that, if third party country producers try to circumvent anti-dumping duties against imported products, the EC may impose anti-dumping duties even if it is a product that originated in the European Economic Area.¹⁷⁹

2.3.2 Anti-dumping law: EU's Anti-Dumping Regulation

The EC will not impose anti-dumping duties if member states in the Union Trade Defence Instrument Committee (hereafter TDI Committee) oppose the implementation of anti-dumping duties by a majority vote.¹⁸⁰ The TDI Committee will deliver opinions regarding anti-dumping investigations and the EC should take their opinion into account during

1152. The current EFTA states are Iceland, Liechtenstein, Norway and Switzerland. See the preamble and article 2 of the *EFTA Convention*.

¹⁷⁵ Articles 1 and 8 of the *European Economic Area Agreement*.

¹⁷⁶ Before the *European Economic Area Agreement*, anti-dumping duties were imposed against some of the EFTA states. See EC investigation: *Council Regulation (EEC) of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted*, Reg 341/90 in *OJEU* L38/1 15 (hereafter EC investigation: *Ferro-Silicon Iceland*).

¹⁷⁷ This means that anti-dumping duties should not be applied to products that are specifically stated in the *European Economic Area Agreement* and where the Union *acquis* is integrated. The Union *acquis* is common rights and obligations that is binding on all EU members. See Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 2.04.A.

¹⁷⁸ This means the EC can initiate anti-dumping proceedings against EFTA members with regard to products not covered by the *European Economic Area Agreement*. For examples, see EC investigation: *Council Regulation (EC) of 26 September 1997 imposing a definitive countervailing duty on imports of farmed Atlantic salmon originating in Norway – Council Declaration*, Reg 1891/97 in *OJEU* L267/19; EC investigation: *Council Regulation (EC) of 8 March 2004 imposing definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of large rainbow trout originating in Norway and the Faeroe Islands*, Reg 437/2004 in *OJEU* L72/23.

¹⁷⁹ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 2.04.B.

¹⁸⁰ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 1.04.B; Herbert Smith Freehills *EU Anti-dumping Legal Guide* 11.

investigations.¹⁸¹ The TDI Committee is composed of representatives of all EU member states and is chaired by a representative of the EC.¹⁸²

Anti-dumping duties are the most common trade remedy that the EC imposes.¹⁸³ During the period 1995 to 2022, the EU initiated 547 investigations.¹⁸⁴ As mentioned earlier, the first anti-dumping regulation was published in 1968. This was followed by five further regulations until the current *EU's Anti-Dumping Regulation* was published in 2016 and amended in 2020.¹⁸⁵

2.3.3 Developed status of the EU

A developed country is generally defined as a country which has a mature economy and technologically advanced infrastructure.¹⁸⁶ For example, in 2022, Switzerland had the highest Human Development Index score of 0.962 and South Sudan had the lowest score of 0.385.¹⁸⁷ Various sources have established that most countries within the EU are seen

¹⁸¹ This should be done in accordance with *Regulation (EU) of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers*, Reg 182/2011 in *OJEU* L55/13; Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 1.04.B.1.

¹⁸² *EC Trade Defence Instruments Committee* 1.

¹⁸³ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 1.01.A.

¹⁸⁴ WTO 2023 https://www.wto.org/english/tratop_e/adp_e/adp_e.htm.

¹⁸⁵ *EU's first Anti-Dumping Regulation; Council Regulation (EEC) of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community*, Reg 3017/79 in *OJEU* L339/1; *Council Regulation (EEC) of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community*, Reg 2176/84 in *OJEU* L201/1; *Council Regulation (EEC) of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community*, Reg 2423/88 in *OJEU* L209/1; *Council Regulation (EC) of 22 December 1995 on protection against dumped imports from countries not members of the European Community*, Reg 384/96 in *OJEU* L56/1; *Council Regulation (EC) of 30 November 2009 on protection against dumped imports from countries not members of the European Community*, Reg 1225/2009 in *OJEU* L343/51; *Regulation (EU) of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union*, Reg 2016/1036 in *OJEU* L176/21.

¹⁸⁶ World Population Review 2023 <https://worldpopulationreview.com/country-rankings/developed-countries>.

¹⁸⁷ According to the United Nations Development Programme, certain factors determine a Human Development Index, such as gross domestic product per capita, political stability and access to electricity. The higher the score, the more likely it is that the country is developed and the lower the score, the more likely it is that the country is developing. See HDR 2022 <https://hdr.undp.org/data-center/country-insights#/ranks>; World Population Review 2023 <https://worldpopulationreview.com/country-rankings/developed-countries>; UN 2023 <https://hdr.undp.org/data-center/human-development-index#/indicies/HDI>.

as developed.¹⁸⁸ Most countries in the EU have a high Human Development Index which indicates developed status.¹⁸⁹ The EU is a provider and not a beneficiary of the preferential tariffs and can be seen as a developed country.¹⁹⁰ This study therefore considers the EU as a developed country.

2.3.4 *Dispute settlement*

The EU, as a WTO member, has an obligation to resolve trade disputes with other WTO members through the *DSU* and not through unilateral action.¹⁹¹ The Court of Justice of the European Union is responsible for dispute settlement regarding the interpretation of EU law.¹⁹² The Court of Justice of the European Union consists of the Court of Justice and the General Court located in Luxembourg.¹⁹³ All regulations published by the EC are subject to review by the Court of Justice of the European Union.¹⁹⁴ This means that the Court of Justice of the European Union will adjudicate on the procedural aspects of anti-dumping investigations.¹⁹⁵ However, anti-dumping disputes between WTO members will be considered in terms of the DSB and not the Court of Justice of the European Union.¹⁹⁶

2.4 **SA**

2.4.1 *Background*

During the apartheid years, SA adopted protectionist measures and was reluctant to move away from these measures due to the sanctions that were in place.¹⁹⁷ During the Uruguay

¹⁸⁸ For examples, see Michalopoulos *Aid, Trade and Development: 50 years of Globalisation* 339; IMF 2023 https://www.imf.org/external/datamapper/NGDP_RPCH@WEO/OEMDC/ADVEC/WEOWORLD/GUY/SUR/BRA/COL.

¹⁸⁹ HDR 2022 <https://hdr.undp.org/data-center/country-insights#/ranks>.

¹⁹⁰ WTO 2022 <http://ptadb.wto.org/SearchByCountry.aspx>.

¹⁹¹ WTO dispute: *US Products EC* para 111. This is confirmed in article 23 of the *DSU* which emphasises the strengthening of the multilateral trading system.

¹⁹² Court of Justice of the European Union 2022 https://curia.europa.eu/jcms/jcms/Jo2_6999/en/.

¹⁹³ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 1.04.D.

¹⁹⁴ Article 263 of the *Treaty on the Functioning of the European Union* (2016) stipulates that the Court of Justice can review the legality of acts by the EC. See also Andersen 2022 *European Law Review* 552.

¹⁹⁵ The General Court will typically adjudicate on the procedure the EC followed during an anti-dumping investigation and the EC's correct interpretation of the *EU's Anti-Dumping Regulation* or the EC misuse of power. Appeals will be adjudicated by the Court of Justice. See Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 1.04.D.

¹⁹⁶ WTO dispute: *US Products EC* para 111.

¹⁹⁷ Apartheid was a period in SA from 1948 to 1994 where an all-white government imposed racial segregation and where non-white South Africans were required to live in designated areas. See AU

round (1986–1994), SA was pressured to liberalise its trade policies.¹⁹⁸ The EU specifically wanted SA to fall in line with the *GATT* and open the SA market to imported goods.¹⁹⁹ By 1992, SA had started to realise that it would be necessary to move away from protectionism to be part of the global multilateral trading system.²⁰⁰ During negotiations in the Uruguay round, SA was still under the leadership of an apartheid government and when SA became a member of the WTO in 1995, it was under the leadership of a newly elected democratic government.²⁰¹ Finally, after becoming a member of the WTO, SA could fully take part in international trade.²⁰²

Following democracy and its WTO membership, SA became a popular country to invest in and it was essential for the SA industry to understand anti-dumping measures as a means to protect the SA industry against unfair competition.²⁰³ Anti-dumping became a focus area as SA industries had to brace themselves for a flood of competitive imports due to SA's trade liberation.²⁰⁴

The EU was the first in line to conduct trade with SA near the end of apartheid and began trade negotiations with SA in the early 1990s.²⁰⁵ In 1999, the EU and SA concluded a trade agreement, the *Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part*²⁰⁶ (hereafter *Agreement on Trade*). The *Agreement on Trade*

2023 <https://au.int/en/auhrm-project-focus-area-apartheid>; Blumberg "South African trade policy and regulation in the 1990s: The late years of the Uruguay Round and the early days of the WTO" 38-39.

¹⁹⁸ Blumberg "South African trade policy and regulation in the 1990s: The late years of the Uruguay Round and the early days of the WTO" 38.

¹⁹⁹ Blumberg "South African trade policy and regulation in the 1990s: The late years of the Uruguay Round and the early days of the WTO" 38.

²⁰⁰ Blumberg "South African trade policy and regulation in the 1990s: The late years of the Uruguay Round and the early days of the WTO" 39.

²⁰¹ Blumberg "South African trade policy and regulation in the 1990s: The late years of the Uruguay Round and the early days of the WTO" 39.

²⁰² Blumberg "South African trade policy and regulation in the 1990s: The late years of the Uruguay Round and the early days of the WTO" 41.

²⁰³ Blumberg "South African trade policy and regulation in the 1990s: The late years of the Uruguay Round and the early days of the WTO" 43.

²⁰⁴ Blumberg "South African trade policy and regulation in the 1990s: The late years of the Uruguay Round and the early days of the WTO" 43.

²⁰⁵ Blumberg "South African trade policy and regulation in the 1990s: The late years of the Uruguay Round and the early days of the WTO" 55.

²⁰⁶ *Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part* (1999) in *OJEU* L311/3.

abolished certain customs duties or reduced them significantly.²⁰⁷ When SA became a member of SACU, the country was required to negotiate the *Agreement on Trade* via SACU, which did not happen.²⁰⁸ This resulted in imbalances that allowed certain tariff-free EU goods to enter the SACU region.²⁰⁹ Despite these imbalances, the *Agreement on Trade* is still an important stepping stone for EU-SA trade.²¹⁰ The EU-SA Joint Strategic Partnership of 2006 also strengthened the trade partnership between SA and the EU.²¹¹

2.4.2 Anti-dumping law: SA's Anti-Dumping Regulation and the ITA Act

Even though SA was one of the first countries to establish anti-dumping legislation, anti-dumping measures were not truly implemented until 1990 (near the end of apartheid).²¹² In 1994, SA created a special committee to restructure SA's anti-dumping laws to be in line with the soon-to-be-established *ADA*.²¹³ This came to an end in 2003 and resulted in the promulgation of the *ITA Act* and *SA's Anti-Dumping Regulation*.²¹⁴ ITAC was then established in terms of the *ITA Act* which also mandated ITAC to investigate dumping from 2003.²¹⁵ ITAC performs its functions in terms of the *ITA Act* but is still subject to directives made by the Minister of Trade.²¹⁶

²⁰⁷ Article 11-12 of the *Agreement on Trade*.

²⁰⁸ Parshotam "South Africa's international economic relations" 95.

²⁰⁹ Parshotam "South Africa's international economic relations" 95.

²¹⁰ During 2016, some of the provisions in the *Agreement on Trade* were repealed by Protocol 4 of the *Economic Partnership Agreement between the European Union and the Southern African Development Community EPA States* (2016) (hereafter the *EPA 2016*). See also Parshotam "South Africa's international economic relations" 95.

²¹¹ The EU has a free trade agreement with Southern African Development Community Economic Partnership Agreement States (hereafter EPA states). The Southern African Development Community EPA States are the SACU members with Mozambique. See article 20 of the *EPA 2016*; article 1 of the *Free Trade Agreement Between the EFTA States and the SACU States* (2014); Parshotam "South Africa's international economic relations" 99.

²¹² Article 8 of the *Customs Tariff Act* 26 of 1914; Blumberg "South African trade policy and regulation in the 1990s: The late years of the Uruguay Round and the early days of the WTO" 44.

²¹³ Blumberg "South African trade policy and regulation in the 1990s: The late years of the Uruguay Round and the early days of the WTO" 45.

²¹⁴ The *ITA Act* was finally published on 22 January 2003 in the Government Gazette. *SA's Anti-Dumping Regulation* was published on 14 November 2003 in the Government Gazette. See ss 7, 64 of the *ITA Act*; GG 24287 of 22 January 2003; GN 3197 in GG 25684 of 14 November 2003.

²¹⁵ Sections 7, 16 of *ITA Act*.

²¹⁶ Sections 7, 5, 15 of the *ITA Act*.

To date, SA has initiated a total of 254 investigations while the EU initiated 547 anti-dumping investigations.²¹⁷ This is interesting seeing that SA is a much smaller economy than the EU.

2.4.3 *Developing status of SA*

There is no formal definition of “developing country” in the WTO Agreements.²¹⁸ Instead, the WTO leaves it to members to declare themselves as developing or developed.²¹⁹ A developed country can disagree with this self-selection and challenge a member’s developing status.²²⁰ Article XVIII of the *GATT* provides some guidance on the aspects of developing countries. It provides that particular attention must be given to economies with a “low standard of living” and which are in the “early ages of development”.²²¹ According to Lester, Mercurio and Davies,²²² it is a political issue that WTO members should negotiate.

SA did not start as a developing country in terms of the WTO. SA participated in the *GATT* 1947 and during the Uruguay round in 1986 as a self-selected developed country.²²³ Some argue that SA was obliged to accept this developed status during the Uruguay round.²²⁴ However, in 1993, SA made it clear that even though it participated in the *GATT* as a developed country, it should be “re-classified as a developing country in order to take

²¹⁷ WTO 2023 https://www.wto.org/english/tratop_e/adp_e/adp_e.htm.

²¹⁸ Michalopoulos *Aid, Trade and Development: 50 years of Globalisation* 339.

²¹⁹ Simo “Developing countries and special and differential treatment” 258-260.

²²⁰ Simo “Developing countries and special and differential treatment” 258. In 2001, the EU contested Korea’s self-selection as a developing country. See WTO: *Dispute Settlement Body – Minutes of meeting*, WT/DSB/M/96 (2001) para 14.

²²¹ Article XVIII(1) of the *GATT*. See also Gibbs “Special and Differential Treatment in the Context of Globalization” 4, who notes three further categories of developing countries.

²²² In 2019, the US introduced four categories of WTO member countries that should have developed status and not developing status in terms of the WTO. In February 2020, the US dropped SA from their list of developing countries for trade purposes. This came from SA’s membership of the Group of 20 (one of the four categories introduced). The Group of 20 is a forum for international economic cooperation with 20 members including the EU. See WTO: *Draft General Council Decision Procedures to Strengthen the Negotiating Function of the WTO*, WT/GC/W/764 (2019); Federal Register *Designations of Developing and Least-Developed Countries Under the Countervailing Duty Law* (2020); De Wet 2020 <https://www.news24.com/news24/bi-archive/ustr-update-drops-south-africa-as-developing-country-cites-g20-membership-2020-2>; Lester, Mercurio and Davies *World Trade Law* 878.

²²³ Sucker “(Southern) African Priorities in international economic law” 28.

²²⁴ Sucker “(Southern) African Priorities in international economic law” 29.

advantage of the benefits offered internationally”.²²⁵ Then again in 1998, in a communication to the WTO, SA confirmed that it deems itself to be a developing country.²²⁶

Just a few years ago, in a communication to the WTO in 2019, SA stated that even though it has an emerging economy, it still faces serious development issues.²²⁷ SA, along with other developing countries, stated that there is an enormous development divide between developing and developed members of the WTO that is evident from a range of indicators such as gross domestic product per capita and poverty levels.²²⁸ As a result, SA made its position clear in this communication that it is to be seen as a developing country. Furthermore, Sucker²²⁹ notes that since SA regularly invokes special and differential treatment, it is a developing country. In terms of the WTO, SA is a beneficiary and not a provider of this preferential treatment and can be seen as a developing country.²³⁰ The EU has Economic Partnership Agreements with developing countries such as the free trade agreement with Southern African Development Community EPA states.²³¹ Since SA is part of these states, it can be said that SA is seen as a developing country by the EU.²³²

Most recently on 29 July 2022 in WTO dispute: *EU Citrus Fruit SA*, SA made its developing position very clear by stating that “the EU did not take account of the special needs of

²²⁵ WTO: *Trade policy review mechanism the Republic of South Africa: Report by the Government*, C/RM/G/37 (1993) 48. Interestingly, the US has rejected this classification and claimed that SA as a founding member of the *GATT* has never been seen as a developing country and the US will thus continue to see SA as a developed country. See WTO: *Trade policy review mechanism South Africa: Minutes of Meeting*, C/RM/M/37 (1993) 54.

²²⁶ WTO: *Trade Policy Review South Africa: Report by the Government*, WT/TPR/G/34 (1998) 77.

²²⁷ WTO: *The continued relevance of special and differential treatment in favour of developing members to promote development and ensure inclusiveness*, WT/GC/W/765/Rev.2 (2019) (hereafter WTO: *Communication on Developing Members*).

²²⁸ WTO: *Communication on Developing Members* paras 1.1, 2.3, 2.4. This communication came from China, India, SA, Venezuela, Lao, Bolivia, Kenya, Cuba, Central African Republic and Pakistan.

²²⁹ Sucker “(Southern) African Priorities in international economic law” 30.

²³⁰ WTO 2022 <http://ptadb.wto.org/SearchByCountry.aspx>.

²³¹ Article 20 of the *EPA* 2016; EC 2023 https://policy.trade.ec.europa.eu/development-and-sustainability/support-developing-countries_en.

²³² Various other sources also see SA as a developing country. See Moodley “Children with Disabilities in South Africa: Policies for Early Identification and Education” 109; Van den Berg “The Role of Open Distance Learning in Addressing Social Justice: A South African Case Study” 341; Michalopoulos *Aid, Trade and Development: 50 years of Globalisation* 339; IMF 2023 https://www.imf.org/external/datamapper/NGDP_RPCH@WEO/OEMDC/ADVEC/WEOWORLD/GUY/SUR/BRA/COL. The Australian Minister for Foreign Affairs published a list of developing countries in March 2022 that included SA. See DFAT 2022 <https://www.dfat.gov.au/about-us/publications/list-of-developing-countries-as-declared-by-the-minister-for-foreign-affairs>.

South Africa, a developing country Member”.²³³ Following these various sources and SA’s own communication to the WTO, this study deems SA a developing country.

2.4.4 Dispute settlement

As with the EU, SA has an obligation to resolve disputes with other WTO members through the *DSU* and not through unilateral action.²³⁴ In SA, parties affected by an ITAC determination may apply to the High Court for a review on the procedural aspects of ITAC’s determinations and follow with an appeal to the Supreme Court of Appeal.²³⁵ Brink²³⁶ notes that ITAC is regarded as a specialist institution and the courts generally do not interfere and will typically only review procedural aspects during investigations.

2.5 Conclusion

This chapter set out a discussion of the history and background relating to anti-dumping measures under the multilateral trading system, as well as the EU and SA. The chapter noted that the *GATT* 1947 was the only multilateral trading instrument that governed international trade for 47 years, from 1947 until the end of 1994.²³⁷ To improve the multilateral trading system, eight negotiating rounds were held where various trade-related matters were discussed. Following the Uruguay round, the WTO came into existence, signifying a new era of international trade and the establishment of the first truly international trade organisation.

The *ADA*, implemented with the establishment of the WTO, clarifies the application of Article VI of the *GATT*. All WTO members must align their anti-dumping legislation with the *ADA*.²³⁸

²³³ WTO dispute: *EU Citrus Fruit SA* 4.

²³⁴ Article 23 of the *DSU*.

²³⁵ Sections 46(1) and 47(1) of the *ITA Act*.

²³⁶ Brink “Anti-dumping in southern Africa” 364; see SA case: *Algorax (Pty) Ltd v The International Trade Administration Commission of South Africa* (T) (unreported) case number 18829/2001 of 17 May 2007; SA case: *Scaw*; SA case: *International Trade Administration Commission v South African Tyre Manufacturers Conference (Pty) Ltd* 2011 JDR 1161 (SCA); SA case: *Progress Office Machines CC v SARS* 2007 4 SA 1358 (SCA).

²³⁷ WTO 2023 https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

²³⁸ WTO 2023 https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

In the EU, the EC investigates dumping claims and imposes anti-dumping duties in accordance with the *EU's Anti-Dumping Regulation*. The EC will impose anti-dumping duties unless member states in the TDI Committee oppose the anti-dumping duties by a majority vote.²³⁹ In SA, ITAC investigates dumping claims and imposes anti-dumping duties in accordance with *SA's Anti-Dumping Regulation* and the *ITA Act*.

SA and the EU are both member states of the WTO and both are active in numerous anti-dumping investigations. Various sources have established that most countries within the EU are seen as developed. As a result, the EU can be seen as a developed region. Following the majority classification, SA's own trade policy and the recent WTO dispute, SA is seen as a developing country.

The next chapter discusses and compares the actual anti-dumping investigation process in terms of the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* against the backdrop of the relevant provisions in the *ADA*.

²³⁹ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 1.04.B.

CHAPTER 3 THE ANTI-DUMPING INVESTIGATION PROCESS

3.1 Introduction

Before the requirements to consider during an anti-dumping investigation are discussed, it is necessary to first set out how anti-dumping investigations are conducted by investigating authorities in the EU and SA, respectively. The investigation starts once the relevant domestic industry lodges a complaint with the EC or ITAC, as respective investigating authorities.

The EC and ITAC's anti-dumping determinations reports are usually laid out in a similar structure. They start by setting out the parties involved in the anti-dumping investigation, then move on to identify the relevant domestic industry. Next, they provide a product classification for the relevant goods involved in the investigation. After this has been discussed, the EC and ITAC generally consider the requirements to determine if anti-dumping duties should be imposed, namely dumping, injury and causation. Here, the EC will also consider the fourth requirement of Union interest. Finally, if the investigation reveals compliance with the requirements, the EC and ITAC will calculate the duty to be imposed and publish their findings in a determination.

This chapter starts with a discussion on the domestic industry followed by a discussion on the product classification and a discussion on the anti-dumping investigation procedure.

3.2 Domestic industry

Different types of goods have been involved in anti-dumping disputes before the DSB, ranging from frozen fries to school exercise books and many others.²⁴⁰ In terms of the

²⁴⁰ For frozen fries, see WTO Dispute: *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WT/DS591/1, G/ADP/D133/1 G/VAL/D/14, G/L/1339 (2019); for school exercise books, see WTO dispute: *Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia*, WT/DS578/1 G/L/1297 G/ADP/D131/1 (2019); for vehicles, see WTO dispute: *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/AB/R (2018) (hereafter WTO dispute: *Russia Light Commercial Vehicles Germany*); for biodiesel, see WTO dispute: *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R (2016) (hereafter WTO dispute: *EU Biodiesel Argentina*); for broiler products, see WTO dispute: *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R

ADA, the application to investigate the alleged dumping should be initiated by or on behalf of the relevant domestic industry.²⁴¹ In the EU, this application should be initiated by or on behalf of the domestic producers of the relevant product in the Union industry.²⁴² In SA, this application should be initiated by or on behalf of the domestic producers of the relevant product in the SACU industry.²⁴³

The term “domestic industry” refers to the domestic producers as a whole of the like products or to the producers whose collective output of the products is seen as a major

(2013); for footwear, see WTO dispute: *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R (2011); for stainless steel, see WTO dispute: *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (2008); for pharmaceutical products, see WTO dispute: *SA Pharmaceutical Products India*; for beef and rice, see WTO dispute: *Mexico – Definitive Anti-dumping Measures on Beef and Rice – Complaint with Respect to Rice*, WT/DS295/AB/R (2005) (hereafter WTO dispute: *Mexico Beef and Rice US*); for lumber, see WTO dispute: *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (2004) (hereafter WTO dispute: *US Lumber Canada*); for poultry, see *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (2003) (hereafter WTO dispute: *Argentina Poultry Brazil*); for alcoholic beverages, see WTO dispute: *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R (1996) (hereafter WTO dispute: *Japan Alcoholic Beverages Canada*).

²⁴¹ Article 5(4) of the ADA. All relevant producers in the domestic industry should be included when defining the domestic industry. See WTO dispute: *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/R (2017) para 7.11.

²⁴² Article 5(4) of the *EU’s Anti-Dumping Regulation*. Anti-dumping applications have been submitted by the European Steel Association (hereafter Eurofer) on behalf of the Union industry against steel imports. See EC investigation: *Commission Implementing Regulation (EU) of 15 November 2022 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of electrolytic chromium coated steel products originating in the People’s Republic of China and Brazil*, Reg 2022/2247 in *OJEU* L295/7 para 2; EC investigation: *Commission Implementing Regulation (EU) of 5 October 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia and Ukraine and terminating the investigation on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Serbia*, Reg 2017/1795 in *OJEU* L258/24 para 1 (hereafter EC investigation: *Alloy Steel Serbia*).

²⁴³ In recent years, SAPA has filed several anti-dumping applications on behalf of the SACU industry regarding the importation of frozen chicken. See ITAC: *Investigation 479 Frozen Chicken*; ITAC: *Investigation 492 Frozen Chicken*; ITAC: *Investigation 678 Frozen Chicken*; ITAC: *Investigation 695 Frozen Chicken*; ITAC: *Sunset review investigation of the anti-dumping duties on frozen bone-in portions of fowls of species Gallus Domesticus from Germany, Netherlands and UK: Final determination*, Report No 666 (2021); ITAC: *Investigation into the Alleged Dumping of Frozen Meat of Fowls of the Species Gallus Domesticus, Whole Bird and Boneless Cuts, Originating in or Imported from Brazil: Preliminary Determination*, Report No 389 (2012). Other examples of domestic industries include the South African Coil Coaters Association regarding steel and the South African Tyre Manufacturing Conference regarding tyres. For steel, see ITAC: *Investigation into the alleged dumping of other flat-rolled products of iron or non-alloy steel originating in or imported from the People’s Republic of China: Preliminary determination*, Report No 710 (2023) para 1.2 (hereafter ITAC: *Investigation Steel China*); for tyres, see ITAC: *Investigation into the alleged dumping of new pneumatic tyres of rubber of a kind used on motor cars and on buses or lorries originating in or imported from the People’s Republic of China: Preliminary determination*, Report No 700 (2022) para 1.2 (hereafter ITAC: *Investigation Tyres China*).

proportion of the total domestic production of the products.²⁴⁴ The domestic producers in the EU are the EU producers and in SA the domestic producers are the SACU producers.²⁴⁵ The *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* are in agreement that the collective output should constitute more than 50 per cent of the total production of the like product.²⁴⁶ The investigation will not be initiated if less than 25 per cent of the producers of the relevant like product in the domestic industry support the investigation.²⁴⁷ This threshold requirement ensures that anti-dumping duties, if imposed following the investigation, have a positive impact on the domestic industry and do not cause any harm to the domestic industry.²⁴⁸ Ultimately, *SA's Anti-Dumping Regulation* and the *EU's Anti-Dumping Regulation* are aligned with regard to the domestic industry classification.

3.3 Product classification

As members of the World Customs Organization, SA and the EU use the *International Convention on the Harmonized Commodity Description and Coding System* (1983) (hereafter the *Harmonized Commodity Tariff Code*) to classify goods.²⁴⁹ The World

²⁴⁴ Article 4(1) of the *ADA*; Brink "Anti-dumping in southern Africa" 312.

²⁴⁵ The Union industry also refers to producers who are the importers of the alleged dumped product or who are related to exporters or importers of the alleged dumped product. For producers who are seen as related to exporters or importers, see articles 4(1)(a) and 4(2) of the *EU's Anti-Dumping Regulation*. The SACU industry are the domestic producers in the SACU. See article 1 of *SA's Anti-Dumping Regulation*.

²⁴⁶ Article 5(4) of the *EU's Anti-Dumping Regulation*; A 7(3)(b) of *SA's Anti-Dumping Regulation*; this is aligned with A 5(4) of the *ADA*; to illustrate, see ITAC: *Investigation into the alleged dumping of laminated safety glass originating in or imported from the People's Republic of China (PRC): Final determination*, Report No 697 (2022) para 1.2 (hereafter ITAC: *Investigation Safety Glass China*); ITAC: *Investigation into the alleged dumping of Portland cement originating in or imported from Pakistan: Final Determination*, Report No 512 (2015) para 1.2 (hereafter ITAC: *Investigation Portland Cement Pakistan*).

²⁴⁷ Article 5(4) of the *EU's Anti-Dumping Regulation*; A 7(3)(a) of *SA's Anti-Dumping Regulation*; this is aligned with A 5(4) of the *ADA*. In the EU, the General Court held that article 5(4) of the *EU's Anti-Dumping Regulation* deals exclusively where the EC initiates a proceeding at the start of the process. In this case, the necessary 25 per cent support was obtained to initiate the investigation and support only fell below 25 per cent during the proceedings, which does not mean that the investigation should be terminated. There is nothing contrary to this standing in SA law. See EU case: *Interpipe Nikopol'sky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT) and Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT) v Council of the European Union*, T-249/06 (2009) paras 139-140.

²⁴⁸ Lester, Mercurio and Davies *World Trade Law* 519.

²⁴⁹ It is also commonly referred to as the HS Nomenclature. Over 200 countries use this code and 98 per cent of products that trade internationally are classified with this code. See also SA case: *Samsung Electronics SA (Pty) Ltd v The Commissioner for the South African Revenue Service* 2022 JDR 2654

Customs Organization created this code to ensure uniformity amongst countries so that the same product can be identified by any country with the use of a code.²⁵⁰ Within anti-dumping investigations, the product under consideration and the like product need to be defined in order to classify it with the correct code.

3.3.1 Product under consideration

In terms of EU case law, the product under consideration is the product imported into the EU which is considered to be dumped.²⁵¹ There is no clear classification of the product under consideration in terms of SA case law. However, it is clear from ITAC investigations that the product under consideration is the product being imported into the SACU industry which is considered as dumped.²⁵²

As confirmed in EU case law and ITAC investigations, the product under consideration should be defined in order to create a list of products which might be subject to the imposition of anti-dumping duties.²⁵³ In ITAC: *Investigation 695 Frozen Chicken*, ITAC clearly defined the product under consideration as “frozen meat of fowls of the species *gallus domesticus*, cut in pieces, with bone in” which was used throughout the

(SCA) para 6; Section 47(8)(a) of the *Customs and Excise Act*; World Customs Organization 2023 <https://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx>.

²⁵⁰ *International Convention on the Harmonized Commodity Description and Coding System* (1983).

²⁵¹ EU case: *Portmeirion Group UK Ltd v Commissioners for Her Majesty's Revenue & Customs*, C-232/14 (2016) paras 39-40; EU case: *Yingli Energy (China) Co. Ltd v Council of the European Union*, T-160/14 (2017) para 111 (hereafter EU case: *Yingli Energy*); EU case: *JingAo Solar Co. Ltd v Council of the European Union*, T-158/14, T-161/14, T-163/14 (2017) para 85 (hereafter EU case: *JingAo*); EU case: *Whirlpool Europe Srl v Council of the European Union*, T-314/06 (2010) para 138 (hereafter EU case: *Whirlpool*); EU case: *European Wire Rope Importers Association (EWRIA) v European Commission*, T-369/08 (2010) para 82 (hereafter EU case: *EWRIA*); EU case: *Brosmann Footwear (HK) Ltd v Council of the European Union*, T-401/06 (2010) para 131 (hereafter EU case: *Brosmann*); Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 4.01.

²⁵² ITAC: *Investigation Steel China* para 2.1.1; ITAC: *Investigation into the alleged dumping of windscreens for vehicles originating in or imported from People's Republic of China into the SACU market: Preliminary determination*, Report No 707 (2023) para 2.1.1 (hereafter ITAC: *Investigation Windscreens China*); ITAC: *Investigation into the alleged dumping of frozen potato chips originating in or imported from Belgium, Germany and the Netherlands: Final Determination*, Report No 706 (2023) para 2.1.1 (hereafter ITAC: *Investigation Frozen Potato Chips Belgium*); ITAC: *Investigation Safety Glass China* para 2.1.1; ITAC: *Investigation into the alleged dumping of clear float glass originating in or imported from Malaysia: Final Determination*, Report No 683 (2021) para 2.1.1 (hereafter ITAC: *Investigation Float Glass Malaysia*).

²⁵³ EU case: *Yingli Energy* para 111; EU case: *JingAo* para 85; EU case: *Whirlpool* para 138; EU case: *EWRIA* para 82; EU case: *Brosmann* para 131; ITAC: *Investigation Steel China* para 2.1.1; ITAC: *Investigation Windscreens China* para 2.1.1; ITAC: *Investigation Float Glass Malaysia* para 2.1.1.

investigation.²⁵⁴ The EC is also specific when defining the product under consideration in its investigations.²⁵⁵ The Appellate Body in WTO dispute: *EC Bed Linen India*²⁵⁶ confirmed the importance of using the same product definition throughout investigations. As a result, once the EC and ITAC define the product under consideration including using the *Harmonized Commodity Tariff Code* classification, they will conduct the rest of the investigation in accordance with that definition.²⁵⁷ Brink and Van Bael and Bellis²⁵⁸ agree that defining the product under consideration is a crucial step during the anti-dumping investigation as it provides the scope of the like products that will be investigated.

In order to define the product under consideration, the Court of Justice of the European Union has on several occasions stated that the EC can take into account factors such as the physical, technical and chemical characteristics of the product, the use,

²⁵⁴ ITAC then broke down the definition of the product under consideration in ITAC: *Investigation 695 Frozen Chicken* paras 2.1.1, 2.1.4.

²⁵⁵ The EC once defined yarn as "high tenacity yarn of polyesters not put up for retail sale, including monofilament of less than 67 decitex, (excluding sewing thread and 'Z'-twisted multiple (folded) or cabled yarn, intended for the production of sewing thread, ready for dyeing and for receiving a finishing treatment, loosely wound on a plastic perforated tube)". See EC investigation: *Commission Implementing Regulation (EU) of 11 May 2023 imposing a definitive anti-dumping duty on imports of high tenacity yarns of polyesters originating in the People's Republic of China and produced by Zhejiang Hailide New Material Co., Ltd.*, Reg 2023/935 in *OJEU* L127/58 para 24 (hereafter EC investigation: *Yarns Polyesters China*); other examples include EC investigation: *Commission Implementing Regulation (EU) of 9 February 2023 imposing a definitive anti-dumping duty on imports of ceramic tiles originating in India and Türkiye*, Reg 2023/265 in *OJEU* L41/1 paras 115-118 (hereafter EC investigation: *Tiles India*); EC investigation: *Commission Implementing Regulation (EU) of 11 January 2023 imposing a provisional anti-dumping duty on imports of stainless steel refillable kegs originating in the People's Republic of China*, Reg 2023/100 in *OJEU* L10/36 paras 17-18 (hereafter EC investigation: *Kegs China*); EC investigation: *Commission Implementing Regulation (EU) of 11 August 2022 imposing a definitive anti-dumping duty on imports of certain corrosion resistant steels originating in Russia and Turkey*, Reg 2022/1395 in *OJEU* L211/27 paras 40-42 (hereafter EC investigation: *Resistant Steels Russia*); EC investigation: *Commission Implementing Regulation (EU) of 5 April 2022 imposing a definitive anti-dumping duty on imports of superabsorbent polymers originating in the Republic of Korea*, Reg 2022/547 in *OJEU* L107/27 paras 58-59 (hereafter EC investigation: *Superabsorbent Polymers Korea*); EC investigation: *Commission Implementing Regulation (EU) of 16 February 2022 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China*, Reg 2022/191 in *OJEU* L36/1 paras 102-110 (hereafter EC investigation: *Steel Fasteners China*).

²⁵⁶ WTO dispute: *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (2001) para 57 (hereafter WTO dispute: *EC Bed Linen India*).

²⁵⁷ This means that the EC or ITAC should not change the definition of the product once it is established. This is also applicable to the like product as confirmed in WTO dispute: *EC Bed Linen India* para 53; EU case: *Changshu City Standard Parts Factory and Ningbo Jinding Fastener Co. Ltd v Council of the European Union*, C-376/15 and C-377/15 (2017) para 72 (hereafter EU case: *Changshu City*); ITAC: *Investigation 695 Frozen Chicken* paras 2.1.1, 2.1.4.

²⁵⁸ Brink "Anti-dumping in southern Africa" 316; Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 4.02.

interchangeability, consumer perception, distribution channels, manufacturing process, costs of production, quality and other factors.²⁵⁹ The EC is not obliged to take into account all these factors when defining the product.²⁶⁰ In practice, the EC generally takes into account the physical and technical characteristics of the product under consideration.²⁶¹ Ultimately, the EC has a wide discretion when defining the product under consideration.²⁶² *SA's Anti-Dumping Regulation* sets out similar factors that ITAC "may" consider when defining the product under consideration.²⁶³ The word "may" also indicates that ITAC also has as wide a discretion as the EC when defining the product under consideration.²⁶⁴

Once the EC and ITAC define the product under consideration, which is the alleged dumped product, they will establish whether the product under consideration and the product produced and sold in the Union industry or SACU industry are like products.²⁶⁵ Ultimately, the processes of defining the product under consideration within SA's and EU's respective legal frameworks are aligned.

3.3.2 Like product

Article 2(6) of the *ADA* defines the term like product as:

a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

²⁵⁹ EU case: *Yingli Energy* para 111; EU case: *JingAo* para 85; EU case: *Whirlpool* para 138; EU case: *EWRIA* para 82; EU case: *Brosmann* para 131.

²⁶⁰ EU case: *JingAo* para 88; EU case: *Yingli Energy* para 125.

²⁶¹ The EC held that the essential parts of saddles form part of the product under consideration. The EC held that the different types of the product (the essential parts) share the same basic physical and technical characteristics which are used for one basic purpose. As a result, the saddle with its essential parts was seen as the product under consideration. See EC investigation: *Council Regulation (EC) of 18 June 2007 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain saddles originating in the People's Republic of China*, Reg 691/2007 in *OJEU* L160/1 paras 4-6.

²⁶² EU case: *Yingli Energy* para 125; EU case: *JingAo* para 90.

²⁶³ Article 1 of *SA's Anti-Dumping Regulation*.

²⁶⁴ Article 1 of *SA's Anti-Dumping Regulation*.

²⁶⁵ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 4.03.A; as shown in in EC Investigation: *Commission Implementing Regulation (EU) of 16 November 2016 imposing a provisional anti-dumping duty on imports of certain lightweight thermal paper originating in the Republic of Korea*, Reg 2016/2005 in *OJEU* L310/1 paras 18-19.

This definition of like product is mirrored in the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation*.²⁶⁶ The panel in WTO dispute: *EC Salmon Norway*²⁶⁷ held that during the investigation to determine whether goods are “like”, it must first be determined if the goods are identical. If there are no identical goods, it can be considered whether there are other goods that have characteristics that closely resemble those of the product under consideration.²⁶⁸

The panel in WTO dispute: *US Poultry China*²⁶⁹ provided four criteria that investigating authorities can use to determine whether the product under consideration is like the product in the domestic market:

1. The properties nature, nature and quality of the products;
2. The end-uses of the products;
3. Consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and
4. The tariff classification of the products.

In defining the like product, the EC considers the same factors it considers during its definition of the product under consideration.²⁷⁰ These factors are related to the criteria established in WTO dispute: *US Poultry China* above.²⁷¹ The EC generally bases its findings on physical, technical and chemical characteristics of the product and its use.²⁷² The EC also enjoys a wide discretion when defining the like product as with the product under consideration.²⁷³

²⁶⁶ Article 1(4) of the *EU's Anti-Dumping Regulation*; A 1 of *SA's Anti-Dumping Regulation*.

²⁶⁷ WTO dispute: *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R (2007) para 7.52 (hereafter WTO dispute: *EC Salmon Norway*).

²⁶⁸ WTO dispute: *EC Salmon Norway* para 7.52. The EC and ITAC both follow this principle during their investigations.

²⁶⁹ WTO dispute: *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R (2010) para 7.425 (hereafter WTO dispute: *US Poultry China*); WTO dispute: *Japan Alcoholic Beverages Canada* para 113.

²⁷⁰ See para 3.3.1 of this study above.

²⁷¹ See WTO dispute: *US Poultry China* para 7.425; WTO dispute: *Japan Alcoholic Beverages Canada* para 113.

²⁷² EC investigation: *Yarns Polyesters China* para 27; EC investigation: *Kegs China* para 20; EC investigation: *Resistant Steels Russia* para 43; EC investigation: *Superabsorbent Polymers Korea* para 60; EC investigation: *Steel Fasteners China* para 111.

²⁷³ Lester, Mercurio and Davies *World Trade Law* 523. See EC investigation: *Commission Implementing Regulation (EU) of 11 July 2023 imposing a provisional anti-dumping duty on imports of steel bulb flats originating in the People's Republic of China and Türkiye*, Reg 2023/1444 in *OJEU* L177/63.

SA's Anti-Dumping Regulation goes a step further than the *EU's Anti-Dumping Regulation* and lists factors that ITAC may consider when establishing the like product:

- (i) the raw materials and other inputs used in producing the products;
- (ii) the production process;
- (iii) physical characteristics and appearance of the product;
- (iv) the end-use of the product;
- (v) the substitutability of the product with the product under investigation;
- (vi) tariff classification; and/or
- (vii) any other factor proven to the satisfaction of the Commission to be relevant.²⁷⁴

In ITAC: *Investigation 695 Frozen Chicken*, ITAC defined the domestically produced product as “frozen portions of meat that contain bones, of fowls of the species *Gallus Domesticus*”.²⁷⁵ In its assessment, ITAC considered the factors mentioned in (i) to (vii) above and used the definition throughout the investigation.²⁷⁶ These factors overlap with the factors the EC uses to determine the like product and are similar to the criteria established in WTO dispute: *US Poultry China*.²⁷⁷ The word “may” clearly indicates that ITAC has a wide discretion when defining the like product as with the EC.²⁷⁸

In the EU, the process and factors used for defining the like product is established in EU case law and EC investigations, whereas in SA, it is established during ITAC investigations by considering the factors provided in *SA's Anti-Dumping Regulation*.

²⁷⁴ Article 1 of *SA's Anti-Dumping Regulation*.

²⁷⁵ ITAC used a tariff code to define the product as 0207. See ITAC: *Investigation 695 Frozen Chicken* para 2.1.4, 2.2. ITAC provided a specific description of the product under consideration to determine its likeness to the domestic product in ITAC: *Investigation into the alleged dumping of refined sunflower oil originating in or imported from the Argentine Republic and the Federative Republic of Brazil: Final determination*, Report No 162 (2006) paras 2.1.1, 2.3; see also ITAC: *Investigation into the alleged dumping of citric acid originating in or imported from the People's Republic of China (PRC): Final determination*, Report No 267 (2008) para 2.3-2.4. This investigation compared citric acid originating from the exporting country (China) with malic acid produced in the SACU industry. ITAC compared the products based on multiple characteristics and determined that citric acid and malic acid are “chemically distant”. As the chemical characteristics were different, ITAC made a final determination that the citric acid and malic acid are not like products and terminated the investigation.

²⁷⁶ Raw materials, production process, physical appearances, tariff classification, application or end use and substitutability. See ITAC: *Investigation 695 Frozen Chicken* para 2.3.

²⁷⁷ WTO dispute: *US Poultry China* para 7.425; WTO dispute: *Japan Alcoholic Beverages Canada* para 113; EU case: *Yingli Energy* para 111; EU case: *JingAo* para 85; EU case: *Whirlpool* para 138; EU case: *EWRIA* para 82; EU case: *Brosmann* para 131.

²⁷⁸ Article 1 of *SA's Anti-Dumping Regulation*.

3.4 Anti-dumping investigation procedure

During the anti-dumping investigation, the TDI Committee assists the EC.²⁷⁹ In SA, ITAC is supposed to be assisted by the Tariff Board. As the Tariff Board has not been established, a domestic industry in the SACU region will approach ITAC to conduct an anti-dumping investigation in terms of the *ITA Act* and *SA's Anti-Dumping Regulation*.²⁸⁰ In 2013, the Government of Botswana, on behalf of the domestic industry in Botswana, approached ITAC (through the Minister of Trade) to investigate the alleged dumping of soda ash in the SACU industry.²⁸¹ ITAC then conducted the investigation in terms of the *ITA Act* and *SA's Anti-Dumping Regulation*.²⁸² After establishing the existence of dumping, injury and causation, ITAC made recommendations to the Minister of Trade to impose anti-dumping duties.²⁸³ Since Botswana is a member of SACU, it must adopt anti-dumping duties that were determined by ITAC.²⁸⁴ This means that when SARS imposes anti-dumping duties via publication in the Government Gazette, it does so for the SACU tariff system.²⁸⁵ Botswana will then impose the anti-dumping duties as published by SARS.²⁸⁶ In essence, this means that all SACU member states are subject to decisions made by ITAC and indirectly the Minister of Trade. Ultimately, in 2022 when the Minister of Trade suspended the anti-dumping duties on the imported frozen chicken, it suspended it for

²⁷⁹ Article 15 of the *EU's Anti-Dumping Regulation*.

²⁸⁰ See para 1.3.3 of this study for the position of the Tariff Board.

²⁸¹ The domestic industry was located in Botswana. See ITAC: *Investigation into the alleged dumping of Disodium Carbonate (Soda Ash) Originating in or imported from the United States of America (USA): Final Determination*, Report No 476 (2014) (hereafter ITAC: *Investigation Soda Ash USA*).

²⁸² ITAC: *Investigation Soda Ash USA* para 1.1.

²⁸³ ITAC: *Investigation Soda Ash USA* synopsis.

²⁸⁴ UNCTAD *Trade Policy Framework Botswana* 53.

²⁸⁵ WTO: *Trade Policy Review Report by the Secretariat SACU*, WT/TPR/S/447 (2023) 5, 16, 26, 33; Immanuel 2022 <https://atf.org.na/2022/10/31/poultry-dumping/>.

²⁸⁶ Botswana's Ministry of Trade is responsible to impose the anti-dumping duties as determined by ITAC via Government Publication. See UNCTAD *Trade Policy Framework Botswana* 54. The *Botswana Trade Commission Act* (2013) established the Botswana Trade Commission to investigate requests received from the Tariff Board (currently ITAC) regarding the imposition of anti-dumping duties. The Botswana Trade Commission can also investigate dumping according to article 31 of the *Botswana Trade Commission Act* (2013). However, there are no investigation reports to be found and it seems that the Botswana Trade Commission has not yet exercised this function. There are no ongoing investigation reports on their website. See BOTC 2021 <https://botc.org.bw/publications/investigation-reports>. Furthermore, on the WTO website all anti-dumping investigation notifications are done by ITAC and not Botswana. See WTO 2023 <https://trade-remedies.wto.org/en/antidumping/investigations>.

all five SACU member countries and when he resumed the imposition of anti-dumping duties in 2023, it was for all SACU member countries.²⁸⁷

The *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* mirror for the most part the same investigation procedure as in the *ADA* which is discussed below.²⁸⁸

3.4.1 Lodging an application

As illustrated above, the relevant domestic industry in the SACU region will lodge with ITAC the application to investigate dumping.²⁸⁹ In the EU, the relevant domestic industry in the EU will lodge the application with the EC.²⁹⁰ The EC will inform the TDI Committee and EU member states of any application that it has received.²⁹¹ In practice, the EC prefers to investigate a draft application before the formal application is submitted to ensure that there is sufficient evidence in the written application.²⁹² In the EU, the EC takes into account the TDI Committee's opinions during the investigation process, where in SA, the Tariff Board's opinions are supposed to be considered. Since the SACU council delegated its powers to ITAC, there is no group such as the TDI Committee to assist in ITAC's decision-making process.

The *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* are aligned to the extent that the application must contain evidence of dumping, injury and a causal link between the dumped imports and alleged injury.²⁹³ Details to be disclosed in the

²⁸⁷ Dlamini 2022 <https://namibian.com.na/suspension-of-anti-dumping-duty-to-hurt-nam-poultry/>; GN 1925 in GG 49065 of 2 August 2023.

²⁸⁸ Articles 5 and 6 of the *EU's Anti-Dumping Regulation*; A 5 of the *ADA*.

²⁸⁹ Article 3(1) of *SA's Anti-Dumping Regulation*. This complaint should be done through the prescribed questionnaire in accordance with article 21(1) of *SA's Anti-Dumping Regulation*. Article 3(3) of *SA's Anti-Dumping Regulation* allows ITAC to initiate an investigation in special circumstances without having received a written complaint if there is sufficient evidence of dumping, injury and causation. Article 5(6) of the *EU's Anti-Dumping Regulation* has a similar provision.

²⁹⁰ Article 5(1) of the *EU's Anti-Dumping Regulation*. The EC can request the complainant to provide additional information. See EU case: *HEG Ltd and Graphite India Ltd v Council of the European Union*, T-462/04 (2008) para 36. The EC published a guide on its website on how the complaint can be structured. See <https://circabc.europa.eu/ui/group/2e3865ad-3886-4131-92bb-a71754ffec6/library/2f4a7940-545f-43b2-ae16-172a176a2474/details>.

²⁹¹ Article 5(1)(b) of the *EU's Anti-Dumping Regulation*; Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 8.07.

²⁹² The EC has 45 days to accept or reject the complaint. See Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 8.05; article 5(9) of the *EU's Anti-Dumping Regulation*.

²⁹³ Article 5(2) of the *EU's Anti-Dumping Regulation*; A 3(3) of *SA's Anti-Dumping Regulation*; A 5(2) of the *ADA*. See also EU case: *Gul Ahmed Textile Mills Ltd v Council of the European Union*, T-199/04

application include the identity of the applicant, list of known domestic producers and description of the volume, value and price of the like product.²⁹⁴ The application should also include a description of the dumped product, names of the export country, identity of the exporter and persons importing the product.²⁹⁵ This should be accompanied by information about the impact that the imports have on the domestic industry.²⁹⁶ The EC and ITAC will then determine if there is sufficient evidence to justify an investigation.²⁹⁷ The application will be rejected if there is not sufficient evidence for dumping and injury to initiate an investigation.²⁹⁸ The EC and ITAC will inform the exporting country before initiating the investigation upon acceptance of a properly documented application.²⁹⁹

3.4.2 Notice of initiation

The EC will publish a notice of initiation of an anti-dumping investigation in the *OJEU* and ITAC will publish the notice of initiation in the Government Gazette.³⁰⁰ The EC and ITAC will inform all interested parties of the initiation of the investigation and provide them

(2016) para 90; EU case: *Rima Eletrometalurgia SA v Council of the European Communities*, T-216/91 (1993) para 16.

²⁹⁴ Article 5(2) of the *EU's Anti-Dumping Regulation*; A 5(2)(i) and (iii) of the *ADA*; ITAC 2023 <http://www.itac.org.za/pages/services/trade-remedies/investigation-application-form>. See also WTO dispute: *Mexico – Definitive Anti-Dumping Measures on Beef and Rice – Complaint with Respect to Rice*, WT/DS295/R (2005) paras 4.99, 7.189, 7.192; the Appellate Body upheld the panel's report in WTO dispute: *Mexico Beef and Rice US* paras 247, 251.

²⁹⁵ Article 5(2) of the *EU's Anti-Dumping Regulation*; A 5(2)(ii) of the *ADA*; ITAC 2023 <http://www.itac.org.za/pages/services/trade-remedies/investigation-application-form>.

²⁹⁶ Article 5(2) of the *EU's Anti-Dumping Regulation*; A 5(2)(iv) of the *ADA*; ITAC 2023 <http://www.itac.org.za/pages/services/trade-remedies/investigation-application-form>.

²⁹⁷ Article 5(3) of the *EU's Anti-Dumping Regulation*; A 25 and 26(1) of *SA's Anti-Dumping Regulation*; A 5(3) of the *ADA*. In this assessment, the EC and ITAC should be unbiased and objective. See WTO dispute: *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R (1998) paras 7.49-7.50; WTO dispute: *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (2000) para 7.95 (hereafter WTO dispute: *Mexico HFCS US*); WTO dispute: *Mexico – Anti-dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R (2007) para 7.24.

²⁹⁸ Article 5(7) of the *EU's Anti-Dumping Regulation*; A 5(8) of the *ADA*. Even though this requirement is not specifically mentioned in *SA's Anti-Dumping Regulation*, it is still implied by the wording of A 3(3) of *SA's Anti-Dumping Regulation*.

²⁹⁹ Article 5(5) of the *EU's Anti-Dumping Regulation*; A 22 and 27(1) of *SA's Anti-Dumping Regulation*; A 5(5) of the *ADA*. The panel held that a written notice will be best suited for documentation purposes in WTO dispute: *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R (2000) paras 7.89-7.90 (hereafter WTO dispute: *Thailand H-Beam Poland*).

³⁰⁰ Article 5(9) of the *EU's Anti-Dumping Regulation*; section 26(3)(a) of the *ITA Act*; A 28(1) of *SA's Anti-Dumping Regulation*; A 21(1) of the *ADA*.

with relevant documentation.³⁰¹ In the EU, the relevant Association Council will also be informed about the investigation.³⁰²

In terms of the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation*, the notice of initiation will contain information about the product and the countries involved, a summary of information received, and information about the complainant and export country.³⁰³ It will also provide interested parties with the time frames to make themselves and their views known.³⁰⁴ The EC and ITAC will provide interested parties with questionnaires to comment on the investigation.³⁰⁵ In the EU and SA, where the number of producers is too large, the investigation may be limited to the largest producer by using samples.³⁰⁶ The EC will publish on its website the intention to impose provisional anti-dumping duties and the duty rates.³⁰⁷

3.4.3 Preliminary determination

In the EU, the EC will publish a provisional determination in the form of a regulation in the *OJEU*.³⁰⁸ If the investigation was successful, provisional anti-dumping duties can be

³⁰¹ Article 5(9) and 5(11) of the *EU's Anti-Dumping Regulation*; A 28(5) of *SA's Anti-Dumping Regulation*; A 21(1) of the *ADA*.

³⁰² There are many agreements between the EU and third countries that established Association Councils. If such a third country is involved in the investigation, the relevant Association Council should be informed. See article 36(2) of the *Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part*, in *OJEU* L084/13 (2004); article 25(3)(a) of *Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part*, in *OJEU* L147/3 (2000).

³⁰³ Article 5(10) of the *EU's Anti-Dumping Regulation*; A 28(2) of *SA's Anti-Dumping Regulation*.

³⁰⁴ Articles 5(10) and 19a of the *EU's Anti-Dumping Regulation*; A 28(2) of *SA's Anti-Dumping Regulation*. In SA, if there are any deficiencies, the parties have seven days to respond to deficiency letters sent by ITAC. See article 31(2) of *SA's Anti-Dumping Regulation*.

³⁰⁵ The interested parties then have 30 days to respond to these questionnaires. See article 6(2) of the *EU's Anti-Dumping Regulation*; A 29(1)-(3) of *SA's Anti-Dumping Regulation*; A 6(1)(1) of the *ADA*.

³⁰⁶ Article 8(6) of *SA's Anti-Dumping Regulation*; A 17(1) of the *EU's Anti-Dumping Regulation*; Herbert Smith Freehills *EU Anti-dumping Legal Guide* 9. ITAC used sampling in ITAC: *Investigation Tyres China* para 4.1.

³⁰⁷ Article 7M2 of the *EU's Anti-Dumping Regulation*; see the EC website https://commission.europa.eu/index_en. The EC will create Integrated Tariff of the European Union codes to assist in calculation of the anti-dumping duties. See Article 14(6) of the *EU's Anti-Dumping Regulation*. Interested parties can request information on the planned imposition of provisional anti-dumping duties as illustrated in EC investigation: *Notice of initiation of an anti-dumping proceeding concerning imports of welded tubes, pipes and hollow profiles of square or rectangular cross-section, of iron other than cast iron or steel other than stainless, originating in the former Yugoslav Republic of Macedonia, Russia and Turkey*, in *OJEU* C347/6 (2018) para 6.

³⁰⁸ Article 7(1) of the *EU's Anti-Dumping Regulation*.

imposed by means of the published regulation.³⁰⁹ The regulation directs national customs authorities of the respective EU member states to impose and collect anti-dumping duties determined by the EC in their respective countries.³¹⁰ Interested parties may request disclosure of the essential facts and considerations on the basis that the provisional anti-dumping duties have been imposed.³¹¹

Once ITAC makes an affirmative preliminary finding that there is dumping, injury and causation, it will publish a preliminary determination in the Government Gazette.³¹² Within seven days after publication in the Government Gazette, ITAC will provide the interested parties with a preliminary report.³¹³ Once ITAC publishes a notice in the Government Gazette about a preliminary determination, SARS will impose a provisional anti-dumping duty as specified by ITAC upon approval of the Minister of Trade.³¹⁴ However, in terms of article 9 of the *ADA*, the investigating authority has the discretion to decide whether to impose anti-dumping duties even if all the requirements have been met.³¹⁵ The Minister of Trade used this discretion when he suspended the anti-dumping duties in August 2022.³¹⁶

3.4.4 Provisional anti-dumping duties

Provisional anti-dumping duties are interim measures imposed on dumped goods to prevent the domestic industry from suffering further injury until a definite anti-dumping duty can be imposed by means of the final determination.³¹⁷ The definite anti-dumping duty will usually expire after five years if one of four types of review is conducted.³¹⁸

³⁰⁹ Article 14(2) of the *EU's Anti-Dumping Regulation*.

³¹⁰ Korkea-aho and Sankari 2017 *European Papers* 555. This will be done in accordance with the *EU Customs Code*. Also see EU case: *Paltrade EOOD v Nachalnik na Mitnicheski punkt - Pristanishte Varna pri Mitnitsa Varna*, C-667/11 (2013) para 32.

³¹¹ Article 20(1) of the *EU's Anti-Dumping Regulation*.

³¹² Section 57A of the *Customs and Excise Act*.

³¹³ Article 34 of *SA's Anti-Dumping Regulation*.

³¹⁴ Section 57A of the *Customs and Excise Act*.

³¹⁵ Article 9(1) of the *ADA*; Lester, Mercurio and Davies *World Trade Law* 556.

³¹⁶ GN 1179 in GG 47156 of 1 August 2022.

³¹⁷ WTO dispute: *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (2009) para 207.

³¹⁸ Namely new shipper reviews, sunset reviews, interim reviews and judicial reviews. See EU investigation: *Commission Implementing Regulation (EU) of 30 March 2023 initiating a 'new exporter' review of Regulation (EU) 2017/2230 imposing a definitive anti-dumping duty on imports of*

In terms of the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation*, the anti-dumping duty can only be implemented after 60 days have passed from the date when the investigation was initiated.³¹⁹ The provisional anti-dumping duty should be as short as possible, not exceeding four months, or six months upon the exporter's request.³²⁰ In terms of the *ADA* and the *EU's Anti-Dumping Regulation*, when a provisional anti-dumping duty is lower than the margin of dumping and is sufficient to remove the injury, a lesser duty can be imposed for six to nine months.³²¹ In terms of *SA's Anti-Dumping Regulation*, provisional anti-dumping duties may be extended for up to nine months upon request by an exporter.³²²

3.4.5 Final determination

Before the final determination, the EC and ITAC will inform all interested parties of the essential facts which will form the basis of the final determination.³²³ Parties will then be given the opportunity to comment on these findings, which will be taken into consideration for the final determination.³²⁴ The final determination is published in the *OJEU* for the EU and the Government Gazette for SA.³²⁵ Ultimately, the EC and ITAC will

trichloroisocyanuric acid originating in the People's Republic of China, Reg 2023/712 in *OJEU* L93/88; ITAC: *New shipper investigation into aluminium hollowware originating in or imported from Egypt: Final determination*, Report No 63 (2004); ITAC: *New shipper review for acetaminophen originating in or imported from the People's Republic of China: Final Determination*, Report No 421 (2012).

³¹⁹ Article 7(1) of the *EU's Anti-Dumping Regulation*; A 33(1) of *SA's Anti-Dumping Regulation*; A 7(3) of the *ADA*.

³²⁰ Article 7(4) of the *ADA*.

³²¹ The margin of dumping is discussed in para 4.6 of this study below. See also Article 7(4) of the *ADA*; A 7(2) and 7(6) of the *EU's Anti-Dumping Regulation*. See Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.01.

³²² Article 33(3) of *SA's Anti-Dumping Regulation*. Furthermore, price undertakings are an alternative to imposing anti-dumping duties in terms of article 8 of the *ADA*. Anti-dumping proceedings may be suspended or terminated if the exporter initiates a price undertaking to revise its dumped prices and eliminate the injury caused to the domestic industry. In the EU and SA, if a preliminary determination has been made, the exporter may voluntarily make a price undertaking to remove the injury caused by the dumping. Once the price undertaking is accepted, the EC and ITAC can terminate the investigation. See article 8(1) of the *ADA*; A 8(1)-(5) of the *EU's Anti-Dumping Regulation*; A 39(1)-(3) of *SA's Anti-Dumping Regulation*.

³²³ Article 20(1) of the *EU's Anti-Dumping Regulation*; A 37(1) of *SA's Anti-Dumping Regulation*. Essential facts are those that will have an impact on the decision to apply definite anti-dumping duties. See WTO dispute: *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R (2012) para 240.

³²⁴ EC *Flowchart of the anti-dumping investigation process* 1; Article 37(2)-(4) of *SA's Anti-Dumping Regulation*.

³²⁵ The final determination sets out the findings, conclusions and the law considered during the investigation in line with article 12(2) of the *ADA*.

first publish a provisional determination in the relevant publication, followed by a final determination.

Figure 3-1 below presents the outline for the anti-dumping investigation steps investigating authorities ought to follow in accordance with the *ADA*.

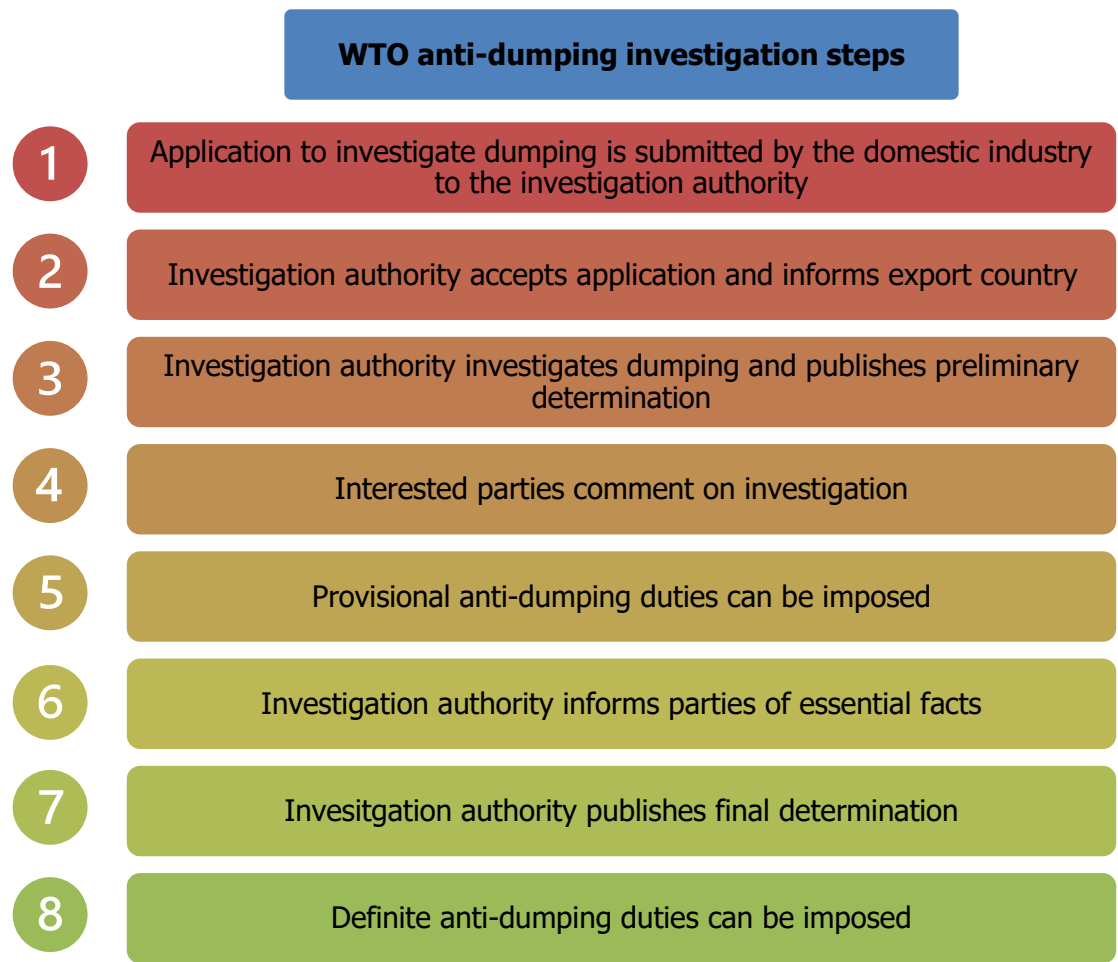


Figure 3-1: Anti-dumping investigation steps as set out in the *ADA*

Figure 3-2 below presents the outline for the anti-dumping investigation steps the EC must follow in accordance with the *EU's Anti-Dumping Regulation*.

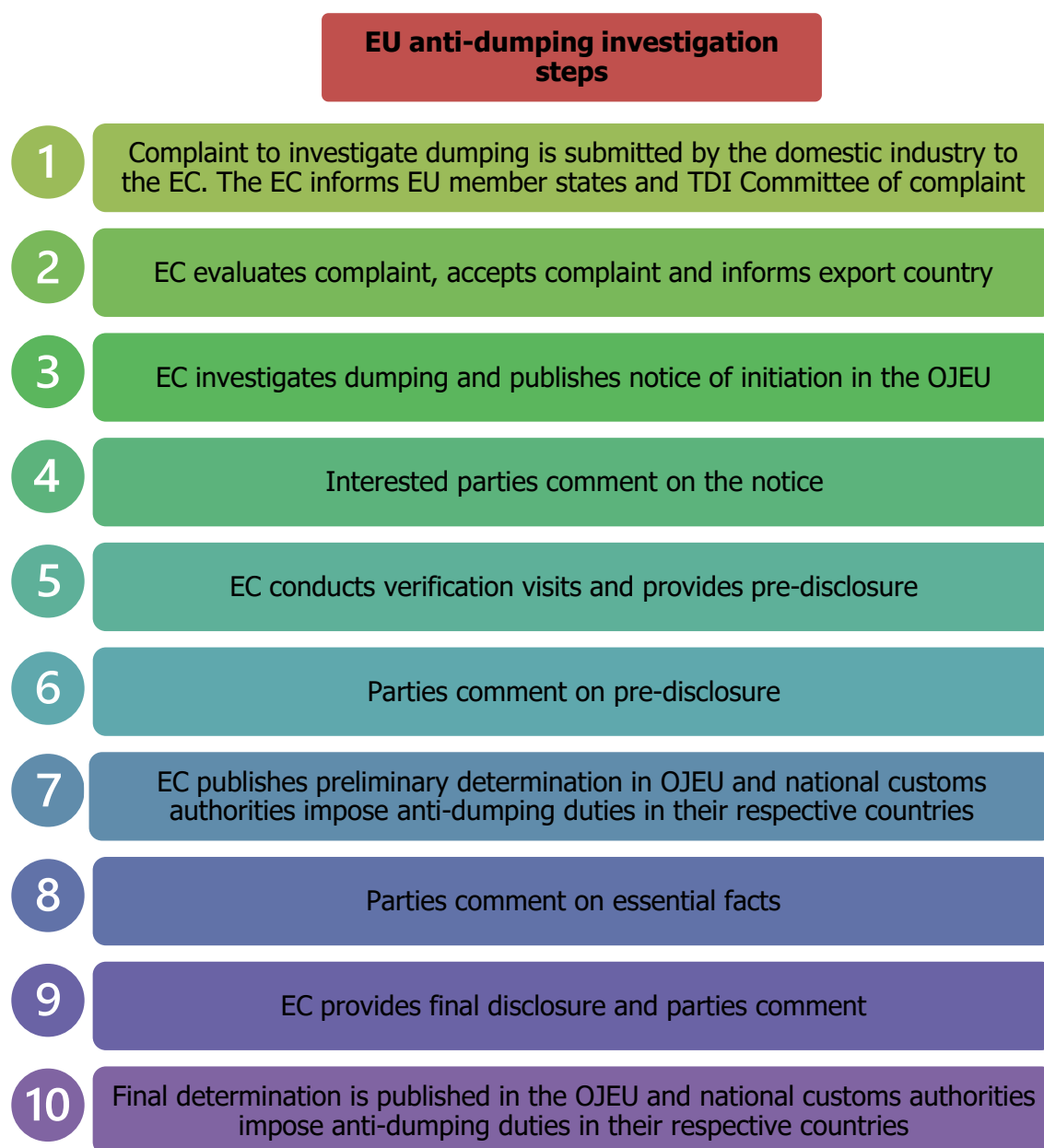


Figure 3-2: Anti-dumping investigation steps as set out by the *EU's Anti-Dumping Regulation*

Figure 3-3 below presents the outline for the anti-dumping investigations steps ITAC must follow in accordance with the *ITA Act* and *SA's Anti-Dumping Regulation*.

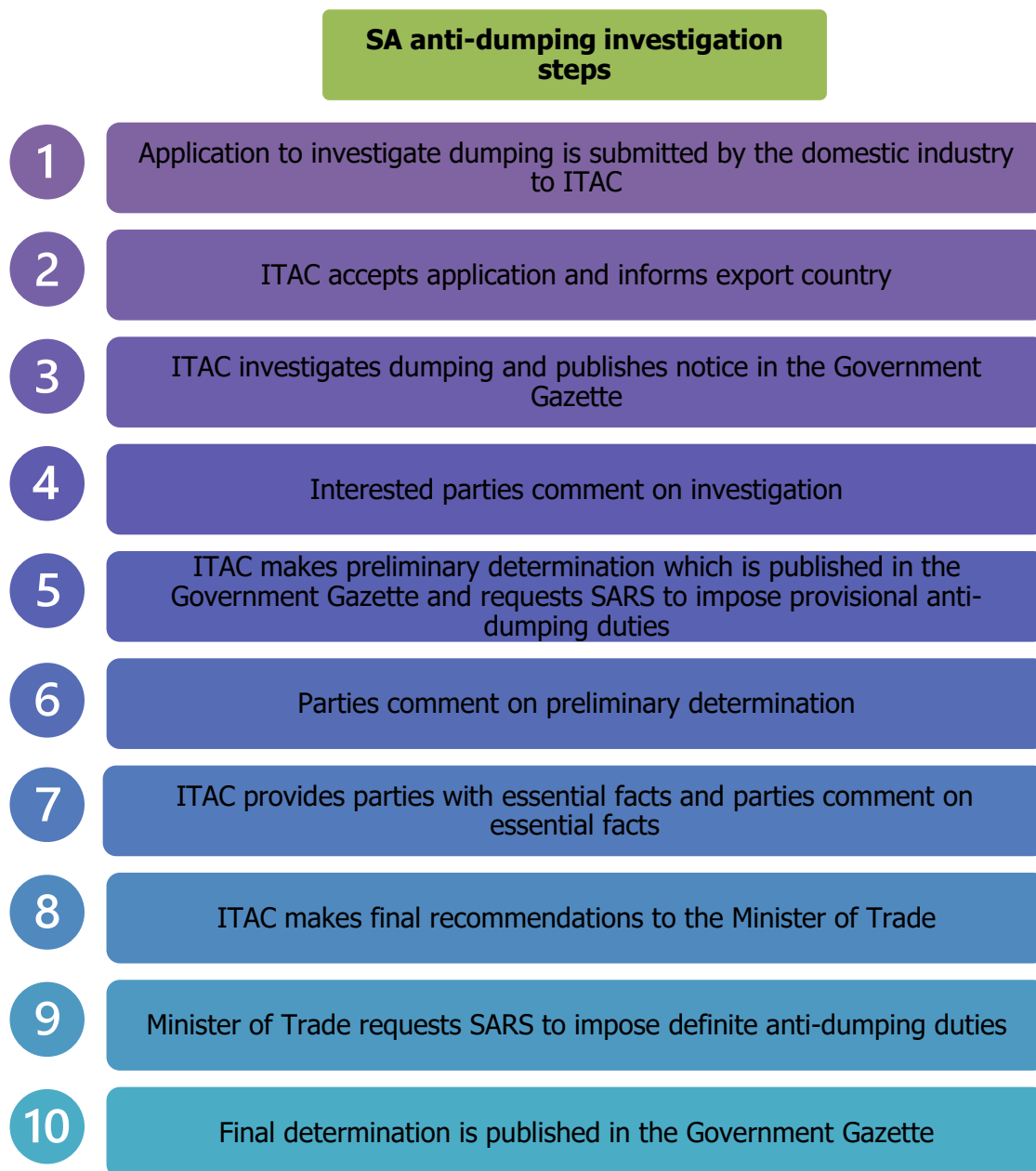


Figure 3-3: Anti-dumping investigation steps as set out by *SA's Anti-Dumping Regulation*

Figures 3-4 and 3-5 below set out an overall comparison of the anti-dumping investigation steps followed in the EU and SA.

	EU	SA
Legal Text	<i>EU's Anti-Dumping Regulation</i>	<i>SA's Anti-Dumping Regulation and ITA Act</i>
Investigation authority	EC	ITAC
Investigation period	365 days	448 days
Anti-dumping investigations (1995–2022)	547	254
WTO disputes as complainant	110	1
WTO disputes as respondent	93	5
WTO disputes as third-party	216	21

Figure 3-4: Overall Comparison

	EU	SA
1	Application is submitted to the EC.	Application is submitted to ITAC.
2	EC informs export country and TDI committee of application.	ITAC informs export country of application (here it should be the Tariff Board).
3	EC investigates and publishes notice in the OJEU.	ITAC investigates and publishes notice in the Government Gazette.
4	Interested parties comment via questionnaires.	Interested parties comment via questionnaires.
5	EC provides parties with pre-disclosure. <i>*Notable difference from SA.</i>	ITAC makes preliminary determination which is published in the Government Gazette and requests SARS to impose provisional anti-dumping duties.
6	Parties comment on pre-disclosure. <i>*Notable difference from SA.</i>	Parties comment on preliminary determination.
7	EC publishes preliminary determination and national customs authorities impose anti-dumping duties in their respective countries <i>*Notable difference from SA as this happened at step 5 for SA.</i>	Parties comment on essential facts.
8	Parties comment on essential facts of preliminary determination.	ITAC makes final recommendation to Minister of Trade.
9	EC provides final disclosure and parties comment on the final disclosure. <i>*Notable difference from SA.</i>	Minister of Trade requests SARS to impose definite anti-dumping duties.
10	Final determination is published in OJEU and national customs authorities impose	Final determination is published in Government Gazette.

anti-dumping duties in their respective countries.

Figure 3-5: Overall Comparison

3.5 Conclusion

This chapter set out and compared the respective investigation processes followed by the EC and ITAC during an anti-dumping investigation. The *GATT* and *ADA* are flexible when it comes to anti-dumping procedures and members have different approaches to the procedures based on their own domestic legislation.³²⁶ The basis of the EU and SA anti-dumping investigations are similar to the *ADA* with some notable differences.

In the EU, the EC conducts anti-dumping investigations for the EU industry in accordance with the *EU's Anti-Dumping Regulation*. In SA, ITAC conducts anti-dumping investigations for the SACU industry in accordance with *SA's Anti-Dumping Regulation* and the *ITA Act*. During the investigation, the EC will take into account the Union industry and SA will take into account the SACU industry. The EC should also take into account the TDI Committee's opinions during the investigation process. In SA, this is supposed to be the SACU Tariff Board's opinions but since the SACU council delegated its powers to ITAC, there is no group such as the TDI Committee to assist in ITAC's decision-making process.

Upon acceptance of a properly documented application, ITAC and the EC will inform the export country of their decision to investigate the alleged dumping before initiating the investigation.³²⁷ The EC takes one additional step here by investigating a draft application before the formal application is submitted to ensure that there is sufficient evidence in the written application.³²⁸

Overall, the core processes of the anti-dumping investigation according to the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* are aligned. However, the *EU's Anti-Dumping Regulation* process related to the final determination is noticeably different from *SA's Anti-Dumping Regulation* process. ITAC is supposed to consider the whole

³²⁶ Lester, Mercurio and Davies *World Trade Law* 516.

³²⁷ Articles 22 and 27(1) of *SA'S Anti-Dumping Regulation*; A 5(5) of the *EU's Anti-Dumping Regulation*; A 5(5) of the *ADA*.

³²⁸ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 8.05.

SACU industry during their investigation. However, the missing element of the Tariff Board raises the question of how effective this is. Furthermore, the *SACU Agreement* only provides for making recommendations to the Tariff Board regarding anti-dumping duties. There are no provisions or steps related to the actual investigation process.

Following on from the investigation process, the next chapter sets out a comparative discussion on the first requirement considered by both the EC and ITAC during an anti-dumping investigation, namely whether dumping has occurred.

CHAPTER 4 ESTABLISHING DUMPING

4.1 Introduction

In terms of the *ADA*, there are three basic requirements to consider during an anti-dumping investigation: dumping, injury and causation. The meaning of “dumping” is set out below, followed by the four steps that the EC and ITAC use to establish whether dumping has occurred.

4.2 The meaning of dumping

Article VI of the *GATT* and the *ADA* define the word “dumping” and member countries use these definitions as the starting point to determine if dumping has occurred in a member country’s domestic market. The relevant part of Article VI (1) of the *GATT* provides:

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

Article 2(1) of the *ADA* provides further:

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.

Simply put, dumping occurs when a product is imported into a country at a lower price than its normal value in its home (export) country and causes economic harm to the import country’s domestic industry producing the like product.³²⁹

The *EU’s Anti-Dumping Regulation* and the *ITA Act’s* definitions of dumping mirror the definition of dumping in the *ADA*.³³⁰ In SA, dumping is the importation of goods into the commerce of the SACU region at an export price that is less than the normal value of

³²⁹ Article VI (1) of the *GATT*; A 2(1) of the *ADA*; Lester, Mercurio and Davies *World Trade Law* 521.

³³⁰ Article 1(2) of the *EU’s Anti-Dumping Regulation*; A 1(2) of the *ITA Act*; A 2(1) of the *ADA*.

those goods in the exporting country.³³¹ In the EU, dumping is the importation of goods into the commerce of the Union region at an export price that is less than the normal value of those goods in the export country.

In the EU, the exporting country is deemed to be the country of origin or an intermediate country.³³² The *EU Customs Code* stipulates that when products are manufactured in a single country, that country shall be deemed the country of origin.³³³ Where there is more than one country applicable in the manufacturing process, the product shall be deemed to have originated in the country where it was last processed or worked on.³³⁴ An intermediate country is the country where non-substantial processing or work is carried out regarding the product.³³⁵ However, an intermediate country is not regarded as the export country if products are merely shipped through it.³³⁶ Article 8(4) of *SA's Anti-Dumping Regulation* mentions the country of origin and intermediate country but does not specifically expand on either.

Following the above, four basic steps to establish dumping are adopted both in the EU and SA:³³⁷

- (1) determine the normal value of the product under consideration in the exporting country;

³³¹ Article 1(2) of the *ITA Act*.

³³² Article 1(3) of the *EU's Anti-Dumping Regulation*; A 14(3) of the *EU's Anti-Dumping Regulation*. A further in-depth study for the country of origin can be found in Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.02.A.

³³³ Article 60(1) of the *EU Customs Code*.

³³⁴ Article 60(2) of the *EU Customs Code*. For a discussion on trading companies, see Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.02.B; EC investigation: *Council Implementing Regulation (EU) of 11 March 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain organic coated steel products originating in the People's Republic of China*, Reg 214/2013 in *OJEU* L73/1 para 53.

³³⁵ EU case: *Yingli Energy* para 86.

³³⁶ Article 1(3) of the *EU's Anti-Dumping Regulation*. See EU case: *Yingli Energy* para 92, where China was seen as the intermediate country (export country) in EC investigation: *Commission Regulation (EU) of 4 June 2013 imposing a provisional anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China and amending Regulation (EU) No 182/2013 making these imports originating in or consigned from the People's Republic of China subject to registration*, Reg 513/2013 in *OJEU* L152/5 para 275 (hereafter EC investigation: *Cells and Wafers China*).

³³⁷ These steps are used in terms of EU law and can be found in Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.01. These steps flow logically to establish dumping and this chapter uses this order for the discussion in terms of the EU and SA.

- (2) determine the export price of the product under consideration at which it is sold from the export country to the importing country;
- (3) compare the normal value and export price of the product; and
- (4) calculate the dumping margin – the amount by which the normal value is higher than the export price.

These steps are discussed below.

4.3 Step one: establishing the normal value

As a starting point, the relevant part of Article VI (1) of the *GATT* provides:

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

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

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

Article 2 of the *ADA* contains the same provision above. There are three methods to calculate the normal value of the product under consideration in terms of article 2 of the *ADA* and Article VI (1) of the *GATT*. The first method is the primary method and the two alternative methods fall under a constructed normal value.³³⁸

However, in terms of the *EU's Anti-Dumping Regulation*, *SA's Anti-Dumping Regulation* and the *ITA Act*, there are four methods to calculate the normal value.³³⁹ The first method

³³⁸ The primary method is stipulated in article 2(1) of the *ADA*. A 2(2) of the *ADA* provides two alternative methods of calculating the normal value in terms of a constructed normal value. See also WTO dispute: *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R (2003) para 93 (hereafter WTO dispute: *EC Pipe Fittings Brazil AB*).

³³⁹ Articles 2(1)-(3) of the *EU's Anti-Dumping Regulation*; Section 32(2)(b)(i)-(ii) of the *ITA Act*; A 8(1)(a)-(b) of *SA's Anti-Dumping Regulation*; Müller, Khan and Scharf *EC and WTO Anti-dumping law* 87; Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.02.

still falls within the *ADA*'s primary method of calculating the normal value.³⁴⁰ Whereas the second method adopted in both jurisdictions is not specifically mentioned in either the *GATT* or *ADA*.³⁴¹ The third and fourth methods still fall within the *GATT* and *ADA*'s second and third methods as the constructed normal value.³⁴²

For illustrative purposes, figures 4-1 and 4-2 below set out the four methods the EC and ITAC use, respectively, to calculate the normal value during anti-dumping investigations. The sections that follow discuss the methods.

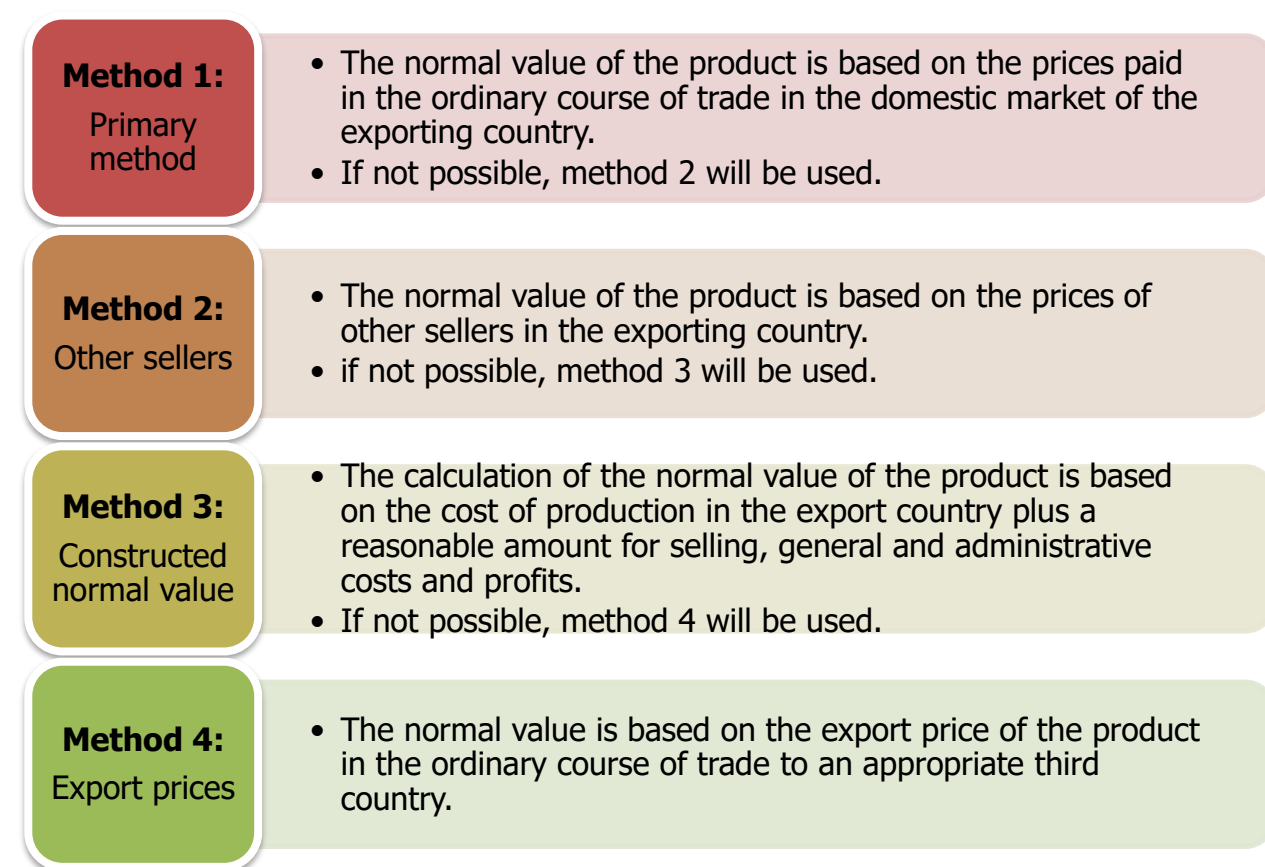


Figure 4-1: EC normal value calculation

³⁴⁰ Section 32(2)(b)(i) of the *ITA Act*; A 8(1)(a) of *SA's Anti-Dumping Regulation*; A 2(1) of the *EU's Anti-Dumping Regulation*; A 2(1) of the *ADA*.

³⁴¹ Article 8(1)(b) of *SA's Anti-Dumping Regulation*; A 2(1) of the *EU's Anti-Dumping Regulation*.

³⁴² Article 2(3) of the *EU's Anti-Dumping Regulation*.

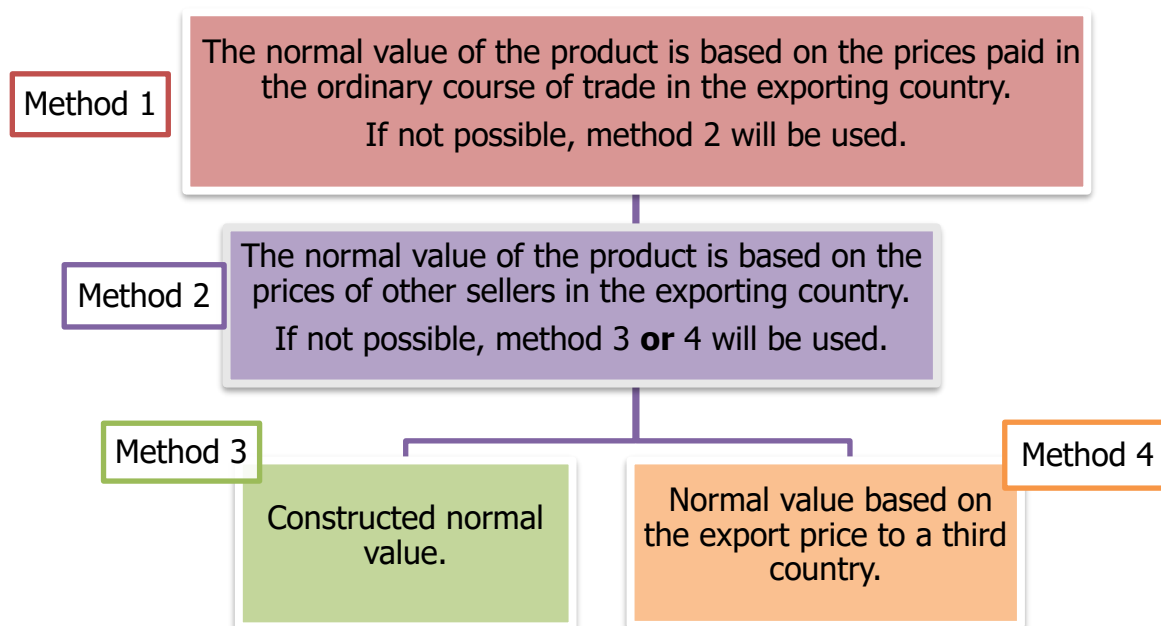


Figure 4.2: ITAC normal value calculation

4.3.1 Normal value determination based on the primary method

The *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* provide for the first method as the primary method. The first method should be used when the normal value of the product is based on the prices paid in the ordinary course of trade in the exporting country.³⁴³ The normal value is the domestic price of the relevant product in a sale transaction in the exporting country.³⁴⁴ SA and the EU take the same position that the

³⁴³ Article 2(1) of the *EU's Anti-Dumping Regulation*; Section 32(2)(b)(i) of the *ITA Act*; A 8(1)(a) of *SA's Anti-Dumping Regulation*; A 2(1) of the *ADA*; Article VI (1)(a) of the *GATT*; Lester, Mercurio and Davies *World Trade Law* 522. In WTO dispute: *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (2001) (hereafter WTO dispute: *US Hot-Rolled Steel Japan*) the Appellate Body stated that article 2(1) of the *ADA* imposes four conditions to calculate the normal value: (1) the sale must be in the ordinary course of trade, (2) the sale must be of the like product, (3) the product must be destined for consumption in the exporting country and, (4) the price must be comparable. These conditions correspond with the EU's and SA's normal value determination.

³⁴⁴ WTO dispute: *Argentina Poultry Brazil* para 7.272.

primary method should be used first and if there were no sales in the ordinary course of sale, the other three methods can then only be used.³⁴⁵

In ITAC: *Investigation 479 Frozen Chicken*,³⁴⁶ ITAC determined that one of the exporters sold sufficient volumes of the product in its domestic market (the exporting country) which was Germany in the investigation.³⁴⁷ As a result, the normal value determination was based on the price paid in the ordinary course of trade for products intended for consumption in Germany.³⁴⁸ In EC investigation: *Alloy Steel Serbia*, the EC established that the products were sold in the export country (Serbia) in the ordinary course of trade and represented 71 per cent of sales to the EU.³⁴⁹ The normal value was therefore the domestic price of the product in Serbia.

In terms of *SA's Anti-Dumping Regulation* and the *EU's Anti-Dumping Regulation*, the domestic sales of the product in the export country should be at least five per cent of the overall sales volume of the product in the SACU region or EU region, as the case may be,

³⁴⁵ Sales are in the ordinary course of trade if the sale has been made under conditions that (for a reasonable time before the date of sale) are normal for the sale of the product in the export country. See Article 8(1) of *SA's Anti-Dumping Regulation*; A 2(1) of the *EU's Anti-Dumping Regulation*; WTO dispute: *US Hot-Rolled Steel Japan* paras 139, 165. See also EU case: *Council of the European Union v Alumina d.o.o.*, C-393/13 (2014) para 20 (hereafter EU case: *Alumina*); EC investigation: *Council Implementing Regulation (EU) of 24 February 2014 imposing a definitive anti-dumping duty on imports of certain manganese dioxides originating in the Republic of South Africa following an expiry review*, Reg 191/2014 in *OJEU* L59/7 para 17.

³⁴⁶ See also ITAC: *Investigation Steel China* para 4.1.1; ITAC: *Investigation Frozen Potato Chips Belgium* paras 4.2.1, 4.4.1, 4.6.1; ITAC: *Investigation into the alleged dumping of spades, shovels, picks, rakes and forks originating in or imported from China and India: Final determination*, Report No 704 (2022) para 4.2.1 (hereafter ITAC: *Investigation Spades China*); ITAC: *Investigation Tyres China* para 4.2.1; ITAC: *Investigation Safety Glass China* para 4.1; ITAC: *Investigation 695 Frozen Chicken* para 4.2.5; ITAC: *Investigation Float Glass Malaysia* para 4.1; ITAC: *Investigation into the alleged dumping of pasta originating in or imported from Egypt, Latvia, Lithuania and Turkey: Final Determination*, Report No 669 (2021) para 4.2.1 (hereafter ITAC: *Investigation Pasta Egypt*); ITAC: *Investigation into the alleged dumping of clear float glass originating in or imported from Saudi Arabia and United Arab Emirates: Final determination*, Report No 615 (2019) para 4.1.1. (hereafter ITAC: *Investigation Float Glass Saudi Arabia*); ITAC: *Investigation Portland Cement Pakistan* para 4.1.1; ITAC: *Investigation into the alleged dumping of wheelbarrows originating in or imported from the People's Republic of China (China): Final Determination*, Report No 502 (2015) para 4.4.1 (hereafter ITAC: *Investigation Wheelbarrows China*); ITAC: *Investigation into the alleged dumping of frozen potato chips originating in or imported from Belgium and the Netherlands: Final Determination*, Report No 474 (2014) para 4.2.1 (hereafter ITAC: *Investigation Frozen Potato Chips the Netherlands and Belgium*); ITAC: *Investigation in the alleged dumping of screw studding of steel originating in or imported from China: Final determination*, Report No 420 (2012) para 4.1.1.

³⁴⁷ ITAC: *Investigation 479 Frozen Chicken* para 4.1.1(a).

³⁴⁸ ITAC: *Investigation 479 Frozen Chicken* para 4.1.1(a).

³⁴⁹ EC investigation: *Alloy Steel Serbia* para 65.

in order to determine the normal value.³⁵⁰ However, if the sale amounts to less than five per cent of the export sales to the relevant region, those sales can nevertheless be used to determine the normal value if deemed to be of sufficient magnitude to provide a proper comparison.³⁵¹ In EC investigation: *Atlantic Salmon Norway*³⁵² for example, the EC applied four per cent instead of five per cent since the prices were considered representative of the market and could still provide a proper comparison.

4.3.2 Normal value determination based on other sellers

In SA and the EU, if the primary method cannot be used, the next step is to consider the second method. Where the comparable price for the product is unknown in the exporting country, the second method is adopted.³⁵³ The normal value shall then be calculated based on the price at which the product is sold in the exporting country by another seller of the relevant product in the exporting country.³⁵⁴ This is a notable difference from the methodology used in terms of the *ADA* as this method is not specifically mentioned in Article VI of the *GATT* or the *ADA*.

The *EU's Anti-Dumping Regulation* stipulates that when the exporter does not produce or sell the product in the exporting country, this method is used.³⁵⁵ Whereas, *SA's Anti-*

³⁵⁰ Article 8(3) of *SA's Anti-Dumping Regulation*; A 2(2) of the *EU's Anti-Dumping Regulation*; A 2(2) of the *ADA*. In WTO dispute: *Thailand H-Beam Poland* para 7.95, the sales of the product under consideration in the export country accounted for less than five per cent of its sales to the importing country. The primary method could not be used and instead a constructed normal value was used.

³⁵¹ Article 8(3) of *SA's Anti-Dumping Regulation*; A 2(2) of the *EU's Anti-Dumping Regulation*; A 2(2) of the *ADA*.

³⁵² EC investigation: *Council Regulation (EC) of 26 May 2003 terminating the anti-dumping and anti-subsidy proceedings concerning imports of farmed Atlantic salmon originating in Norway and the anti-dumping proceeding concerning imports of farmed Atlantic salmon originating in Chile and the Faeroe Islands*, Reg 930/2003 in *OJEU* L133/1 paras 73-74 (hereafter EC investigation: *Atlantic Salmon Norway*); see EC investigation: *Council Regulation (EC) of 26 September 1997 imposing a definitive anti-dumping duty on imports of farmed Atlantic salmon originating in Norway – Council Declaration*, Reg 1890/97 in *OJEU* L267/1.

³⁵³ Article 8(1)(b) of *SA's Anti-Dumping Regulation*; A 2(1) of the *EU's Anti-Dumping Regulation*.

³⁵⁴ Article 8(1)(b) of *SA's Anti-Dumping Regulation*; A 2(1) of the *EU's Anti-Dumping Regulation*.

³⁵⁵ Article 2(1) of the *EU's Anti-Dumping Regulation*. The EC may make adjustments to accommodate physical differences. See EC investigation: *Commission Implementing Regulation (EU) of 5 March 2018 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes of stainless steel originating in the People's Republic of China following an expiry review*, Reg 2018/330 in *OJEU* L63/15 para 51; EC investigation: *Commission Regulation (EU) of 10 May 2010 imposing a provisional anti-dumping duty on imports of certain aluminium wheels originating in the People's Republic of China*, Reg 404/2010 in *OJEU* L117/64 para 70; EC investigation: *Commission Regulation (EU) of 15 September 2010 imposing a provisional anti-dumping duty on imports of certain continuous filament*

Dumping Regulation merely states that when the price is unknown, this method is used.³⁵⁶ Even though the wording differs between the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation*, the core of this method stays the same, namely the normal value is based on the prices of other independent third-party sellers of the product in the domestic market of the exporting country. Interestingly, there are no recent examples of ITAC using the second method in its investigations.

In EC investigation: *Dihydromyrcenol India*³⁵⁷ the exporter argued that the EC made an error to base the normal value of the product on the domestic prices in the ordinary course of trade of another exporting producer. The exporter argued that the calculation of the normal value of the product should have been based on its own cost of production as a constructed normal value.³⁵⁸ However, the EC rejected the exporter's argument and held that this method was the most appropriate in this investigation since the exporting producer had no domestic sales of the product in the exporting country and the products of both exporters were perfectly interchangeable.³⁵⁹ The use of the other exporter's domestic sales prices was held to be the most representative basis for reflecting the sales conditions of the exporting country's domestic market and for establishing normal value.³⁶⁰ The EC has determined on several other occasions that this method must be used before considering the constructed normal value determination, as discussed below.³⁶¹

glass fibre products originating in the People's Republic of China, Reg 812/2010 in *OJEU* L243/40 para 41.

³⁵⁶ Article 8(1)(b) of *SA's Anti-Dumping Regulation*.

³⁵⁷ EC investigation: *Council Regulation (EC) of 21 January 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of dihydromyrcenol originating in India*, Reg 63/2008 in *OJEU* L23/1 para 8 (hereafter EC investigation: *Dihydromyrcenol India*).

³⁵⁸ EC investigation: *Dihydromyrcenol India* para 8.

³⁵⁹ EC investigation: *Dihydromyrcenol India* para 9.

³⁶⁰ EC investigation: *Dihydromyrcenol India* para 9. The EC will not use this method if domestic sales prices are not the most representative basis for reflecting the sales conditions of the exporting country's domestic market. See EC investigation: *Council Regulation (EC) of 7 August 2008 repealing the anti-dumping duties imposed by Regulation (EC) No 437/2004 on imports of large rainbow trout originating in Norway*, Reg 805/2008 in *OJEU* L217/1 para 32 (hereafter EC investigation: *Rainbow Trout Norway*).

³⁶¹ EC investigation: *Council Regulation (EC) of 16 February 1998 imposing a definitive anti-dumping duty on imports of stainless steel fasteners and parts thereof originating in the People's Republic of China, India, the Republic of Korea, Malaysia, Taiwan and Thailand*, Reg 393/98 in *OJEU* L50/1 para 18; EC investigation: *Council Regulation (EC) of 16 December 2008 imposing a definitive anti-dumping duty on imports of certain welded tubes and pipes of iron or non-alloy steel*, Reg 1256/2008 in *OJEU* L343/1

4.3.3 Normal value determination based on a constructed normal value

If it is not possible to determine the normal value based on either of the two methods discussed above, the third method, the constructed normal value, will be used in the EU and SA. However, one of three conditions must first exist before the constructed normal value can be used. These are:

- (a) there are no sales in the exporting country of the like product in the ordinary course of trade; or
- (b) sales in the exporting country's market do not "permit a proper comparison" because of "the particular market situation"; or
- (c) sales in the exporting country's market do not "permit a proper comparison" because of their low volume.³⁶²

In terms of the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation*, the constructed normal value is based on the constructed cost of production in the export country plus a reasonable cost for selling, general costs and administrative costs.³⁶³ The underlying goal of the constructed normal value rules is to ensure that the result is as close as possible to the price-to-price comparison.³⁶⁴

In the EU, the constructed normal value is comprehensive in nature and the EC uses it in most investigations.³⁶⁵ The constructed normal value is used when there are insufficient

para 36; EC investigation: *Rainbow Trout Norway* para 32; EC investigation: *Council Regulation (EC) of 17 July 2008 repealing the anti-dumping duties imposed by Regulation (EC) No 85/2006 on imports of farmed salmon originating in Norway*, Reg 685/2008 in *OJEU* L192/5 para 30.

³⁶² WTO dispute: *EC Pipe Fittings Brazil AB* para 94; WTO dispute: *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan*, WT/DS454/R (2015) para 7.49; WTO dispute: *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS460/R (2015) para 7.49; see also Article VI (1)(b) of the *GATT*; A 2(2) of the *ADA*.

³⁶³ Article 2(3) of the *EU's Anti-Dumping Regulation*; Section 32(2)(b)(ii)(aa) of the *ITA Act*; Article VI (1)(b) of the *GATT*; A 2(2) of the *ADA*; Müller, Khan and Scharf *EC and WTO Anti-dumping law* 87. See WTO dispute: *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, WT/DS488/R (2017) para 7.9; WTO dispute: *EU Biodiesel Argentina* para 7.337; WTO dispute: *EC Pipe Fittings Brazil AB* para 96; Brink "Anti-dumping in southern Africa" 320. There are three options available on how to calculate administrative, selling and general costs and profits. See WTO dispute: *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (2000) para 6.62.

³⁶⁴ WTO dispute: *Thailand H-Beam Poland* para 7.127; Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.05.B.

³⁶⁵ EU case: *PT Wilmar Bioenergi Indonesia and PT Wilmar Nabati Indonesia v Council of the European Union*, T-139/14 (2016) para 41; EC investigation: *Commission Implementing Regulation (EU) of 13 April 2023 imposing a definitive anti-dumping duty on imports of certain stainless steel tube and pipe butt-welding fittings, whether or not finished, originating in the People's Republic of China and Taiwan following an expiry review*, Reg 2023/809 in *OJEU* L101/22 para 135 (hereafter EC investigation: *Butt-*

sales of the product in the ordinary course of trade by either the relevant exporter or other sellers in the exporting country.³⁶⁶ The *EU's Anti-Dumping Regulation* does not contain a specific definition of the term "in the ordinary course of trade" but rather includes two examples of what is not considered to be in the ordinary course of trade.³⁶⁷ First, prices between parties that are associated or have an arrangement with each other are not considered to be in the ordinary course of trade.³⁶⁸ Second, sales of the product in the domestic market of the exporting country or export sales to a third country that were made at prices below unit production costs are not considered to be in the ordinary course of trade.³⁶⁹ These two examples are not exhaustive to determine what instances fall outside the concept of ordinary course of trade.³⁷⁰ The EC has on several occasions determined when sales are not in the ordinary course of trade, without using the above examples.³⁷¹ This just shows that the EC has a wide discretion when determining the normal value.³⁷²

In terms of SA, when ITAC constructs a normal value it includes the production costs; overheads; selling, general and administrative costs; reasonable profit and any other

welding China); EC investigation: *Yarns Polyesters China* para 45; EC investigation: *Commission Implementing Regulation (EU) of 12 April 2023 imposing a definitive anti-dumping duty on imports of sodium gluconate originating in the People's Republic of China following an expiry review*, Reg 2023/752 in *OJEU* L100/16 para 86.

³⁶⁶ Article 2(3) of the *EU's Anti-Dumping Regulation*; Article VI (1)(b) of the *GATT* and A 2(2) of the *ADA*; Müller, Khan and Scharf *EC and WTO Anti-dumping law* 87.

³⁶⁷ Article 2(3) of the *EU's Anti-Dumping Regulation* stipulates that the EC should determine if there can be a proper comparison of the product in the ordinary course of trade because of a particular market situation. See also EU case: *Alumina* paras 22-24.

³⁶⁸ Article 2(1) of the *EU's Anti-Dumping Regulation*; A 127 of the *EU Customs Code* may be taken into account to determine if the parties are associated.

³⁶⁹ These sales also could not provide for the recovery of all costs within a reasonable time. See article 2(4) of the *EU's Anti-Dumping Regulation*; EU case: *Alumina* para 24.

³⁷⁰ EU case: *Alumina* para 25. See also EC investigation: *Council Regulation (EC) of 14 November 2005 amending Regulation (EEC) No 3068/92 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine*, Reg 1891/2005 in *OJEU* L302/14 paras 20-23.

³⁷¹ Domestic sales to state-owned companies were excluded from the normal value determination in EC investigation: *Commission Implementing Regulation (EU) of 26 January 2016 amending Council Implementing Regulation (EU) No 102/2012 imposing a definitive anti-dumping duty on imports of steel ropes and cables originating, inter alia, in Ukraine following a partial interim review*, Reg 2016/90 in *OJEU* L19/22 para 22. Sales prices were fixed by governmental authorities and were not in the ordinary course of trade in EC investigation: *Commission Regulation (EEC) of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand*, Reg 2818/91 in *OJEU* L271/17 para 13.

³⁷² EU case: *Yingli Energy* para 91.

costs considered necessary to compare the constructed normal value to the export price of the relevant product.³⁷³ There are three instances when sales will not be deemed to be in the ordinary course of trade in terms of *SA's Anti-Dumping Regulation*.³⁷⁴ First, if the sales took place at prices below total costs, including selling, general and administrative costs, in substantial quantities of at least 20 per cent of the total domestic sales and for not less than six months.³⁷⁵ Second, where the sales were made to a related party.³⁷⁶ Third, where the product sales do not reflect normal commercial quantities.³⁷⁷ If it is determined that the sales were made in the ordinary course of trade and one or more of these reasons are not present, the constructed normal value calculation will be used in SA.³⁷⁸

When comparing the respective jurisdictions, it is noteworthy that *SA's Anti-Dumping Regulation* provides three instances of what is not deemed to be in the ordinary course of trade whereas the *EU's Anti-Dumping Regulation* provides two examples.³⁷⁹ Article 2(1) of the *EU's Anti-Dumping Regulation* seems to fit with the second instance in *SA's Anti-Dumping Regulation* that the sales were made to a related party.³⁸⁰ Article 2(4) of the

³⁷³ Article 8(10) of *SA's Anti-Dumping Regulation*. ITAC considered these aspects in ITAC: *Investigation 492 Frozen Chicken* para 4.4.1(a).

³⁷⁴ Article 8(2) of *SA's Anti-Dumping Regulation*.

³⁷⁵ Article 8(2)(a) of *SA's Anti-Dumping Regulation*. In ITAC: *Investigation Frozen Potato Chips Belgium* paras 4.1.1, 4.4.1, ITAC had to decide if sales were made in the ordinary course of trade. For one exporter, it was found that the sales made below cost were less than 20 per cent by volume of the total domestic sales. As a result, it was deemed to be in the ordinary course of trade and was calculated in terms of the primary method. However, for another exporter, it was found that the sales that were made below cost, constituted more than 20 per cent of the total domestic volumes sold in the exporting country, which means it is not in the ordinary course of trade. See also ITAC: *Investigation Pasta Egypt* para 4.4.

³⁷⁶ Article 8(2)(b) of *SA's Anti-Dumping Regulation*.

³⁷⁷ Article 8(2)(c) of *SA's Anti-Dumping Regulation*.

³⁷⁸ In ITAC: *Investigation 695 Frozen Chicken* paras 4.2.1, ITAC determined that the sales represented less than five per cent of the export sales to the SACU region and that the volumes sold were insufficient to determine a normal value in terms of the primary method or second method. As a result, ITAC calculated the normal value on a constructed basis. See also ITAC: *Investigation Spades China* para 4.3.1; ITAC: *Investigation Windscreens China* paras 4.1, 4.2, 4.3; ITAC: *Investigation Wheelbarrows China* para 4.3.1; ITAC: *Investigation Frozen Potato Chips the Netherlands and Belgium* para 4.2.1; ITAC: *Investigation into the alleged dumping of coated paper originating in or imported from China and Korea: Final determination*, Report No 464 (2014) para 4.1.1 (hereafter ITAC: *Investigation Coated Paper China*); ITAC: *Investigation into the alleged dumping of frit originating in or imported from Brazil: Final determination*, Report No 414 (2012) para 4.1.2; ITAC: *Investigation into the alleged dumping of fully threaded screws with hexagon heads originating in or imported from China: Final determination*, Report No 408 (2012) para 4.2.1.

³⁷⁹ Article 8(2) of *SA's Anti-Dumping Regulation*; A 2(1) and 2(4) of the *EU's Anti-Dumping Regulation*.

³⁸⁰ Article 8(2)(b) of *SA's Anti-Dumping Regulation*; A 2(1) of the *EU's Anti-Dumping Regulation*.

EU's Anti-Dumping Regulation does not seem to fit with the other two instances in *SA's Anti-Dumping Regulation*.³⁸¹ As such, the EU's explanation as to what is not seen to be in the ordinary course of trade is rather different from that of SA.³⁸² The *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* differ in their wording regarding the constructed normal value calculation.³⁸³ However, the outcome of this method stays the same, namely, if the primary method and the second method cannot be used, a constructed normal value will be used as the third option.

4.3.4 Normal value determination based on the export price

The fourth method available is that the normal value is determined by using the export sales of the product to a third country.³⁸⁴ The *EU's Anti-Dumping Regulation* differs here from the *ITA Act* in that this method is the last resort for the EC to determine normal value.³⁸⁵ However, the *ITA Act* provides no indication that this method is the last resort which means that ITAC has the discretion to use either method three or method four to calculate the normal value if there is not enough information available to use the primary method or the second method.

Interestingly, the EC does not generally use the export price method and rather uses the constructed normal value determination.³⁸⁶ As noted in EC investigation: *Bicycles China*, the EC will use the constructed normal value calculation as a standard practice before considering calculating the normal value based on the export price of the product to an appropriate third country.³⁸⁷ Furthermore, as noted in EC investigation: *Ferro-Silicon*

³⁸¹ Article 2(4) of the *EU's Anti-Dumping Regulation*; A 8(2)(a) and 8(2)(c) of *SA's Anti-Dumping Regulation*.

³⁸² Article 8(2) of *SA's Anti-Dumping Regulation*; A 2(1) and 2(4) of the *EU's Anti-Dumping Regulation*.

³⁸³ Article 32(2)(b)(ii) of the *ITA Act* stipulates if there is a lack of information, the constructed normal value can be used where article 2(3) of the *EU's Anti-Dumping Regulation* stipulates that if there are insufficient sales of the like product in the ordinary course of trade by either the relevant exporter or other sellers in the exporting country, the constructed normal value can be used.

³⁸⁴ Article VI (1)(b) of the *GATT*; A 2(2) of the *ADA*; Brink "Anti-dumping in southern Africa" 312; Lester, Mercurio and Davies *World Trade Law* 523.

³⁸⁵ Article 2(3) of the *EU's Anti-Dumping Regulation*; Section 32(2)(b)(ii)(bb) of the *ITA Act*. In the *ADA*, export prices are put first where the *EU's Anti-Dumping Regulation* places the constructed value first. See Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.07 footnote 144.

³⁸⁶ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* paras 3.07, 3.10.

³⁸⁷ EC investigation: *Council Regulation (EC) of 12 July 2005 imposing a definitive anti-dumping duty on imports of bicycles originating in Vietnam, and amending Regulation (EC) No 1524/2000 imposing a*

Iceland, the reason the EC does not generally use the export price to a third country is that the sales to third-party countries might also be at dumped prices.³⁸⁸

In SA, in terms of the *ITA Act*, the normal value is determined based on the highest comparable price of the product when exported to a third-party country.³⁸⁹ If there has been government intervention in the country of export, ITAC may apply the normal value of goods sold in a third-party country.³⁹⁰ In ITAC: *Investigation 479 Frozen Chicken*, ITAC determined that one of the exporters, Lohne, sold various models of the product (chicken) in its domestic market (the export country) namely Germany.³⁹¹ Lohne did not sell chicken leg quarters, one of the models of the product, in Germany during the investigation period. An absence of sales of the relevant cut or model of chicken in Germany at the relevant time meant that methods one to three could not be used.³⁹² Furthermore, chicken thighs with backbone, one of the models of the product, were sold for less than five per cent to the SACU region and were seen as insufficient to make a proper comparison.³⁹³ ITAC determined that the chicken leg quarters and the chicken thighs with backbone were sold to various third-country export markets.³⁹⁴ In adopting this fourth method, ITAC selected Great Britain as a third-party country and the normal value was based on the export sales of the relevant chicken models or cuts exported from Germany to Great Britain.³⁹⁵

definitive anti-dumping duty on imports of bicycles originating in the People's Republic of China, Reg 1095/2005 in *OJEU* L183/1 para 78 (hereafter EC investigation: *Bicycles China*).

³⁸⁸ EC investigation: *Ferro-Silicon Iceland* para 15; EC investigation: *Bicycles China* para 78; the EC will also not use this method if the export prices of the like product to a third country are not comparable to the product under consideration. See EC investigation: *Commission Regulation (EC) of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the people's Republic of China, the Republic of Korea, Singapore and Thailand*, Reg 2376/94 in *OJEU* L255/50 paras 44-45.

³⁸⁹ Section 32(2)(b)(ii)(bb) of the *ITA Act*; this is similar to A 2(3) of the *EU's Anti-Dumping Regulation*; Article VI (1)(b) of the *GATT* and A 2(2) of the *ADA*. However, they do not specify that it needs to be the highest comparable price.

³⁹⁰ Section 32(4) of the *ITA Act*. See also article 6a(a) of the *EU's Anti-Dumping Regulation*. This is one notable difference from Article VI of the *GATT* and the *ADA*.

³⁹¹ ITAC: *Investigation 479 Frozen Chicken* para 4.1.4(a). See also ITAC: *Investigation Pasta Egypt* para 4.3.1; ITAC: *Investigation Frozen Potato Chips the Netherlands and Belgium* para 4.1.1.

³⁹² ITAC: *Investigation 479 Frozen Chicken* para 4.1.4(a).

³⁹³ ITAC: *Investigation 479 Frozen Chicken* para 4.1.4(a).

³⁹⁴ ITAC: *Investigation 479 Frozen Chicken* para 4.1.4(a).

³⁹⁵ In its selection of Great Britain as an appropriate third country, ITAC considered three criteria: first, that the volumes exported to Great Britain is comparable to the volumes exported to SACU, second, that the customers exported to in Great Britain is comparable to the customers exported to in SACU

To summarise, the primary method will be used first if the product is sold in the export country in the ordinary course of trade and the domestic sales of the product in the export country represent at least five per cent of the total export sales to the importing country.³⁹⁶ However, generally speaking, if domestic sales are less than five per cent of the export sales to the import country or where the relevant product is not sold in the domestic market at all, a constructed normal value determination is used.³⁹⁷

During ITAC investigations, the majority of the normal value determinations are done in line with the primary method.³⁹⁸ If this is not possible, ITAC would normally use a constructed normal value (method 3) rather than the export price (method 4).³⁹⁹ More recently, ITAC has used the export price to a third country or both the constructed normal value and the export price.⁴⁰⁰ In contrast, during EC investigations, the majority of the normal value determinations are done in line with the constructed normal value (method 3) and not the primary method.⁴⁰¹ The normal value determinations most often adopted within the EU and SA therefore appear to be slightly different. Still, various factors impact which method of determining the normal value would be most suitable in a specific case, including the relevant export country, type of product and availability of the relevant product in the domestic market. On this basis, the normal value determination by the EC and ITAC is done on a case-to-case basis.

and third, that Great Britain has a domestic manufacturing industry. See the preliminary determination in ITAC: *Investigation 479 Frozen Chicken* para 4.1.4(a); these criteria were also used in the final determination. See ITAC: *Investigation 492 Frozen Chicken* para 4.1.4 (a).

³⁹⁶ See EC investigation: *Alloy Steel Serbia* para 49.

³⁹⁷ See EC investigation: *Alloy Steel Serbia* para 49.

³⁹⁸ Brink "Anti-dumping in southern Africa" 322.

³⁹⁹ Brink "Anti-dumping in southern Africa" 322; see ITAC: *Sunset review of the anti-dumping duties on frozen meat of fowls of the species Gallus Domesticus cut in pieces with bone-in originating in or imported from the United States of America*, Report No 195 (2006); ITAC: *Sunset review of the anti-dumping duties on picks, shovels and spades, rakes and forks originating in or imported from the People's Republic of China: Final determination*, Report No 251 (2007).

⁴⁰⁰ Brink "Anti-dumping in southern Africa" 322; ITAC: *Investigation Spades China* paras 4.2.1, 4.3.1; ITAC: *Investigation Wheelbarrows China* paras 4.3.1, 4.4.1; ITAC: *Investigation 492 Frozen Chicken* paras 4.2.1, 4.2.5; ITAC: *Investigation Frozen Potato Chips the Netherlands and Belgium* para 4.2.1.

⁴⁰¹ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* paras 3.07, 3.10. In EC investigation: *Alloy Steel Serbia* paras 54, 55, 65, the EC determined that the products were not sold in sufficient quantities in the exporting country (Brazil) and represented less than five per cent of the sale to the EU. The EC then used the constructed normal value and calculated the weighted average of the average selling, general and administrative costs and profits.

4.4 Step two: calculating the export price

After the normal value of the relevant product has been calculated, the second step is to calculate the export price of that product to the importing country as set out in article 2(3) of the *ADA*. To determine the margin of dumping, the export price of the product is compared to the normal value of the product under consideration in the export country.⁴⁰² There are two methods to determine the export price in terms of the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation*. First, the export price can be calculated based on the actual price paid for the product when sold from the export country to the EU or SACU.⁴⁰³ Second, if there is no actual price for the product, the calculation of the export price can be based on a constructed export price.⁴⁰⁴

4.4.1 Actual existing export price

The *EU's Anti-Dumping Regulation* and *ITA Act* are in agreement that the export price is the price actually paid for products sold to the EU or SACU.⁴⁰⁵ Furthermore, both legal instruments are aligned to the extent that actual export price should be used, where possible, before adopting the alternative of a constructed export price.⁴⁰⁶ Only if there is no actual export price or the price is unreliable (as discussed below), should the provisions laid out for a constructed export price be followed.⁴⁰⁷

In EC investigation: *Tiles India*, the actual export price of the product was used since the product was sold directly to customers located in the EU.⁴⁰⁸ When an exporter sells to an unrelated intermediary which is based outside the EU, the calculation of the export price is based on prices charged by the exporter to the intermediary.⁴⁰⁹ However, the final

⁴⁰² Lester, Mercurio and Davies *World Trade Law* 524.

⁴⁰³ Article 2(8) of the *EU's Anti-Dumping Regulation*; Section 32(2)(a) of the *ITA Act*; A 2(1) of the *ADA*.

⁴⁰⁴ Article 2(9) of the *EU's Anti-Dumping Regulation*; Section 32(2)(a) of the *ITA Act*; A 2(3) of the *ADA*.

⁴⁰⁵ Article 8 of the *EU's Anti-Dumping Regulation*; Section 32(2)(a) of the *ITA Act*.

⁴⁰⁶ Article 8 of the *EU's Anti-Dumping Regulation*; Section 32(2)(a) of the *ITA Act*.

⁴⁰⁷ WTO dispute: *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R (2000) para 6.69.

⁴⁰⁸ EC investigation: *Tiles India* para 166. See also Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.15; EC investigation: *Butt-welding China* paras 164-165.

⁴⁰⁹ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.15; see EC investigation: *Implementing Regulation of the Council (EU) of 29 March 2010 amending Regulation (EC) No 452/2007 imposing a definitive anti-dumping duty on imports of ironing boards originating, inter alia, in the People's Republic of China*, Reg 270/2010 in *OJEU* L84/13 paras 46-47.

destination of the product must be in the EU and the exporter must be aware of this.⁴¹⁰ In most of the recent investigations, ITAC used the actual existing export price.⁴¹¹

4.4.2 Constructed export price

The constructed export price determination is parallel in *SA's Anti-Dumping Regulation*, the *ITA Act* and the *EU's Anti-Dumping Regulation*.⁴¹² Where there is no export price, the export price may be constructed when the price is unreliable because there is an association or compensatory arrangement between the exporter and importer or a third party.⁴¹³ The inclusion of the word "may" indicates that the EC and ITAC are not obligated to make a finding that the export price is unreliable but may use their discretion based on the facts and circumstances of the relevant matter.⁴¹⁴

The constructed export price can essentially be used in two cases namely; (1) where there is no export price or (2) where there is an export price, but it is unreliable.⁴¹⁵ The export price may be deemed unreliable when there is an association or a compensatory arrangement between the exporter and the importer or a third party.⁴¹⁶ An association implies the existence of some form of control or contractual agreement between the

⁴¹⁰ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.15. The EC included the sales in the export price where the exporter sold the product to an unrelated intermediary outside of the EU since the exporter knew that the final destination will be in the EU. See EC investigation: *Commission Regulation (EC) of 6 June 1997 imposing a provisional anti-dumping duty on certain imports of flat pallets of wood originating in Poland and accepting undertakings offered from certain exporters in connection with those imports*, Reg 1023/97 in *OJEU* L150/4.

⁴¹¹ ITAC: *Investigation Frozen Potato Chips Belgium* para 4.1.2; ITAC: *Investigation Steel China* para 4.1.2; ITAC: *Investigation Spades China* para 4.3.2; ITAC: *Investigation Safety Glass China* para 4.2; ITAC: *Investigation 695 Frozen Chicken* para 4.2.1.

⁴¹² Article 10 of *SA's Anti-Dumping Regulation*; Section 32(2)(a) of the *ITA Act*; A 2(9) of the *EU's Anti-Dumping Regulation*; A 2(3) of the *ADA*.

⁴¹³ Section 32(6) of the *ITA Act*; article 10(1) of *SA's Anti-Dumping Regulation*; A 2(9) of the *EU's Anti-Dumping Regulation*; A 2(3) of the *ADA*.

⁴¹⁴ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.16.A.

⁴¹⁵ Article 2(9) of the *EU's Anti-Dumping Regulation*; Section 32(6) of the *ITA Act*; article 10(1) of *SA's Anti-Dumping Regulation*; A 2(3) of the *ADA*.

⁴¹⁶ Section 32(6) of the *ITA Act*; article 10(1) of *SA's Anti-Dumping Regulation*; A 2(9) of the *EU's Anti-Dumping Regulation*; A 2(3) of the *ADA*.

parties.⁴¹⁷ In ITAC: *Investigation Acrylic Fibres Turkey*⁴¹⁸, ITAC concluded that the importer and exporter, both being natural persons, were associated by blood as they were relatives. On this basis, their companies were deemed to be associated and a constructed export price was accordingly used.⁴¹⁹

The *EU's Anti-Dumping Regulation* and the *ITA Act* stipulate that the export price may be constructed based on the price at which the products are resold to an independent buyer or, if they are not resold in the condition as they were imported, on a reasonable basis.⁴²⁰ This construction should include adjustments for all costs, such as taxes and duties.⁴²¹ Further adjustments include transport costs, insurance, selling, general and administrative costs, and profit.⁴²² In ITAC: *Investigation Frozen Potato Chips Belgium*, ITAC made adjustments by subtracting value added tax from the export price.⁴²³ In ITAC: *Investigation Steel China*, ITAC subtracted a port handling fee and value added tax in order to calculate the export price.⁴²⁴

⁴¹⁷ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.16.A. The EC stated that the presence of an association between the exporter and importer made the export price unreliable in EC investigation: *Commission Implementing Regulation (EU) of 21 January 2015 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of monosodium glutamate originating in Indonesia*, Reg 2015/84 in *OJEU* L15/54 para 15.

⁴¹⁸ ITAC: *Investigation into the alleged dumping of fabrics of acrylic fibres originating in or imported from Turkey: Final determination*, Report No 68 (2004) para 4.6.4.1 (hereafter ITAC: *Investigation Acrylic Fibres Turkey*); see also ITAC: *Investigation Float Glass Saudi Arabia* para 4.1.2. See also ITAC: *Investigation Spades China* para 4.1.2, the exporter provided two different invoices of the export price and ITAC deemed the prices as unreliable and used a constructed export price.

⁴¹⁹ ITAC: *Investigation Acrylic Fibres Turkey* para 4.6.4.1.

⁴²⁰ Section 32(5) of the *ITA Act*; Article 2(9) of the *EU's Anti-Dumping Regulation*; A 2(3) of the *ADA*.

⁴²¹ Section 32(2)(a) of the *ITA Act*; Article 2(9) of the *EU's Anti-Dumping Regulation*. See also EU case: *Mecafer SA v European Commission*, T-74/12 (2015) para 57; EU case: *RFA International, LP v European Commission*, T-466/12 (2015) para 41.

⁴²² Section 32(2)(a) of the *ITA Act*; Article 2(9) of the *EU's Anti-Dumping Regulation*. In the EU, the burden of proof lies on the party that wants to dispute these adjustments and needs to provide evidence and calculations to justify their claim. See EU case: *Chelyabinsk electrometallurgical integrated plant OAO (CHEMK) and Kuznezhsk Ferrosplavy OAO (KF) v European Commission*, T-487/14 (2018) para 45; EC investigation: *Commission Implementing Regulation (EU) of 17 December 2015 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain aluminium foils originating in the Russian Federation*, Reg 2015/2385 in *OJEU* L332/91 para 22.

⁴²³ Other adjustments can be transporting costs, packaging costs, discounts, export certificates and even lab costs. See ITAC: *Investigation Frozen Potato Chips Belgium* paras 4.1.2, 4.2.2.

⁴²⁴ The export price was ZAR10 107. To get the export price to net of all taxes, ITAC deducted a port handling fee and valued added tax from the export price. The final actual export price was established as ZAR8 742. See ITAC: *Investigation Steel China* para 4.1.2.

In EU case: *RFA International, LP v European Commission*,⁴²⁵ the General Court held that the adjustments involve complex economic assessments, which means that the EC has a wide discretion when determining adjustments. In EC investigation: *Open Mesh Fabrics China*, certain information was not provided by the relevant parties during the investigation and the EC exercised its discretion by using the facts available to construct the export price.⁴²⁶ In EC investigation: *Yarns Polyesters China*, the EC determined the export price for one exporter based on the actual export price and for another exporter based on the constructed export price.⁴²⁷ Ultimately, based on the discussion above, the processes of calculating the export price within SA's and EU's legal frameworks are aligned.

4.5 Step three: comparing the normal value and export price

Comparing the normal value and export price is the third step in establishing dumping. The *EU's Anti-Dumping Regulation* stipulates that a "fair comparison" should be made between the export price and normal value at the ex-factory level (retail level) that was made near the same time.⁴²⁸ Neither *SA's Anti-Dumping Regulation* nor the *ITA Act* includes the specific wording of "fair comparison", but both simply provide that there should be a "comparison" between the export price and normal value at the ex-factory level.⁴²⁹ However, recently in ITAC: *Investigation 695 Frozen Chicken*, ITAC referred to a "fair comparison" between the export and normal value in its report.⁴³⁰ This indicates that,

⁴²⁵ EU case: *RFA International, LP v European Commission*, T-466/12 (2015) para 43. Even a price undertaking can lead to the export price being constructed. See EU case: "*Valimar*" OOD v *Nachalnik na Mitnitsa Varna*, C-374/12, (2014) para 59.

⁴²⁶ The EC used import statistics and information from the complaint in EC investigation: *Commission Implementing Regulation (EU) of 6 November 2017 imposing a definitive anti-dumping duty on imports of certain open mesh fabrics of glass fibres originating in the People's Republic of China as extended to imports of certain open mesh fabrics of glass fibres consigned from India, Indonesia, Malaysia, Taiwan and Thailand, whether declared as originating in these countries or not, following an expiry review*, Reg 2017/1993 in OJEU L288/4 para 56 (hereafter EC investigation: *Open Mesh Fabrics China*); see also EC investigation: *Commission Implementing Regulation (EU) of 5 April 2017 imposing a definitive anti-dumping duty on imports of okoumé plywood originating in the People's Republic of China following an expiry review*, Reg 2017/648 in OJEU L92/48 para 45.

⁴²⁷ EC investigation: *Yarns Polyesters China* paras 152-153.

⁴²⁸ Article 2(10) of the *EU's Anti-Dumping Regulation*; this mirrors A 2(4) of the *ADA*. Ex-factory level means prices at the same level of trade as the price of the product at the factory (wholesale or retail level). See WTO dispute: *EC Salmon Norway* para 7.716.

⁴²⁹ Article 11(3) of *SA's Anti-Dumping Regulation*.

⁴³⁰ ITAC: *Investigation 695 Frozen Chicken* para 4.3.1.

on a practical level when the investigation is conducted, ITAC considers a fair comparison even if it is not specifically stated in *SA's Anti-Dumping Regulation*.⁴³¹

In terms of *SA's Anti-Dumping Regulation* and the *EU's Anti-Dumping Regulation*, if it is not possible to compare the normal value and export price, due allowance shall be made in the form of adjustments for differences in factors which affect the prices and compatibility, such as physical characteristics and currency conversions.⁴³² Five factors are listed in the *ADA* and included in *SA's Anti-Dumping Regulation* that can affect price compatibility.⁴³³ Interestingly, the *EU's Anti-Dumping Regulation* lists eleven factors (which include the five factors listed in the *ADA*) that can affect price compatibility.⁴³⁴ The *ADA* states that investigating authorities can include other factors, which means that the *EU's Anti-Dumping Regulation's* 11 factors are in line with the *ADA*.⁴³⁵ Ultimately, the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* both include the five factors listed in the *ADA*. The EU just goes a bit further than SA by including more factors.

4.6 Step four: determine the margin of dumping

Once the normal value and export price have been calculated and subsequently compared, determining the dumping margin is the fourth step in establishing whether there has been dumping. In terms of the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation*, the dumping margin is the amount by which the normal value of

⁴³¹ This follows the position put forward by several panels that the investigation authority has an obligation to ensure that a fair comparison is made between the normal value and export price. See WTO dispute: *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R (2011) para 487; WTO dispute: *US Hot-Rolled Steel Japan* para 178; WTO dispute: *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R (2003) para 7.158; WTO dispute: *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312 (2005) para 7.147; WTO dispute: *EU Footwear China* para 7.278.

⁴³² Article 2(10) of the *EU's Anti-Dumping Regulation*; A 11(1) of *SA's Anti-Dumping Regulation*; A 2(4) of the *ADA*.

⁴³³ (1) Conditions and terms of trade, (2) taxation, (3) levels of trade, (4) physical characteristics and (5) quantities. See article 11(1) of *SA's Anti-Dumping Regulation* and article 2(4) of the *ADA*.

⁴³⁴ (1) Physical characteristics, (2) import charges and indirect taxes, (3) discounts, rebates and quantities, (4) level of trade, (5) transport, insurance, handling, loading and ancillary costs, (6) packing, (7) credit, (8) after-sales costs, (9) commissions, (10) currency conversions, and (11) other factors. The EC is required to consider any other factor that can affect price compatibility. See EU case: *Godrej Industries Ltd and VVF Ltd v Council of the European Union*, T-6/12 (2013) para 22. See article 2(10) of the *EU's Anti-Dumping Regulation* for a description of each of these factors and Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.19.

⁴³⁵ Article 2(4) of the *ADA*.

the product sold in the exporting country exceeds the export price of the product sold to the EU or SACU.⁴³⁶ In both jurisdictions, the margin of dumping is calculated in terms of a percentage and should be more than two per cent.⁴³⁷ If the margin of dumping is less than two per cent, it is regarded as *de minimus* and no anti-dumping duty will be imposed.⁴³⁸

The EU uses two overarching methods to calculate the margin of dumping, namely the symmetrical method and asymmetrical method.⁴³⁹ The choice between these two methods requires an assessment of complex economic situations.⁴⁴⁰

The first type of symmetrical method is to compare a weighted average normal value with a weighted average of prices of all export transactions in the EU.⁴⁴¹ Where the transaction is large, the investigation may be limited to a reasonable transaction by using samples or the largest representative of exports.⁴⁴² The second type of symmetrical method is the comparison of individual normal values and individual export prices to the EU on a transaction basis.⁴⁴³

⁴³⁶ Article 2(12) of the *EU's Anti-Dumping Regulation*; A 1 of *SA's Anti-Dumping Regulation*; Article VI (2) of the *GATT*. See a calculation formula in Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.20. See also EU case: *Changshu City* para 68.

⁴³⁷ Article 9(3) of the *EU's Anti-Dumping Regulation*; A 12(3) of *SA's Anti-Dumping Regulation*; Section 32(3) of the *ITA Act*; A 5(8) of the *ADA*; ITAC: *Investigation Steel China* para 4.

⁴³⁸ Article 9(3) of the *EU's Anti-Dumping Regulation*; A 12(3) of *SA's Anti-Dumping Regulation*; A 5(8) of the *ADA*; ITAC: *Investigation Steel China* para 4.

⁴³⁹ EU case: *Changshu City* para 53.

⁴⁴⁰ EU case: *Far Eastern New Century Corp. v Council of the European Union*, T-167/07 (2011) para 64 (hereafter EU case: *New Century*).

⁴⁴¹ Article 2(11) of the *EU's Anti-Dumping Regulation*; A 2(4)(2) of the *ADA*. Since 2013, the EC has been using this method the most. See Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.21; EU case: *Changshu City* para 53.

⁴⁴² Article 17(1) of the *EU's Anti-Dumping Regulation*. See in EC investigation: *Commission Regulation (EC) of 8 May 2000 imposing a provisional anti-dumping duty on imports of hairbrushes originating in the People's Republic of China, the Republic of Korea, Taiwan and Thailand, and terminating the proceeding concerning imports of hairbrushes originating in Hong Kong*, Reg 967/2000 in *OJEU* L111/4 paras 51-54. The final destination of the export sales were uncertain and excluded in EC investigation: *Council Regulation (EC) of 17 July 2008 repealing the anti-dumping duties imposed by Regulation (EC) No 85/2006 on imports of farmed salmon originating in Norway*, Reg 685/2008 in *OJEU* L192/5 para 37 and EC investigation: *Commission Regulation (EC) of 20 May 2005 imposing a provisional anti-dumping duty on imports of certain stainless steel fasteners and parts thereof originating in the People's Republic of China, Indonesia, Taiwan, Thailand and Vietnam*, Reg 771/2005 in *OJEU* L128/19 para 89.

⁴⁴³ Article 2(11) of the *EU's Anti-Dumping Regulation*; A 2(4)(2) of the *ADA*. Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.20.

The asymmetrical method is the comparison of a weighted average normal value and all individual export prices to the EU.⁴⁴⁴ This method can be applied if there is a significant difference in the pattern of export prices amongst different purchasers, regions or time periods and the first method cannot reflect the full degree of the dumping.⁴⁴⁵ The asymmetrical method is an exception to the symmetrical rule and two conditions must be present to use the asymmetrical method.⁴⁴⁶ First, the symmetrical method does not reflect the full degree of dumping and, second, the pattern of export prices differs significantly.⁴⁴⁷

In terms of SA, the country uses two approaches to calculate the margin of dumping, depending on the number of products under investigation. First, if there is one product category, such as steel, the margin of dumping is determined as the amount by which the normal value exceeds the export price.⁴⁴⁸ Second, if there is more than one product category, such as different types of tyres, it must first be determined if SARS can identify the products separately.⁴⁴⁹ If SARS can identify the products separately, the margin of dumping is determined separately for each product.⁴⁵⁰ However, if this is not possible, the margin of dumping shall be calculated separately for each product and the weighted average margin of dumping for all products would be based on the individual export volume of each product.⁴⁵¹ According to Brink,⁴⁵² calculating each product separately may amount to price discrimination within the WTO and this was confirmed in WTO dispute: *EC Bed Linen India*.⁴⁵³ This second approach used by SA also differs from the *EU's Anti-Dumping Regulation* determination of the dumping margin as discussed above.

⁴⁴⁴ Article 2(11) of the *EU's Anti-Dumping Regulation*; EU case: *Changshu City* para 53.

⁴⁴⁵ Article 2(11) of the *EU's Anti-Dumping Regulation*.

⁴⁴⁶ EU case: *New Century* para 62.

⁴⁴⁷ EU case: *New Century* para 62.

⁴⁴⁸ Article 12(1) of *SA's Anti-Dumping Regulation*.

⁴⁴⁹ Article 12(2) of *SA's Anti-Dumping Regulation*.

⁴⁵⁰ Article 12(2)(a) of *SA's Anti-Dumping Regulation*.

⁴⁵¹ Article 12(2)(b) of *SA's Anti-Dumping Regulation*. See a weighted average calculation in ITAC: *Investigation Tyres China* para 4.3; ITAC: *Investigation Float Glass Malaysia* para 4.3.

⁴⁵² Brink "Anti-dumping in southern Africa" 327.

⁴⁵³ In WTO dispute: *EC Bed Linen India* para 55, the Appellate Body concluded that some WTO member states calculate the dumping margins by comparing the weighted average normal value to individual export prices. However, this method is mostly prohibited since it does not account for *all* comparable export prices. The difference between the normal value and export price is calculated for each transaction. Positive margins are used where the export price is lower than the normal value and it is taken as it is. Negative margins are used where the export price is higher than the normal value and is counted as zero. This method is called zeroing. Also see WTO dispute: *US Lumber Canada* para

In ITAC: *Investigation Steel China*,⁴⁵⁴ the margin of dumping was calculated for one product category (steel) in terms of the South African Rand (hereafter ZAR). A dumping margin of 41.50 per cent was established, which meant that dumping had taken place.⁴⁵⁵ For illustrative purposes, the four steps that ITAC used to establish the margin of dumping in that matter are set out below:⁴⁵⁶

1. **Normal value:** the normal value was calculated by considering the domestic prices of the relevant product in the exporting country based on the primary method and was determined at ZAR12 370.
2. **Export price:** the actual existing export price was taken into consideration and calculated to be ZAR8 742.
3. **Margin of dumping:** the normal value was deducted from the export price (ZAR12 370 - ZAR8 742) and the margin of dumping was calculated to be ZAR3 628.
4. **Margin of dumping percentage:** the margin of dumping was divided by the export price and multiplied by 100 (ZAR3 628/ZAR8 742 x 100) to arrive at the margin of dumping expressed as a percentage of 41.50 per cent.

Figure 4-3 below sets out the above calculations visually.

Normal value	ZAR12 370
Minus: export price	(ZAR8 742)
Equals: margin of dumping	ZAR3 628
Equals: margin of dumping percentage	41.50%

Figure 4-3: Margin of dumping calculation

5.23. On an EU level, the court agreed with the WTO's take on zeroing and called it an "error of assessment" in EU case: *Ikea Wholesale Ltd v Commissioners of Customs & Excise*, C-351/04 (2007) para 56 (hereafter EU case: *Ikea*). In this case, the court had to consider the use of zeroing in paras 50-57. For further information on zeroing, see Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 3.23; Lester, Mercurio and Davies *World Trade Law* 525.

⁴⁵⁴ ITAC: *Investigation Steel China* para 4.1.

⁴⁵⁵ ITAC: *Investigation Steel China* para 6.1.

⁴⁵⁶ ITAC: *Investigation Steel China* para 4.1.

4.7 Conclusion

This chapter set out the meaning of dumping, followed by a comparative discussion on the four steps to establish dumping as the first requirement in an anti-dumping investigation, both in the EU and SA.

When considering the first step of establishing the normal value, *SA's Anti-Dumping Regulation* and *EU's Anti-Dumping Regulation* are unique when compared to the *ADA*. Article 2 of the *ADA* sets out three methods to calculate the normal value. However, article 2 of the *EU's Anti-Dumping Regulation* and article 8 of *SA's Anti-Dumping Regulation* set out four methods to calculate the normal value.

The primary method should be used first in the EU and SA. The *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* both have a second method that is not included in the *ADA* or Article VI of the *GATT*. The *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* both have a third method where the normal value is determined based on the constructed cost of production in the export country plus a reasonable cost for selling, general costs and administrative costs.⁴⁵⁷ The *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* both have a fourth method where the normal value is determined based on the export price of the product when exported to a third country.⁴⁵⁸ ITAC tends to use the primary method during investigations whereas the EC tends to use the third method (constructed normal value).

In terms of step two, the *EU's Anti-Dumping Regulation*, *SA's ITA Act* and *SA's Anti-Dumping Regulation* are aligned and set out two methods to determine the export price: first, using the existing export price and, second, using the constructed export price.⁴⁵⁹

Step three requires a fair comparison of the normal price and export price. *SA's Anti-Dumping Regulation* does not specifically state that there should be a fair comparison.

⁴⁵⁷ Article VI (1)(b) of the *GATT*; A 2(2) of the *ADA*; A 2(3) of the *EU's Anti-Dumping Regulation*; A 32(2)(b)(ii)(aa) of the *ITA Act*.

⁴⁵⁸ Article VI (1)(b) of the *GATT*; A 2(2) of the *ADA*; A 2(3) of the *EU's Anti-Dumping Regulation*; A 32(2)(b)(ii)(bb) of the *ITA Act*.

⁴⁵⁹ Article 2(1) and 2(3) of the *ADA*; A 2(8)-(9) of the *EU's Anti-Dumping Regulation*; A 10 of *SA's ADA* and A 32(2)(a) and 32(6) of the *ITA Act*.

However, during past investigations, ITAC has confirmed that there should be fair comparison.⁴⁶⁰ The *ADA* and *SA's Anti-Dumping Regulation* both list five factors that can affect price compatibility,⁴⁶¹ whereas the *EU's Anti-Dumping Regulation* has eleven factors that can affect price compatibility.⁴⁶²

As a final step, the calculation of the dumping margin is similar in the *ADA* and the *EU's Anti-Dumping Regulation*. However, *SA's Anti-Dumping Regulation* is significantly different in this regard. The *ADA* and *EU's Anti-Dumping Regulation* stipulate that the dumping margin is the weighted average of prices of all export transactions or on a transaction basis.⁴⁶³ However, *SA's Anti-Dumping Regulation* allows for the calculation of the dumping margin of each product separately.⁴⁶⁴

A notable observation from this chapter is that the steps to establish dumping in terms of the *EU's Anti-Dumping Regulation* are easier to follow than those of the *ADA*. The *ADA* does not have headings or distinguish between the steps to establish dumping. The *EU's Anti-Dumping Regulation* lists the different steps as headings namely, normal value, export price, comparison and dumping margin. *SA's Anti-Dumping Regulation* is similar in this regard, however, the reader has to jump back and forth between the *ITA Act* and *SA's Anti-Dumping Regulation* to follow the steps, which is unnecessarily tedious.

The next chapter focuses on the second and third requirements to establish injury and causation.

⁴⁶⁰ ITAC: *Investigation 695 Frozen Chicken* para 4.3.1.

⁴⁶¹ Article 11(1) of *SA's Anti-Dumping Regulation*; article 2(4) of the *ADA*.

⁴⁶² Article 2(10) of the *EU's Anti-Dumping Regulation*.

⁴⁶³ Article 2(4) of the *ADA*; A 2(11) of the *EU's Anti-Dumping Regulation*.

⁴⁶⁴ Article 12 of *SA's Anti-Dumping Regulation*.

CHAPTER 5 ESTABLISHING INJURY AND CAUSATION

5.1 Introduction

Once the EC or ITAC has established that dumping is present, the second requirement during an anti-dumping investigation is for them to establish whether there has been injury to the relevant domestic industry of the importing country.⁴⁶⁵ Determining injury goes hand in hand with the third requirement: to establish whether the dumped imports are the cause of the injury suffered by the relevant domestic industry. This chapter discusses the determination of injury and causation collectively.

5.2 Injury and causation

Article VI of the *GATT* provides that anti-dumping duties can only be imposed if the effect of the dumping causes material injury, or threat of material injury, or material retardation of the establishment of an industry.⁴⁶⁶ Article 3 of the *ADA* defines the term injury as:

material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.

The same definition of the term injury is incorporated in the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation*.⁴⁶⁷ An anti-dumping duty may only be imposed in the EU and SA if the dumped imports cause (i) material injury, or (ii) threat of material injury, or (iii) material retardation of the relevant EU or SACU industry, as the case may be, that produces a like product to the dumped imports.⁴⁶⁸ In simple terms, the EC and ITAC will determine if the dumped imports cause or may soon cause some degree of economic harm to its domestic industry.⁴⁶⁹ Interestingly, the *EU's Anti-Dumping Regulation* does not clarify what constitutes material retardation of the establishment of an industry.⁴⁷⁰ In contrast, material retardation is stipulated in article 15 of *SA's Anti-Dumping Regulation*. However, this third form of injury has not been raised recently in either EC or ITAC anti-

⁴⁶⁵ Lester, Mercurio and Davies *World Trade Law* 546.

⁴⁶⁶ Article VI(6)(a) of the *GATT*.

⁴⁶⁷ Article 1 of *SA's Anti-Dumping Regulation*; A 3 of the *EU's Anti-Dumping Regulation*.

⁴⁶⁸ Article VI (6)(a) of the *GATT*; A 1(1) of the *EU's Anti-Dumping Regulation*; A 1 of *SA's Anti-Dumping Regulation*.

⁴⁶⁹ Lester, Mercurio and Davies *World Trade Law* 546.

⁴⁷⁰ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 4.10.C.

dumping investigations as material injury or threat of material injury are usually raised by the relevant domestic industry. The discussion that follows, therefore, focuses on the first two types of injury.

The Appellate Body in WTO dispute: *Thailand H-Beam Poland AB*⁴⁷¹ summarised the subsections of article 3 of the *ADA* as follows:

- Article 3(1) sets out the obligations to determine injurious dumping.
- Article 3(2) sets out the determination of the volume of the dumped imports and their effect on prices.
- Article 3(3) sets out investigations of imports from more than one country.
- Article 3(4) sets out the impact of dumped imports on the domestic industry.
- Article 3(5) sets out the causality between dumped imports and injury.
- Article 3(6) sets out the assessment of the domestic production of the like product.
- Articles 3(7)-(8) set out the determination of the threat of material injury.

These summarised concepts are used as headings in the discussion below. The assessment of the like product in terms of article 3(6) is not discussed here as it is discussed in chapter 3 of this study.

5.2.1 Obligation to determine injurious dumping

The *EU's Anti-Dumping Regulation* provides that a determination of injury shall be based on positive evidence and an objective examination of:

1. The volume of the dumped imports into the importing country; and
2. The effect of the dumped imports on prices in the Union market for the like products; and
3. The impact of these dumped imports on the Union industry.⁴⁷²

⁴⁷¹ WTO dispute: *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R (2001) para 106 (hereafter WTO dispute: *Thailand H-Beam Poland AB*).

⁴⁷² Article 3(1) of the *EU's Anti-Dumping Regulation*; A 3(1) of the *ADA*.

The Court of Justice of the European Union has on several occasions held that the EC has a wide discretion regarding the determination of injury since its assessment involves complex economic matters.⁴⁷³

The Appellate Body in WTO dispute: *US Hot-Rolled Steel Japan* held that an objective examination means that the investigation must be conducted in an unbiased manner without favouring any party.⁴⁷⁴ The Appellate Body further held that positive evidence means evidence that is affirmative, objective and verifiable.⁴⁷⁵

In terms of SA, there is no specific reference to the terms injury, material injury or threat of material injury in the *ITA Act*. Brink⁴⁷⁶ notes that at first glance, when considering the *ITA Act*, it appears as though injury is not a requirement for anti-dumping investigations in terms of SA law. However, *SA's Anti-Dumping Regulation* provides factors that ITAC must consider during its determination of injury, which indicates that injury is a requirement in terms of SA law as *SA's Anti-Dumping Regulation* was promulgated in terms of the *ITA Act*.⁴⁷⁷

This study recommends that the *ITA Act* be amended to include the obligation to determine injurious dumping to bring legal certainty that injury is a requirement in SA. Specifically, this study recommends that the *ITA Act* should be amended to align with the *ADA* by including a provision to the effect that a determination of injury:⁴⁷⁸

shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

⁴⁷³ EU case: *Caviro Distillerie Srl v European Commission*, T-211/16 (2018) para 36; EU case: *ArcelorMittal Tubular Products Ostrava a.s. v Hubei Xinyegang Steel Co. Ltd and Council of the European Union v Hubei Xinyegang Steel Co. Ltd*, C-186/14, C-193/14 (2016) para 34; EU case: *Bricmate AB v Tullverket*, C-569/13 (2015) para 46; EU case: *Aluminium Silicon Mill Products GmbH v Council of the European Union*, T-107/04 (2007) paras 43-44; EU case: *Ikea* para 63; EU case: *Shanghai Teraoka Electronic Co. Ltd v Council of the European Union*, T-35/01 (2004) para 277.

⁴⁷⁴ WTO dispute: *US Hot-Rolled Steel Japan* para 193. See also WTO dispute: *Thailand H-Beam Poland AB* paras 106-107; WTO dispute: *Russia Light Commercial Vehicles Germany* para 5.51.

⁴⁷⁵ WTO dispute: *US Hot-Rolled Steel Japan* paras 192-193; see also WTO dispute: *Thailand H-Beam Poland AB* para 107.

⁴⁷⁶ Brink "Anti-dumping in southern Africa" 330.

⁴⁷⁷ These factors are listed in article 13(2) of *SA's Anti-Dumping Regulation*, such as sales volumes.

⁴⁷⁸ This wording is derived from article 3(1) of the *ADA*.

5.2.2 Determination of the volume of the dumped imports and their effect on prices

When ITAC considers the causal relationship between the dumped imports and the material injury caused to the domestic industry, it needs to consider all relevant factors listed in article 16 of *SA's Anti-Dumping Regulation*. These are:

1. The change in the volume of the dumped imports relative to the production or consumption in the SACU market.⁴⁷⁹
2. The price undercutting experienced by the SACU industry through the dumped imports.⁴⁸⁰
3. The market share of the dumped imports.⁴⁸¹
4. The level of the margin of dumping.⁴⁸²
5. The price of undumped imports available in the SACU market.⁴⁸³

These factors are similar to the *EU's Anti-Dumping Regulation* which provides that a determination of injury shall be an examination of the volume of the dumped imports as listed above.⁴⁸⁴

The *EU's Anti-Dumping Regulation* provides that the EC shall consider whether there has been a significant increase in the volume of the dumped imports relative to production or consumption in the importing country.⁴⁸⁵ The EC generally uses the figures reported in Eurostat statistics concerning exports of the relevant product to the EU.⁴⁸⁶ If it is not

⁴⁷⁹ Article 16(1)(a) of *SA's Anti-Dumping Regulation*.

⁴⁸⁰ A price undercutting is the extent to which the price of the imported product is lower than the price of the like product produced by the SACU industry. See article 1 of *SA's Anti-Dumping Regulation*; A 16(1)(b) of *SA's Anti-Dumping Regulation*.

⁴⁸¹ Article 16(1)(c) of *SA's Anti-Dumping Regulation*.

⁴⁸² Article 16(1)(d) of *SA's Anti-Dumping Regulation*.

⁴⁸³ Article 16(1)(e) of *SA's Anti-Dumping Regulation*.

⁴⁸⁴ Article 3(1) of the *EU's Anti-Dumping Regulation*; A 3(1) of the *ADA*.

⁴⁸⁵ Article 3(3) of the *EU's Anti-Dumping Regulation*; A 3(2) of the *ADA*.

⁴⁸⁶ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 4.10.A. See EC 2023 <https://ec.europa.eu/eurostat>; see also EU investigation: *Commission Implementing Regulation (EU) of 16 August 2017 imposing a provisional anti-dumping duty on imports of certain cast iron articles originating in the People's Republic of China*, Reg 2017/1480 in *OJEU* L211/14 para 123 (hereafter EC investigation: *Cast Iron China*).

possible to use Eurostat statistics to determine the volume of the imports, the EC will use the information that is available to determine the volume of the imports.⁴⁸⁷ The volume of the dumped imports is generally assessed in terms of the rate at which the imports increase in quantity with regard to the consumption in the Union.⁴⁸⁸ The Union consumption generally includes all sales made by Union producers except those sales that Union producers made to related companies for internal consumption.⁴⁸⁹

The *EU's Anti-Dumping Regulation* provides that the EC shall consider whether there has been a significant price undercutting by the dumped imports when compared with the price of a like product of the Union industry, or if the dumped imports will decrease prices or prevent domestic price increases.⁴⁹⁰ The price undercutting is the extent to which imported prices are lower than the prices of domestic like products.⁴⁹¹ The EC generally calculates the extent to which imported product prices are lower than domestic product prices in the EU by using the weighted averages of the imported products and the weighted averages of the domestic products.⁴⁹² The EC will generally find that in addition to a price undercutting, the Union industry is experiencing injury since the imported product prices are below the EU producers' cost of production.⁴⁹³

In terms of SA, *SA's Anti-Dumping Regulation* states that ITAC should consider the change in the volume of the dumped imports relative to the production or consumption

⁴⁸⁷ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 4.10.A. The EC can use figures from the EC customs authorities to determine the volume of the imports or statistics provided by the US International Trade Commission. See EU investigation: *Commission Regulation (EC) of 18 September 2007 imposing a provisional anti-dumping duty on imports of coke of coal in pieces with a diameter of more than 80 mm (Coke 80+) originating in the People's Republic of China*, Reg 1071/2007 in *OJEU* L244/3 paras 36, 41; EU investigation: *Council Implementing Regulation (EU) of 18 February 2013 imposing a definitive anti-dumping duty on imports of bioethanol originating in the United States of America*, Reg 157/2013 in *OJEU* L49/10 paras 84-85.

⁴⁸⁸ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 4.10.B. The EC looked at an increase of nine per cent in the volume of imports and found that injury was present. See EU investigation: *Commission Regulation (EU) of 11 November 2016 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes of iron (other than cast iron) or steel (other than stainless steel), of circular cross-section, of an external diameter exceeding 406,4 mm, originating in the People's Republic of China*, Reg 2016/1977 in *OJEU* L305/1 para 55 (hereafter EC investigation: *Circular Cross-Section China*).

⁴⁸⁹ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 4.10.C.

⁴⁹⁰ Article 3(3) of the *EU's Anti-Dumping Regulation*; A 3(2) of the *ADA*.

⁴⁹¹ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 4.11.A.

⁴⁹² Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 4.11.A.

⁴⁹³ EC investigation: *Yarns Polyesters China* para 187.

in the SACU market.⁴⁹⁴ This includes an assessment of whether there have been significant changes in the sales volumes.⁴⁹⁵ *SA's Anti-Dumping Regulation* also provides for a price undercutting aligned with the *EU's Anti-Dumping Regulation*.⁴⁹⁶ However, *SA's Anti-Dumping Regulation* goes one step further and provides that during the investigation, ITAC can also consider a price depression, price disadvantage and price suppression.⁴⁹⁷ In *ITAC: Investigation Steel China*, ITAC established that there was a significant increase in the volume of the dumped imports which caused an increase in imports into the SACU industry.⁴⁹⁸ Thereafter, ITAC established that there was price undercutting as the price of the imported products was lower than the price of the like product in the SACU industry.⁴⁹⁹

SA's Anti-Dumping Regulation is in line with the *EU's Anti-Dumping Regulation* regarding the volume and the effect of the dumped imports.⁵⁰⁰ *SA's Anti-Dumping Regulation* goes further and stipulates that in determining material injury to the SACU industry, ITAC shall consider whether there has been a significant depression or suppression of the SACU industry's prices.⁵⁰¹

5.2.3 Investigations of imports from more than one country

The *EU's Anti-Dumping Regulation* provides that where imports of products from more than one country are simultaneously subject to a single anti-dumping investigation, the

⁴⁹⁴ Article 16(1)(a) of *SA's Anti-Dumping Regulation*. A 91 per cent increase in the volume of the dumped imports over a period of three years resulted in growth of the imports in the SACU industry, causing injury. See *ITAC: Investigation Windscreens China* para 5.2.1.

⁴⁹⁵ Article 13 of *SA's Anti-Dumping Regulation*.

⁴⁹⁶ Article 1 of *SA's Anti-Dumping Regulation*.

⁴⁹⁷ A price depression takes place where the SACU industry's ex-factory selling price of the domestically produced like product decreases during the investigation period. A price disadvantage takes place when considering the extent to which an imported product's price is lower than the like product's price produced by the SACU industry. A price suppression takes place where the SACU industry sells its domestically produced like product at a loss or the cost to price ratio of the SACU industry like product increases. See article 1 of *SA's Anti-Dumping Regulation*.

⁴⁹⁸ *ITAC: Investigation Steel China* para 5.3.

⁴⁹⁹ ITAC established that a price depression had not taken place as the SACU industry's selling price had not decreased during the investigation. ITAC established that a price suppression had not taken place as the increases in the production cost could be recovered by the selling price. However, since there were enough factors present causing injury, ITAC established that injury is present. See *ITAC: Investigation Steel China* paras 5.4.2.1-5.4.2.3.

⁵⁰⁰ Article 3(3) of the *EU's Anti-Dumping Regulation*; A 1 and 13(1) of *SA's Anti-Dumping Regulation*; A 3(2) of the *ADA*.

⁵⁰¹ Articles 1 and 13(1) of *SA's Anti-Dumping Regulation*.

EC shall conduct a cumulative assessment to evaluate the effect of the imports simultaneously.⁵⁰² The *EU's Anti-Dumping Regulation* provides that this cumulative assessment may only take place if the EC establishes two criteria:

- (a) the margin of dumping relating to the imports from each country is more than *de minimus* and the volume of imports from each country is not negligible; and
- (b) a cumulative assessment of the effects of the imports is appropriate considering the competition between the imported products and the competition between the imported products and the like products of the Union industry.⁵⁰³

There is no specific reference to the injury assessment regarding the investigation of imports from more than one country in either the *ITA Act* or *SA's Anti-Dumping Regulation*. However, this is implied by the wording of article 16(3) of *SA's Anti-Dumping Regulation* that ITAC can cumulatively assess the effect of the dumped imports.⁵⁰⁴ ITAC can only conduct a cumulative assessment if it is appropriate in light of four criteria listed in article 16(3) of *SA's Anti-Dumping Regulation*, namely where:

1. there is competition between imports from different countries;
2. there is competition between the imports and the SACU like product;
3. the dumped imports are not negligible; and
4. the margin of dumping is at least two per cent of the export price.

In *ITAC: Investigation 695 Frozen Chicken*, five countries were involved in the investigation and ITAC found it appropriate to conduct a cumulative assessment as all four of the abovementioned criteria had been met.⁵⁰⁵ However, in *ITAC: Investigation*

⁵⁰² Article 3(4) of the *EU's Anti-Dumping Regulation*; A 3(3) of the *ADA*.

⁵⁰³ Article 3(4) of the *EU's Anti-Dumping Regulation*; A 3(3) of the *ADA*. The EC conducted a cumulative assessment in EC investigation: *Tiles India* paras 271, 274, 275.

⁵⁰⁴ This is in line with Article 3(3) of the *ADA*; A 3(4) of the *EU's Anti-Dumping Regulation*.

⁵⁰⁵ *ITAC: Investigation 695 Frozen Chicken* para 5.4; see also *ITAC: Investigation Frozen Potato Chips Belgium* para 5.2; *ITAC: Investigation Pasta Egypt* para 5.2.

Spades China, one of the exporter's dumped imports was found to be negligible and a cumulative assessment was not conducted.⁵⁰⁶

5.2.3.1 De minimus test

As discussed in chapter 4, the margin of dumping is deemed to be *de minimus* if the margin is less than two per cent based on the export price both in the EU and SA.⁵⁰⁷ This means that if the margin of dumping is less than two per cent, there is no dumping and, as a result, the anti-dumping investigation is terminated.⁵⁰⁸ The *de minimus* test is used for one or more countries.⁵⁰⁹

5.2.3.2 Negligible volume test

The *EU's Anti-Dumping Regulation* provides that the volume of dumped imports is negligible if the volume of the dumped imports from a country "normally" accounts for less than one per cent of the imports of the like product in the Union.⁵¹⁰ This means that if imports from a country are less than one per cent of the like product, there is no injury and the anti-dumping investigation is terminated.⁵¹¹ This is not in line with the *ADA* which provides that the percentage should be three per cent.⁵¹² However, in practice, the EC will stay within the *ADA* threshold of three per cent.⁵¹³

In the EU, if more than one country is involved, the margin of one per cent changes to three per cent collectively for those countries who individually would account for less than one per cent. The volume of dumped imports is negligible if the volume of dumped imports from the countries that individually account for less than one per cent collectively

⁵⁰⁶ ITAC: *Investigation Spades China* para 5.2.

⁵⁰⁷ Article 9(3) of the *EU's Anti-Dumping Regulation*; A 12(3) of *SA's Anti-Dumping Regulation*; A 5(8) of the *ADA*.

⁵⁰⁸ Article 9(3) of the *EU's Anti-Dumping Regulation*; A 12(3) of *SA's Anti-Dumping Regulation*; A 5(8) of the *ADA*.

⁵⁰⁹ ITAC: *Investigation 695 Frozen Chicken* para 2.1.5; ITAC: *Investigation Steel China* para 2.1.6.

⁵¹⁰ Article 5(7) of the *EU's Anti-Dumping Regulation*.

⁵¹¹ Article 5(7) of the *EU's Anti-Dumping Regulation*.

⁵¹² Article 5(8) of the *ADA*.

⁵¹³ Even if the *EU's Anti-Dumping Regulation* stipulates one per cent, the EC will still regard imports as negligible if it is below three per cent. See Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 4.10.C; EU investigation: *Commission Decision of 3 March 1998 terminating the anti-dumping proceeding concerning imports of certain magnetic disks (3,5" microdisks) originating in Canada, Macao and Thailand*, Reg 98/175 in *OJEU* L63/32.

account for less than three per cent of the imports of the like product in the Union.⁵¹⁴ This means that if imports from these countries collectively are less than three per cent of the like product, there is no injury present and no anti-dumping duty will be imposed for these countries.⁵¹⁵ This is not in line with the *ADA* which provides that countries should collectively account for less than seven per cent.⁵¹⁶

In EC investigation: *Alloy Steel Serbia*, the EC held that the import volumes from Serbia were negligible as they accounted for 1,04 per cent.⁵¹⁷ Even though the *EU's Anti-Dumping Regulation* provides for one per cent, the EC held that the additional 0,04 per cent is "immaterial" and the import volumes of Serbia are still negligible and were excluded from the investigation.⁵¹⁸ In 2020, the Union industry challenged the EC's exclusion of Serbia in front of the General Court, arguing that the EC erred in its discretion to regard the 0,4 per cent as immaterial.⁵¹⁹ The General Court held that EC's exclusion of Serbia was warranted.⁵²⁰ In 2022, an appeal was heard before the Court of Justice.⁵²¹ The Court of Justice explained that when the EC considered the volume of the imports, they looked at the quantity of the imports as well as the quality.⁵²² The quality relates to other factors which indicate the effects that the volume can have.⁵²³ When the EC assessed the 1,04 per cent, they concluded that the effect of the import volume would not cause injury to the Union industry.⁵²⁴ The Court of Justice held that the wording of the *EU's Anti-Dumping Regulation* allows the EC some flexibility and discretion regarding the one per cent threshold when considering the *de minimus* principle.⁵²⁵ On this basis, it was held on

⁵¹⁴ Article 5(7) of the *EU's Anti-Dumping Regulation*.

⁵¹⁵ Article 5(7) of the *EU's Anti-Dumping Regulation*.

⁵¹⁶ Article 5(8) of the *ADA*.

⁵¹⁷ Eurofer lodged the complaint on behalf of the Union industry against steel imports from Brazil, Iran, Russia, Ukraine and Serbia. Dumping, injury and causation were found in the cases of Brazil, Iran, Russia and Ukraine. However, Serbia was excluded based on the negligibility test. See EC investigation: *Alloy Steel Serbia* paras 1, 2, 232.

⁵¹⁸ EC investigation: *Alloy Steel Serbia* para 232.

⁵¹⁹ EC case: *Eurofer, Association Européenne de l'Acier, AISBL v European Commission*, T-835/17 (2020).

⁵²⁰ EC case: *Eurofer, Association Européenne de l'Acier, AISBL v European Commission*, T-835/17 (2020) para 67.

⁵²¹ EU case: *Eurofer, Association Européenne de l'Acier, AISBL v European Commission*, C-226/20 (2022) (hereafter EU case: *Eurofer*).

⁵²² EU case: *Eurofer* para 75.

⁵²³ EU case: *Eurofer* para 75.

⁵²⁴ EU case: *Eurofer* para 84.

⁵²⁵ EU case: *Eurofer* para 91.

appeal that the EC did not err in their exclusion of Serbia as the EC enjoys a wide discretion when it comes to protecting trade and assessing injury during anti-dumping investigations.⁵²⁶

In terms of SA, in line with the *ADA*, *SA's Anti-Dumping Regulation* stipulates that the volume of dumped imports is negligible if the volume of dumped imports from a country is less than three per cent of the total imports of the like product in the SACU market.⁵²⁷ In ITAC: *Investigation Steel China*, ITAC found that the volume of the dumped imports was 99 per cent, which is significantly above the negligible level and the dumped imports caused injury to the SACU industry.⁵²⁸

SA's Anti-Dumping Regulation does not specifically clarify the implications of negligible dumped imports. However, the findings from ITAC investigations encompass the same meaning as within the *ADA*.⁵²⁹ In other words, if imports from a country are less than three per cent of the like product, there is no injury and the anti-dumping investigation is terminated.⁵³⁰

In line with the *ADA*, *SA's Anti-Dumping Regulation* provides if more than one country is involved, the margin of three per cent changes to seven per cent collectively for those countries who individually would account for less than three per cent.⁵³¹ The volume of dumped imports is negligible if the volume of dumped imports from the countries that individually account for less than three per cent collectively account for less than seven per cent of imports of the like product in the SACU market.⁵³² This means that if more than one country is involved, the countries which individually account for less than three per cent of the imports of the like product, collectively account for more than seven per cent⁵³³ and are seen to have caused injury and will be subject to anti-dumping duties.

⁵²⁶ EU case: *Eurofer* para 55.

⁵²⁷ Article 5(8) of the *ADA*; A 16(2) of *SA's Anti-Dumping Regulation*.

⁵²⁸ ITAC: *Investigation Steel China* para 2.1.6; see also ITAC: *Investigation Windscreens China* para 2.1.5; ITAC: *Investigation Frozen Potato Chips Belgium* para 2.1.6; ITAC: *Investigation Tyres China* para 2.1.6.

⁵²⁹ ITAC: *Investigation 695 Frozen Chicken* para 2.1.5.

⁵³⁰ Article 5(8) of the *ADA*; A 16(2) of *SA's Anti-Dumping Regulation*.

⁵³¹ Article 5(8) of the *ADA*; A 16(2) of *SA's Anti-Dumping Regulation*.

⁵³² Article 5(8) of the *ADA*; A 16(2) of *SA's Anti-Dumping Regulation*.

⁵³³ Article 5(8) of the *ADA*.

However, if the countries which individually account for less than three per cent of the imports of the like product still do not collectively account for seven per cent, they will be excluded from the injury assessment as they are not causing injury to the domestic industry.⁵³⁴

In ITAC: *Investigation 695 Frozen Chicken*, certain parts of chicken imports from two of the five countries (Ireland and Poland) were individually below three per cent.⁵³⁵ Collectively, Ireland and Poland's imports were also below seven per cent and the countries were excluded for the injury assessment regarding certain chicken imports.⁵³⁶

5.2.4 Determination of the impact of dumped imports on the domestic industry

In line with the *ADA*, the *EU's Anti-Dumping Regulation* provides that the EC must take into consideration 15 economic factors during their examination of injury.⁵³⁷ The economic factors listed in the *EU's Anti-Dumping Regulation* are not exhaustive and the EC has the discretion to consider other relevant economic factors.⁵³⁸ On several occasions, panels and Appellate Bodies have established that investigation authorities must consider each of these 15 economic factors, while they have the discretion whether to also consider

⁵³⁴ ITAC: *Investigation 695 Frozen Chicken* para 2.1.5.

⁵³⁵ ITAC: *Investigation 695 Frozen Chicken* para 2.1.5.

⁵³⁶ In this investigation, certain parts of frozen chicken were divided into leg quarters, wings, thighs and other. Spain was one of the five exporters that were below three per cent for leg quarters and there were no other countries below three per cent that could collectively make up seven per cent. As a result, there were no anti-dumping duties imposed on Spain for leg quarters. However, Spain was above the negligible level for wings and was subject to anti-dumping duties for this part of frozen chicken. See ITAC: *Investigation 695 Frozen Chicken* para 2.1.5. Another example can be found in ITAC: *Investigation Spades China* para 2.1.6.

⁵³⁷ The factors stipulated in article 3(5) of the *EU's Anti-Dumping Regulation* are the same as provided for in article 3(4) of the *ADA*. The factors are (1) actual and potential decline in sales, (2) profits, (3) output, (4) market share, (5) productivity, (6) return on investments, (7) or utilisation of capacity, (8) factors affecting Union prices, (9) the magnitude of the margin of dumping, (10) actual and potential negative effects on cash flow, (11) inventories, (12) employment, (13) wages, (14) growth, and (15) ability to raise capital or investments.

⁵³⁸ Article 3(5) of the *EU's Anti-Dumping Regulation*; A 3(4) of the *ADA*. In practice, the factors listed in article 3(4) of the *ADA* are the minimum standard which investigating authorities must consider during their investigation. See Lester, Mercurio and Davies *World Trade Law* 547.

other relevant factors.⁵³⁹ The EC generally divides these factors into macroeconomic and microeconomic factors in its assessment.⁵⁴⁰

SA's Anti-Dumping Regulation, in contrast, lists 13 factors that ITAC should consider in its injury assessment and not 15 factors as provided in the *EU's Anti-Dumping Regulation* and *ADA*.⁵⁴¹ *SA's Anti-Dumping Regulation* does not include factors affecting domestic prices and the magnitude of the margin of dumping as provided for in the *ADA* and *EU's Anti-Dumping Regulation*. However, article 16(1) of *SA's Anti-Dumping Regulation* does include factors that ITAC must consider in light of the causal relationship between the dumped imports and the material injury, making up the two missing factors.⁵⁴² This was confirmed in ITAC: *Investigation Steel China* where ITAC considered all 15 economic factors as stipulated in the *ADA*.⁵⁴³

In ITAC: *Investigation 695 Frozen Chicken*, ITAC considered 13 out of the 15 factors during its injury assessment.⁵⁴⁴ However, the additional factors (namely, those affecting domestic prices and the margin of dumping) were considered separately in the investigation report.⁵⁴⁵ As a result, ITAC still considered the 15 factors required by the *ADA*. This study recommends that ITAC considers all 15 factors under the same heading as its separation is unnecessarily confusing. Furthermore, in ITAC: *Investigation 492 Frozen Chicken*, ITAC found injury present in only six out of all factors considered.⁵⁴⁶

⁵³⁹ WTO dispute: *Mexico HFCS US* para 7.128; WTO dispute: *Thailand H-Beam Poland* para 7.225; WTO dispute: *EC Pipe Fittings Brazil AB* para 160; WTO dispute: *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R (2013) para 7.180; WTO dispute: *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R (2000) para 8.283; WTO dispute: *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R (2002) para 7.36.

⁵⁴⁰ EC investigation: *Yarns Polyesters China* paras 193-212; EC investigation: *Tiles India* paras 307-335; EC investigation: *Kegs China* paras 158-185.

⁵⁴¹ Article 13(1) of *SA's Anti-Dumping Regulation*. The factors are (1) sales volume, (2) profit and loss, (3) output, (4) market share, (5) productivity, (6) return on investments, (7) capacity utilisation, (8) cash flow, (9) inventories, (10) employment, (11) wages, (12) growth, (13) ability to raise capital or investments, and any other relevant factors.

⁵⁴² ITAC should consider the price undercutting, the price of undumped imports, the market share and the level of the margin of dumping.

⁵⁴³ ITAC: *Investigation Steel China* para 5.4.3.

⁵⁴⁴ ITAC: *Investigation 695 Frozen Chicken* para 5.6.

⁵⁴⁵ ITAC: *Investigation 695 Frozen Chicken* para 5. The margin of dumping was assessed at ITAC's dumping assessment in para 4.

⁵⁴⁶ ITAC: *Investigation 492 Frozen Chicken* para 5.7; see also ITAC: *Investigation Soda Ash USA* para 5.

According to Brink,⁵⁴⁷ ITAC merely lists information related to injury without conducting an analysis in its investigation reports. Brink⁵⁴⁸ notes that this is problematic as ITAC's injury findings are not comprehensive and expose SA to possible dispute resolution in front of the DSB.

5.2.5 The determination of the threat of material injury

An injury assessment focuses on either material injury or threat of material injury. Threat of material injury indicates that no injury has occurred and that there is a prediction that injury will occur in the future.⁵⁴⁹ The *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* specify that a determination of a threat of material injury shall be based on the "facts and not merely on allegation, conjecture or remote possibility".⁵⁵⁰ It must also be clearly foreseeable and imminent that dumping will cause injury in the future.⁵⁵¹ In terms of the *EU's Anti-Dumping Regulation*, to determine the existence of a threat of material injury, the EC shall consider four factors:⁵⁵²

1. A significant increase in dumped imports into the Union's market;
2. A significant increase in the capacity of the exporter indicating a likelihood of increased dumped imports into the Union's market;
3. Whether the dumped imports will decrease domestic prices and likely increase demand for the dumped imports; and/or
4. The exporter's inventories of the product under investigation.

SA's Anti-Dumping Regulation specifies that ITAC shall consider five factors to determine the existence of a threat of material injury.⁵⁵³ These factors are the same as those listed

⁵⁴⁷ Brink "Anti-dumping in southern Africa" 330. See ITAC: *Investigation Coated Paper China* para 5.3.2.1.

⁵⁴⁸ Brink "Anti-dumping in southern Africa" 330.

⁵⁴⁹ Lester, Mercurio and Davies *World Trade Law* 553.

⁵⁵⁰ Article 3(9) of the *EU's Anti-Dumping Regulation*; A 14(1) of *SA's Anti-Dumping Regulation*; A 3(7) of the *ADA*.

⁵⁵¹ Article 3(9) of the *EU's Anti-Dumping Regulation*; A 14(1) of *SA's Anti-Dumping Regulation*; A 3(7) of the *ADA*.

⁵⁵² Article 3(9) of the *EU's Anti-Dumping Regulation*; A 3(7) of the *ADA*.

⁵⁵³ Article 14(2) of *SA's Anti-Dumping Regulation*.

in the *EU's Anti-Dumping Regulation* outlined above.⁵⁵⁴ However, *SA's Anti-Dumping Regulation* provides one additional factor to consider, namely if other export markets can absorb additional export volumes.⁵⁵⁵ In WTO dispute: *Mexico HFCS US*, the panel held that these factors, as well as the economic factors listed in article 3(4) of the *ADA*, must be considered during the determination of the existence of threat of injury.⁵⁵⁶

5.3 Causality between the dumped imports and injury

As with injury, the *ITA Act* does not specifically mention causality and it might seem as though causation is not a requirement for anti-dumping investigations in terms of SA law. However, *SA's Anti-Dumping Regulation* does provide in several articles that dumping, injury and causation should be considered during investigations, which implies that causation is a requirement in terms of SA law and will be treated as such.⁵⁵⁷ As with injury, this study recommends the *ITA Act* should be amended to specifically add causality as a requirement during anti-dumping investigations to bring legal certainty that causality is a requirement in SA law.

Both the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* set out two basic steps that the EC and ITAC need to follow when considering causality.⁵⁵⁸ First, establish the causal relationship between the dumped imports and injury.⁵⁵⁹ Second, establish other factors which are not attributed to the dumped imports.⁵⁶⁰ Van Bael and Bellis⁵⁶¹ indicate that the first step can be classified as the attributable analysis, which means that the injurious effect of the dumped imports on the domestic industry needs to be analysed. The second step can be classified as the non-attributable analysis, which

⁵⁵⁴ Article 3(9) of the *EU's Anti-Dumping Regulation*; A 3(7) of the *ADA*.

⁵⁵⁵ Article 14(2) of *SA's Anti-Dumping Regulation*.

⁵⁵⁶ WTO dispute: *Mexico HFCS US* paras 7.124, 7.127. The investigating authority must consider all the factors and conclude that further dumped exports are imminent and that, unless protective action is taken, material injury would occur. See also article 3(7) of the *ADA*; Article 14(2) of *SA's Anti-Dumping Regulation*.

⁵⁵⁷ Articles 3(3), 14(1), 16(4), 28(2) of *SA's Anti-Dumping Regulation*.

⁵⁵⁸ Article 3(6)-(7) of the *EU's Anti-Dumping Regulation*; A 16(4)-(5) of *SA's Anti-Dumping Regulation*; A 3(5) of the *ADA*.

⁵⁵⁹ Article 3(6) of the *EU's Anti-Dumping Regulation*; A 16(4) of *SA's Anti-Dumping Regulation*; A 3(5) of the *ADA*.

⁵⁶⁰ Article 3(7) of the *EU's Anti-Dumping Regulation*; A 16(5) of *SA's Anti-Dumping Regulation*; A 3(5) of the *ADA*.

⁵⁶¹ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 5.01.

means that the injurious effect of other factors on the domestic industry needs to be analysed.⁵⁶² The Appellate Body clarified in WTO dispute: *US Hot-Rolled Steel Japan* that investigation authorities must first examine other known factors before determining if the factors are not attributable to the dumped imports.⁵⁶³ Following this position, the discussion below first focuses on the attributable analysis and then on the non-attributable analysis.

5.3.1 Attributable analysis: causal relationship between dumped imports and injury

The *EU's Anti-Dumping Regulation* stipulates that the EC must determine if the dumped imports are causing injury to the Union industry.⁵⁶⁴ In other words, there needs to be a clear link between dumping and injury.⁵⁶⁵ This means that the EC needs to demonstrate that the volume or prices of the dumped imports are responsible for an impact (injury) on the Union industry which is seen as material.⁵⁶⁶

In line with the *EU's Anti-Dumping Regulation*, ITAC will consider if there is a causal link between the dumped imports and injury.⁵⁶⁷ In ITAC: *Investigation 695 Frozen Chicken*, ITAC established that there was a causal link between the dumped imports and injury.⁵⁶⁸

WTO panels previously held that there is no obligation on investigation authorities to determine that the dumped imports are the sole cause of injury.⁵⁶⁹ This means that the investigation authority will first determine if the dumped imports are causing injury to the domestic market. If they establish that the dumped imports are not the sole cause of injury, other factors can be taken into account to determine injury.

⁵⁶² Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 5.01.

⁵⁶³ WTO dispute: *US Hot-Rolled Steel Japan* para 222.

⁵⁶⁴ Article 3(6) of the *EU's Anti-Dumping Regulation*; A 3(5) of the *ADA*.

⁵⁶⁵ Brink "Anti-dumping in southern Africa" 331.

⁵⁶⁶ Articles 3(3), (5) and 3(6) of the *EU's Anti-Dumping Regulation*.

⁵⁶⁷ Article 3(6) of the *EU's Anti-Dumping Regulation*; A 16(4) of *SA's Anti-Dumping Regulation*; A 3(5) of the *ADA*.

⁵⁶⁸ ITAC: *Investigation 695 Frozen Chicken* paras 7.2-7.4.

⁵⁶⁹ WTO dispute: *European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India — Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW (2002) para 6.231; WTO dispute: *China — Anti-Dumping Measures on Imports of Cellulose Pulp from Canada*, WT/DS483/R (2017) para 7.26.

In EC investigation: *Cast Iron China*, the EC found that the worsening of the economic situation of the Union industry had a causal link to the large volumes of dumped imports from the exporter.⁵⁷⁰ In EC investigation: *Yarns Polyesters China* the EC found that due to the significant volume and price pressure of the dumped imports, there was a causal relationship between the dumped imports and the injury suffered by the Union industry.⁵⁷¹

5.3.2 Non-attributable analysis: factors not attributed to the dumped imports

The *EU's Anti-Dumping Regulation* provides that the EC must examine other known factors, in addition to the dumped imports, that are causing injury to the Union industry at the same time as the dumped imports.⁵⁷² The Appellate Body confirmed this in WTO dispute: *US Hot-Rolled Steel Japan*.⁵⁷³ *SA's Anti-Dumping Regulation* provides that ITAC must consider other factors, other than the dumped imports, that are causing injury to the SACU industry.⁵⁷⁴ However, *SA's Anti-Dumping Regulation* makes no mention of these factors causing injury at the same time as the dumped imports.⁵⁷⁵

The *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* are in agreement that the injury that is caused by these other factors must not be attributed to the dumped imports.⁵⁷⁶ This means that if other factors are causing injury but are attributed to the dumped imports, the factors must be disregarded for the injury assessment.⁵⁷⁷

The *EU's Anti-Dumping Regulation* provides for five factors that the EC can consider as "other factors":

⁵⁷⁰ EC investigation: *Cast Iron China* paras 173-174; see also EC investigation: *Commission Regulation (EU) of 4 May 2018 imposing a provisional anti-dumping duty on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in the People's Republic of China*, Reg 2018/683 in *OJEU* L116/8 paras 217-219.

⁵⁷¹ EC investigation: *Yarns Polyesters China* para 217.

⁵⁷² Article 3(7) of the *EU's Anti-Dumping Regulation*; A 3(5) of the *ADA*.

⁵⁷³ WTO dispute: *US Hot-Rolled Steel Japan* para 222.

⁵⁷⁴ Article 3(7) of the *EU's Anti-Dumping Regulation*; A 16(5) of *SA's Anti-Dumping Regulation*; A 3(5) of the *ADA*;

⁵⁷⁵ The Appellate Body in WTO dispute: *US Hot-Rolled Steel Japan* para 223, clarified that article 3(5) of the *ADA* is only applicable in cases where the dumped imports and the other known factors are causing injury "at the same time".

⁵⁷⁶ Article 3(7) of the *EU's Anti-Dumping Regulation*; A 16(5) of *SA's Anti-Dumping Regulation*; A 3(5) of the *ADA*.

⁵⁷⁷ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 5.03.

the volume and prices of imports not sold at dumping prices; contraction in demand or changes in the patterns of consumption; restrictive trade practices of, and competition between, third country and Union producers; developments in technology and the export performance; and productivity of the Union industry.⁵⁷⁸

The panel in WTO dispute: *Thailand H-Beam Poland* held that these factors are not exhaustive in nature and investigating authorities may consider other factors applicable to each case.⁵⁷⁹ In EC investigation: *Tiles India*, the EC assessed the impact of COVID-19 as an “other factor”.⁵⁸⁰

SA’s Anti-Dumping Regulation provides seven factors that ITAC can consider as “other factors”:

the volume and prices of imports not sold at dumped prices; contraction in demand or changes in the patterns of consumption; trade restrictive trade practices of and competition between the foreign and SACU producers; developments in technology; other factors affecting the SACU prices; the industry's export performance; and the productivity of the SACU industry.⁵⁸¹

SA’s Anti-Dumping Regulation lists seven factors in contrast to the five factors that *EU’s Anti-Dumping Regulation* lists.⁵⁸² However, *SA’s Anti-Dumping Regulation* splits one factor into two namely, developments in technology and the industry's export performance. ITAC also added one additional factor that the commission can consider as other factors affecting SACU price.⁵⁸³

⁵⁷⁸ Article 3(5) of the *ADA*; A 3(7) of the *EU’s Anti-Dumping Regulation*. The General Court held that the EC should separate and distinguish the injurious effect of the other factors from the injurious effects of the dumped imports. See EU case: *Photo USA Electronic Graphic, Inc. v Council of the European Union*, T-394/13 (2014) para 68; this agrees with the Appellate Body’s finding in WTO dispute: *US Hot-Rolled Steel Japan* para 223.

⁵⁷⁹ WTO dispute: *Thailand H-Beam Poland* paras 7.274-7.275.

⁵⁸⁰ EC investigation: *Tiles India* paras 382-389; EC investigation: *Kegs China* paras 210-211. COVID-19 (or known as the coronavirus disease 2019) is an infectious disease that started a global pandemic in 2019. For more information, visit WHO 2023 <https://www.who.int/health-topics/coronavirus>.

⁵⁸¹ Article 16(5) of *SA’s Anti-Dumping Regulation*; in ITAC: *Investigation 695 Frozen Chicken* para 7.5 ITAC considered most of these factors in its assessment.

⁵⁸² Article 3(7) of the *EU’s Anti-Dumping Regulation*; A 16(5) of *SA’s Anti-Dumping Regulation*; A 3(5) of the *ADA*.

⁵⁸³ In ITAC: *Investigation Steel China* para 5.5, ITAC considered the impact of “strikes” on the prices. In ITAC: *Investigation Frozen Potato Chips Belgium* para 6.5, ITAC considered the impact of the lockdown of COVID-19 on prices. In ITAC: *Investigation Tyres China* para 7.5, ITAC considered the impact of the exchange rate on prices.

5.4 Conclusion

This chapter discussed and compared the second and third requirements in the anti-dumping investigations by the EC and ITAC. It was found that the obligation to determine injurious dumping as set out in article 3(1) of the *ADA* is included in article 3(1) of the *EU's Anti-Dumping Regulation*. However, there is no clear obligation to determine injurious dumping in the *ITA Act*. In agreement with Brink,⁵⁸⁴ this study recommends that the *ITA Act* be amended to include the obligation to determine injurious dumping. This measure would serve to align SA's domestic legislation with Article VI of the *GATT* and the *ADA*, and bring legal certainty that injury is a requirement in SA law.

The *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* are in agreement that the margin of dumping is *de minimus* if the margin is less than two per cent based on the export price which will result in the termination of the anti-dumping investigation.⁵⁸⁵ In line with the *ADA*, *SA's Anti-Dumping Regulation* stipulates that the volume of dumped imports is negligible if the volume of dumped imports from a country is less than three per cent of the total imports of the like product in the SACU market.⁵⁸⁶ In line with the *ADA*, *SA's Anti-Dumping Regulation* provides if there is more than one country involved, the volume of dumped imports is negligible if the volume of dumped imports from the countries that individually account for less than three per cent collectively account for less than seven per cent of imports of the like product in the SACU market.⁵⁸⁷ However, the *EU's Anti-Dumping Regulation* provides that the volume of dumped imports is negligible if the volume of the dumped imports from countries normally accounts for less than one per cent of the imports of the like product in the Union.⁵⁸⁸ This is not in line with the *ADA* which provides that the percentage should be three per cent.⁵⁸⁹ However, in practice, the EC will stay within the *ADA* threshold of three per cent.⁵⁹⁰

⁵⁸⁴ Brink "Anti-dumping in southern Africa" 330.

⁵⁸⁵ Article 9(3) of the *EU's Anti-Dumping Regulation*; A 12(3) of *SA's Anti-Dumping Regulation*; A 5(8) of the *ADA*.

⁵⁸⁶ Article 16(2) of *SA's Anti-Dumping Regulation*; A 5(8) of the *ADA*.

⁵⁸⁷ Article 16(2) of *SA's Anti-Dumping Regulation*; A 5(8) of the *ADA*.

⁵⁸⁸ Article 5(7) of the *EU's Anti-Dumping Regulation*.

⁵⁸⁹ Article 5(8) of the *ADA*.

⁵⁹⁰ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 4.10.C.

In line with the *ADA*, the *EU's Anti-Dumping Regulation* provides that the EC must evaluate 15 economic factors during their examination of injury.⁵⁹¹ *SA's Anti-Dumping Regulation* also provides for the 15 factors, just in different articles and this is confirmed in recent ITAC investigations where all 15 factors are considered (just under separate headings).⁵⁹² For practical purposes, it is suggested that ITAC follows the EC's approach during anti-dumping investigations and evaluates the 15 factors under one heading during their anti-dumping investigations reports.

In terms of the third requirement of causality considered during an anti-dumping investigation by the EC and ITAC, the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* are in agreement regarding the attributable analysis and non-attributable analysis.⁵⁹³ *SA's Anti-Dumping Regulation* lists seven factors in contrast to the *EU's Anti-Dumping Regulation* which lists five factors.⁵⁹⁴ However, *SA's Anti-Dumping Regulation* has split one factor into two and also added one additional factor, namely that ITAC can consider other factors affecting the price.⁵⁹⁵

The next chapter discusses the EU's fourth requirement of establishing the Union interest during anti-dumping investigations.

⁵⁹¹ Article 3(5) of the *EU's Anti-Dumping Regulation*; A 3(4) of the *ADA*.

⁵⁹² Article 13(2) and 16(1) of *SA's Anti-Dumping Regulation*; ITAC: *Investigation 695 Frozen Chicken* paras 4, 5.5, 5.6.

⁵⁹³ Article 3(6)-(6) of the *EU's Anti-Dumping Regulation*; A 16(4)-(5) of *SA's Anti-Dumping Regulation*; A 3(5) of the *ADA*.

⁵⁹⁴ Article 3(7) of the *EU's Anti-Dumping Regulation*; A 16(5) of *SA's Anti-Dumping Regulation*; A 3(5) of the *ADA*.

⁵⁹⁵ Article 16(5) of *SA's Anti-Dumping Regulation*.

CHAPTER 6 ESTABLISHING UNION INTEREST

6.1 Introduction

In addition to the three requirements investigating authorities must consider when investigating the imposition of anti-dumping duties in terms of the *ADA*, the *EU's Anti-Dumping Regulation* provides for a fourth requirement. The fourth requirement is that the imposition of anti-dumping duties should not be against the Union interest.⁵⁹⁶ The previous *Anti-Dumping Regulation* referred to "community interest" and the current *Anti-Dumping Regulation* refers to the "Union interest", resulting in "Union interest" and "community interest" being used interchangeably in EU legal texts.⁵⁹⁷ For consistency, this study will use the current term "Union interest". In past investigations, the EC has mainly concluded that it is in the Union's interest to impose anti-dumping duties. However, there have been a few determinations that it would not be in the Union's interest to adopt anti-dumping duties, which are discussed below.

Following the above, this chapter also explores the Minister of Trade's decision to consider the impact of anti-dumping duties on the poor citizens of SA when recently suspending such duties for a year and the possible connection of this decision to the EU's fourth requirement of Union interest.⁵⁹⁸

6.2 Rationale behind the Union interest

Aggarwal⁵⁹⁹ notes that the term "Union interest" stems from the term "public interest" which refers to an assessment of the interests of consumers, users, importers and the relevant industry that can be affected by the imposition of anti-dumping duties. From 2002 to 2008, several negotiations were conducted between the WTO and certain members states, including the EU, to incorporate "public interest" into the *ADA* as an anti-dumping requirement during investigations.⁶⁰⁰ The negotiations proved unsuccessful

⁵⁹⁶ Article 21 of the *EU's Anti-Dumping Regulation*.

⁵⁹⁷ EC investigation: *Council Regulation (EC) of 30 November 2009 on protection against dumped imports from countries not members of the European Community*, Reg 1225/2009 in *OJEU* L343/51.

⁵⁹⁸ ITAC: *Investigation 695 Frozen Chicken*; GN 1179 in GG 47156 of 1 August 2022.

⁵⁹⁹ Aggarwal 2004 *Indian Council for Research on International Economic Relations* 5.

⁶⁰⁰ Some of the member countries were Canada, Chile, Costa Rica, China, Japan, Norway, Switzerland, Thailand, Columbia, Singapore, Turkey and Canada. See *Negotiating Group on Rules – Submission*

and there is currently no obligation in the *ADA* to take into account the public interest during an anti-dumping investigation. This means that a dispute regarding the EC's interpretation of the Union interest during an anti-dumping investigation cannot be adjudicated by the DSB and is considered by the relevant courts in the EU.⁶⁰¹

However, there is nothing in the *ADA* that prohibits WTO members from considering the public interest during an anti-dumping investigation.⁶⁰² Horvathy⁶⁰³ states that since the *ADA* provides investigating authorities a wide discretion during anti-dumping investigations, by including a public interest requirement, investigating authorities are exercising their wide discretion within the *ADA*. As a result, even though public interest is not a requirement in terms of the *ADA*, several other WTO members have included some form of public interest requirement in their national legislation.⁶⁰⁴ In SA, there is currently no obligation in *SA's Anti-Dumping Regulation* or *ITA Act* to take into account the public interest.

The Union interest assessment was already mentioned in the EU's first anti-dumping regulation in 1968.⁶⁰⁵ After the establishment of the WTO, the Union interest was

From the European Communities Concerning the Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement), TN/RL/W/13 (2002); Negotiating Group on Rules – Improved Disciplines under the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement, TN/RL/W/1 (2002); Negotiating Group on Rules – Anti-Dumping: Illustrative Major Issues, TN/RL/W/6 (2002); Negotiating Group on Rules – Public Interest, TN/RL/W/174 (2005); Negotiating Group on Rules – Public Interest, TN/RL/GEN/85 (2005); Negotiating Group on Rules – Public Interest, TN/RL/W/222 (2008). In 2001, preparations started for negotiations when the EC and Canada responded to a questionnaire by the WTO regarding the inclusion of public interest. See WTO: Committee on Anti-Dumping Practices – Ad Hoc Group on Implementation – List of Questions posed by Members on the Application of the Lesser Duty Rule and Consideration of Public Interest, G/ADP/AHG/W/107 (2001); WTO: Committee on Anti-Dumping Practices – Ad Hoc Group on Implementation – List of Questions posed by Members on the Application of the Lesser Duty Rule and Consideration of Public Interest, G/ADP/AHG/W/114 (2001); WTO: Committee on Anti-Dumping Practices – Ad Hoc Group on Implementation – List of Questions posed by Members on the Application of the Lesser Duty Rule and Consideration of Public Interest, G/ADP/AHG/W/116 (2001).

⁶⁰¹ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.03.

⁶⁰² Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.03.

⁶⁰³ Horvathy 2014 *Acta Juridica Hungarica* 265.

⁶⁰⁴ In Canada, a public interest inquiry is conducted in terms of a 45(1) of the *Special Import Measures Act* (1985). In China, a public interest inquiry is conducted in terms of a 37 of the *Anti-Dumping Regulations of the People's Republic of China* (2001). In Brazil, the Council of Ministers may suspend an anti-dumping duty or not impose anti-dumping duties for reasons under the public interest inquiry in terms of a 3 of their *Anti-dumping Regulation: Decree 8058/2013* (2013).

⁶⁰⁵ Article 17 of the *EU's first Anti-Dumping Regulation*.

elaborated on in article 21 of the *EU's Anti-Dumping Regulation* of 1995.⁶⁰⁶ According to Davis,⁶⁰⁷ the rationale behind the inclusion of the Union interest is to analyse all the economic interests that are relevant to a particular case, including the interests of the Union industry, users, importers and consumers. Ahamat⁶⁰⁸ notes that the ultimate aim of considering the Union interest during anti-dumping investigations is to provide a holistic approach in balancing all the relevant interests.

6.3 Assessment of Union interest

Article 21(1) of the *EU's Anti-Dumping Regulation* provides:

A determination as to whether the Union's interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers. 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 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 Union's interest to apply such measures.

Article 21 of the *EU's Anti-Dumping Regulation* is used to determine whether it is in the Union's interest for the EC to intervene and impose or extend anti-dumping duties.⁶⁰⁹ To determine whether the Union interest calls for intervention, the EC should consider "the

⁶⁰⁶ Article 21 of *Council Regulation (EC) of 22 December 1995 on protection against dumped imports from countries not members of the European Community*, Reg 384/96 in *OJEU* L56/1.

⁶⁰⁷ Davis 2009 *ECIPE Working Paper* 5.

⁶⁰⁸ Ahamat 2008 *Manchester Journal of International Economic Law* 60.

⁶⁰⁹ The Union interest requirement is also taken into account during expiry review investigations. See articles 7(1)(d) and 9(4) of the *EU's Anti-Dumping Regulation*; EU case: *T.KUP* para 42; EU case: *Euroalliances, Pechiney électrométallurgie, Vargön Alloys AB and Ferroatlántica, SL v Commission of the European Communities*, T-132/01 (2003) para 42 (hereafter EU case: *Euroalliances*); EU case: *Committee of Polyethylene Terephthalate (PET) Manufacturers in Europe (CPME) v Council of the European Union*, T-422/13 (2017) para 18; EC investigation: *Commission Implementing Regulation (EU) of 29 October 2015 imposing a definitive anti-dumping duty on imports of certain grain-oriented flat-rolled products of silicon-electrical steel originating in the People's Republic of China, Japan, the Republic of Korea, the Russian Federation and the United States of America*, Reg 2015/1953 in *OJEU* L284/109 para 149.

various interests taken as a whole”.⁶¹⁰ Article 21(1) and (2) of the *EU’s Anti-Dumping Regulation* include the interests of the Union industry, users, importers and consumers.⁶¹¹

In order to conduct this assessment of the Union interest, the interested parties should provide relevant information to the EC to examine and take into consideration as part of the investigation.⁶¹² These parties should submit information to the EC to make their views known and present observations on information that was submitted by other interested parties.⁶¹³ If interested parties want to make their views known, the onus lies with them to make their interest known and provide evidence in support of their claims.⁶¹⁴ The parties can then request a hearing by the EC if they provide sufficient proof to support their claims.⁶¹⁵ As a result, the Union interest assessment is dependent on interested parties to submit information to the EC on whether it will be in their interest to impose anti-dumping duties.⁶¹⁶

Van Bael and Bellis⁶¹⁷ note that there is a need to protect the Union interest. Even if it has been determined that dumping has caused material injury, no anti-dumping duty should be imposed if it can be clearly concluded that the imposition of anti-dumping duties is against the Union interest.⁶¹⁸ This means that an assessment of the Union interest should take place during the anti-dumping investigation.⁶¹⁹ With the assessment

⁶¹⁰ Article 21(1) of the *EU’s Anti-Dumping Regulation*; see also EU case: *Canadian Solar Emea GmbH v Council of the European Union*, C-236/17 (2019) para 168; see also EU case: *Changmao Biochemical Engineering Co. Ltd v Distillerie Bonollo SpA*, C-461/18 (2020) para 67 (hereafter EU Case: *Changmao*).

⁶¹¹ Articles 21(1)-(2) of the *EU’s Anti-Dumping Regulation*. The interests of each party are discussed in this chapter.

⁶¹² Articles 21(1)-(2) of the *EU’s Anti-Dumping Regulation*.

⁶¹³ EU case: *T.KUP* para 43.

⁶¹⁴ EU case: *T.KUP* paras 46-47.

⁶¹⁵ Article 21(3) of the *EU’s Anti-Dumping Regulation*.

⁶¹⁶ EU case: *T.KUP* paras 41, 46-47.

⁶¹⁷ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* 377.

⁶¹⁸ Article 21(1) of the *EU’s Anti-Dumping Regulation*; see also EU case: *Polskie Górnictwo Naftowe i Gazownictwo S.A. v European Commission*, T-399/19 (2022) para 46; EU case: *Hangzhou Duralamp Electronics Co., Ltd v Council of the European Union*, T-459/07 (2013) para 182 (hereafter EU case: *Hangzhou*); EU case: *Apache Footwear and Apache II Footwear v Council*, T-1/07 (2009) para 113; EU case: *Volžskij trubnyi zavod OAO (VTZ OAO) v Council of the European Union*, T-432/12 (2015) para 163 (hereafter EU case: *Volžskij*); EU case: *Puma v Commission*, T-781/16 (2021) para 68.

⁶¹⁹ EU case: *C & J Clark International Ltd v Revenue and amp Customs Commissioners*, C-612/16 (2019) para 65. Certain aspects are not considered in the Union interest assessment. For a detailed discussion, see Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.02.A. These elements were discussed in EC investigation: *Commission Implementing Regulation (EU) of 3 July 2015 imposing a provisional anti-dumping duty on imports of certain aluminium foils originating in Russia*, Reg 2015/1081 in *OJEU* L175/14 para 171 (hereafter EC investigation: *Aluminium Foils Russia*);

of the Union interest, two factors require special consideration: (1) remove the trade distorting effects that the injurious dumping has caused and (2) restore effective competition.⁶²⁰ The EC should assess if a duty lower than the dumping margin would be sufficient to remove the injury.⁶²¹ During this assessment, the EC should take into account if there are distortions on raw materials.⁶²² If it is found that raw material distortions do exist, the EC will conduct a two-step Union interest test.⁶²³ For the first step, the EC will determine if the imposition of anti-dumping duties is in the Union's interest.⁶²⁴ If the answer is yes, the EC can move on to the second step aimed at restoring effective competition.⁶²⁵ The EC will then examine if it is in the Union's interest to impose the duty at the actual dumping margin level or at a lesser duty level.⁶²⁶

Van Bael and Bellis⁶²⁷ note that the Union interest has historically not played a major role during anti-dumping investigations, seeing that the imposition of an anti-dumping duty has only on a few occasions been refused on the grounds of the Union interest.⁶²⁸ That

EC investigation: *Commission Implementing Regulation (EU) of 1 June 2017 imposing a definitive anti-dumping duty on imports of tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder originating in the People's Republic of China following an expiry review*, Reg 2017/942 in *OJEU* L142/53 para 216 (hereafter EC investigation: *Tungsten China*); EC investigation: *Commission Regulation (EU) of 28 January 2016 imposing a provisional anti-dumping duty on imports of high fatigue performance steel concrete reinforcement bars originating in the People's Republic of China*, Reg 2016/113 in *OJEU* L23/16 para 117; EC investigation: *Council Regulation (EC) of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam*, Reg 1472/2006 in *OJEU* L275/1 para 281.

⁶²⁰ Article 21(1) of the *EU's Anti-Dumping Regulation*; Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* 377; EC investigation: *Commission Implementing Regulation (EU) of 6 October 2016 imposing a provisional anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China*, Reg 2016/1778 in *OJEU* L272/33 para 199 (hereafter EC investigation: *Hot-Rolled Flat Products China*); EU case: *Hangzhou* para 182; EU case: *Changmao* para 68.

⁶²¹ Article 7(2a) of the *EU's Anti-Dumping Regulation*.

⁶²² Raw materials such as export taxes and dual pricing schemes. See article 7(2a) of the *EU's Anti-Dumping Regulation*.

⁶²³ Article 7(2b) of the *EU's Anti-Dumping Regulation*; Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.01.

⁶²⁴ Article 7(2b) of the *EU's Anti-Dumping Regulation*; Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.01.

⁶²⁵ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.01.

⁶²⁶ Article 7(2b) of the *EU's Anti-Dumping Regulation*; Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.01.

⁶²⁷ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* 379.

⁶²⁸ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* 379. See EC investigation: *Council Implementing Regulation (EU) of 10 May 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of melamine originating in the People's Republic of China*, Reg 457/2011 in *OJEU* L124/2 para 65. In this investigation, the EC had to

being said, this fourth requirement is generally used in support of the other three requirements.⁶²⁹

6.4 Union interest: the four categories of interested parties

During the Union interest assessment, the EC should examine if anti-dumping duties will be beneficial or detrimental to four categories of interested parties:⁶³⁰

- (1) the relevant Union industry that lodged the application;
- (2) Union users of the dumped product, in other words, EU producers who purchase the imported product and produce it into a product that will reach the consumers in the EU;
- (3) importers of the dumped product; and
- (4) Union consumers.

The discussion that follows focuses on each interested party under a separate heading.

6.4.1 Interests of the relevant Union industry

The EC will typically conduct an investigation and determine that the imposition of anti-dumping duties will restore fair trade in the EU.⁶³¹ In EC investigation: *Hot-Rolled Flat Products China*,⁶³² the EC assessed if anti-dumping duties would improve the EU's profitability to levels that are necessary for a capital-intensive industry. The EC considered

determine if it would be in the Union's interest to impose definite anti-dumping duties. The EC found that the imposition of definite anti-dumping duties would increase the price of the product under consideration. Some of the Union producers used the product under consideration in their manufacturing process and the price increase will negatively influence the final cost of their product. As a result, the EC found that it will not be in the Union's interest to raise the provisional anti-dumping duties and the EC instead limited it to a certain amount.

⁶²⁹ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* 380. See EC investigation: *Alloy Steel Serbia* paras 425, 546.

⁶³⁰ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.02.A.

⁶³¹ EC investigation: *Hot-Rolled Flat Products China* para 202; EC investigation: *Commission Implementing Regulation (EU) of 9 August 2017 imposing a provisional anti-dumping duty on imports of certain corrosion resistant steels originating in the People's Republic of China*, Reg 2017/1444 in *OJEU* L207/1 para 155 (hereafter EC investigation: *Steels China*).

⁶³² See para 202. The product concerned was steel and iron in the capital-intensive industry.

whether, in the absence of duties, the threat of injury would likely materialise, resulting in a deterioration of the EU's economic industry.⁶³³

There are numerous investigations where the EC has established that the Union interest calls for intervention and imposed anti-dumping duties.⁶³⁴ In EC investigation: *Crystalline Silicon China*⁶³⁵ the EC concluded that the imposition of anti-dumping duties would safeguard employment in the EU. The EC specified that, without anti-dumping duties, the producers of the product would lose their jobs and that imposing anti-dumping duties was necessary to recover from dumping.⁶³⁶ In EC investigation: *Tungsten China*,⁶³⁷ the EC concluded that the imposition of anti-dumping duties would help protect the environment and encourage investment in new technology.

In contrast, the EC has on occasion decided that it would not be in the Union's interest to impose anti-dumping duties.⁶³⁸ In EC investigation: *White Phosphorus Kazakhstan*,⁶³⁹ the product concerned was white phosphorus that was imported from Kazakhstan to the EU. White phosphorus is produced only by a limited number of countries, such as

⁶³³ EC investigation: *Hot-Rolled Flat Products China* para 202.

⁶³⁴ EC investigation: *Commission Regulation (EC) of 16 March 2006 imposing a provisional anti-dumping duty on imports of chamois leather originating in the People's Republic of China*, Reg 439/2006 in *OJEU* L80/7 para 76 (hereafter EC investigation: *Chamois Leather China*); EC investigation: *Commission Implementing Regulation (EU) of 6 October 2016 imposing a provisional anti-dumping duty on imports of certain heavy plate of non-alloy or other alloy steel originating in the People's Republic of China*, Reg 2016/1777 in *OJEU* L272/5 para 213 (hereafter EC investigation: *Alloy Steel China*).

⁶³⁵ EC investigation: *Commission Implementing Regulation (EU) of 1 March 2017 imposing a definitive anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China following an expiry review and terminating the partial interim review investigation*, Reg 2017/367 in *OJEU* L56/131 para 220 (hereafter EC investigation: *Crystalline Silicon China*).

⁶³⁶ EC investigation: *Crystalline Silicon China* para 220.

⁶³⁷ EC investigation: *Council Regulation (EC) of 9 March 2007 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain tungsten electrodes originating in the People's Republic of China*, Reg 260/2007 in *OJEU* L72/1 para 192 (hereafter EC investigation: *Tungsten from China*). The EC determined that anti-dumping duties should be imposed on imported tungsten from China so that the EU can produce tungsten by using certain technology that will ensure the use of recycled material which would be more environmentally friendly.

⁶³⁸ EU case: *Steinel Vertrieb GmbH v Hauptzollamt Bielefeld*, C-595/11 (2013) para 20; EU case: *Puma SE v European Commission*, C-507/21 (2022) para 87.

⁶³⁹ EC investigation: *Commission Decision of 13 February 2013 terminating the anti-dumping proceeding concerning imports of white phosphorus, also called elemental or yellow phosphorus, originating in the Republic of Kazakhstan*, Reg 2013/81 in *OJEU* L43/38 para 146 (hereafter EC investigation: *White Phosphorus Kazakhstan*). White phosphorus is raw material used in numerous applications, such as pharmaceuticals and agricultural chemicals.

Kazakhstan.⁶⁴⁰ The relevant Union industry also had been producing and selling white phosphorus since 1970.⁶⁴¹ However, the Union industry had gone bankrupt and had not been producing white phosphorus during the relevant investigation period.⁶⁴² Following the bankruptcy, there had been discussions of a potential takeover of the Union industry that would have resumed production of white phosphorus in the EU.⁶⁴³ In its assessment, the EC had to weigh the interests of the Union industry against the interests of producers in the EU. On the one end, it would be in the Union industry's interest to impose anti-dumping duties in order to allow the Union industry to recover from the bankruptcy and resume production of white phosphorus once the takeover was finalised.⁶⁴⁴ On the other end, the EU users would be severely affected by the imposition of anti-dumping duties which would have resulted in a loss in their profitability due to an inability to absorb a cost increase and compete in the market.⁶⁴⁵ When weighing the Union industry's interest against the interest of users, the EC determined that the negative impact of the duties on the users was more significant than the overall benefit to the Union industry.⁶⁴⁶ The EC finally determined that it was not in the Union's interest as a whole to impose anti-dumping duties, because of the negative impact of the duties on the users.⁶⁴⁷ The investigation was subsequently terminated without imposing anti-dumping duties.⁶⁴⁸

In EC investigation: *Atlantic Salmon Norway*,⁶⁴⁹ the product concerned was salmon imported from Norway, Chile and the Faeroe Islands to the EU. The EC had to conduct a Union interest assessment to determine if there were any overriding interests against the imposition of anti-dumping duties despite the existence of dumping that caused injury.⁶⁵⁰ The EC determined that, if anti-dumping duties were to be imposed, the price increase of the imported salmon would have a negative impact on the importers, users and

⁶⁴⁰ EC investigation: *White Phosphorus Kazakhstan* para 148.

⁶⁴¹ EC investigation: *White Phosphorus Kazakhstan* para 149.

⁶⁴² EC investigation: *White Phosphorus Kazakhstan* paras 147-149.

⁶⁴³ EC investigation: *White Phosphorus Kazakhstan* paras 147-149.

⁶⁴⁴ This is because the Union industry suffered material injury that was caused by dumped imports (white phosphorus) from Kazakhstan. See EC investigation: *White Phosphorus Kazakhstan* paras 147-149.

⁶⁴⁵ EC investigation: *White Phosphorus Kazakhstan* paras 162, 191.

⁶⁴⁶ EC investigation: *White Phosphorus Kazakhstan* para 196.

⁶⁴⁷ EC investigation: *White Phosphorus Kazakhstan* para 146, 196, 197.

⁶⁴⁸ EC investigation: *White Phosphorus Kazakhstan* para 196.

⁶⁴⁹ EC investigation: *Atlantic Salmon Norway* para 217.

⁶⁵⁰ EC investigation: *Atlantic Salmon Norway* para 243, 245-247.

consumers.⁶⁵¹ Competition amongst users in the salmon industry had increased, which led to a decline in prices for EU consumers and resulted in more consumers buying salmon because of the health benefits of this food product.⁶⁵² However, the imposition of anti-dumping duties would result in a price increase and a subsequent decrease in consumer purchases which the salmon industry did not want.⁶⁵³ Furthermore, one of the EU users used the salmon imported from Chile to produce ready-made meals for middle- and lower-income consumers.⁶⁵⁴ A price increase would result in the lower-income consumers not being able to purchase the salmon meals, resulting in a decline in demand for the salmon. It was highlighted that the imposition of anti-dumping duties against the imports of salmon from Chile would risk thousands of jobs in the EU food processing industry.⁶⁵⁵ Ultimately, EU importers would be disadvantaged by the imposition of anti-dumping duties.⁶⁵⁶ In considering all the factors, the EC determined that it was not in the Union's interest to adopt anti-dumping duties and the investigation was terminated without imposing anti-dumping measures.⁶⁵⁷

In EC investigation: *Ferro-Silicon China*,⁶⁵⁸ the EC had to consider if it would be in the Union's interest to maintain previously imposed anti-dumping duties on ferro-silicon that was imported from Brazil, China, Kazakhstan, Russia, Ukraine and Venezuela. It was concluded that the EU steel users had to bear negative effects from the additional costs that the anti-dumping duties brought as it had been ongoing since 1987.⁶⁵⁹ The EC ultimately determined that maintaining anti-dumping duties would be against the Union interest and that the anti-dumping duties should expire.⁶⁶⁰ This decision by the EC was challenged by certain EU producers before the court and they initiated proceedings to

⁶⁵¹ EC investigation: *Atlantic Salmon Norway* para 238.

⁶⁵² EC investigation: *Atlantic Salmon Norway* para 232.

⁶⁵³ EC investigation: *Atlantic Salmon Norway* para 232.

⁶⁵⁴ EC investigation: *Atlantic Salmon Norway* para 228.

⁶⁵⁵ EC investigation: *Atlantic Salmon Norway* para 228.

⁶⁵⁶ EC investigation: *Atlantic Salmon Norway* para 236.

⁶⁵⁷ EC investigation: *Atlantic Salmon Norway* paras 245-247.

⁶⁵⁸ EC investigation: *Commission Decision of 21 February 2001 terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in Brazil, the People's Republic of China, Kazakhstan, Russia, Ukraine and Venezuela*, Reg 2001/230 in *OJEU* L84/36 para 130 (hereafter EC investigation: *Ferro-Silicon China*).

⁶⁵⁹ EC investigation: *Ferro-Silicon China* para 152.

⁶⁶⁰ EC investigation: *Ferro-Silicon China* para 154.

reverse the EC decision in EU case: *Euroalliances*.⁶⁶¹ The General Court dismissed the action and upheld the EC's decision.⁶⁶²

6.4.2 Interests of users (EU producers)

Van Bael and Bellis⁶⁶³ note that the EC generally gives more weight to the Union industry than to the interests of EU users. The EC also takes advantage of the limited cooperation from EU users during the investigation.⁶⁶⁴ The EC will generally then justify the imposition of anti-dumping duties since it is in the interest of the Union industry to impose anti-dumping duties.⁶⁶⁵

In EC investigation: *Tungsten from China*,⁶⁶⁶ the EC rejected claims by EU producers that the imposition of anti-dumping duties would have a negative impact on them. The EC justified its decision as the non-imposition of duties would have had a significant negative impact on the interests of the Union industry whereas the imposition of duties would have

⁶⁶¹ EU case: *Euroalliances* paras 1-16.

⁶⁶² EU case: *Euroalliances* paras 187-195.

⁶⁶³ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.02.C; see EC investigation: *Council Implementing Regulation (EU) of 5 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain stainless steel wires originating in India*, Reg 1106/2013 in *OJEU* L298/1 para 113; EC investigation: *Commission Regulation (EC) of 6 July 2000 imposing a provisional anti-dumping duty on imports of polyester staple fibres originating in India and the Republic of Korea*, Reg 1472/2000 in *OJEU* 166/1 para 109; EC investigation: *Council Regulation (EC) of 10 July 2000 imposing a definitive anti-dumping duty on imports of synthetic staple fibres of polyester originating in Australia, Indonesia and Thailand and collecting definitively the provisional duty imposed*, Reg 1522/2000 in *OJEU* 175/10 para 144.

⁶⁶⁴ Some EU users do not respond to questionnaires or provide evidence in support of or against anti-dumping duties during the investigation. The EC will then use its own discretion and usually impose anti-dumping duties. See chapter 3 of this study regarding the investigation process. See Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.02.C; see EC investigation: *Council Implementing Regulation (EU) of 12 December 2013 imposing a definitive anti-dumping duty on imports of peroxosulphates (persulphates) originating in the People's Republic of China following an expiry review*, Reg 1343/2013 in *OJEU* L338/11 para 79 (hereafter EC investigation: *Persulphate China*); EC investigation: *Council Implementing Regulation (EU) of 3 August 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain open mesh fabrics of glass fibres originating in the People's Republic of China*, Reg 791/2011 in *OJEU* L204/1 para 64 (hereafter EC investigation: *Mesh Fabrics Glass Fibres China*); EC investigation: *Commission Regulation (EU) of 16 March 2011 imposing a provisional anti-dumping duty on imports of ceramic tiles originating in the People's Republic of China*, Reg 258/2011 in *OJEU* L70/5 para 150.

⁶⁶⁵ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.02.C.

⁶⁶⁶ EC investigation: *Tungsten from China* para 144; see also EC investigation: *Commission Regulation (EC) of 18 September 2002 imposing provisional anti-dumping duties on imports of certain filament yarns of cellulose acetate originating in Lithuania and the United States of America*, Reg 1662/2002 in *OJEU* L251/9 para 98 (hereafter EC investigation: *Yarns Lithuania*).

resulted in a minimal negative impact on the EU users.⁶⁶⁷ In EC investigation: *Barium Carbonate China*,⁶⁶⁸ the EC also determined that the imposition of anti-dumping duties was still in the Union's interest even if there was an impact of a price increase on the EU users due to this impact being limited.

In contrast, the EC determined that it would not be in the Union's interest to impose anti-dumping duties in EC investigation: *White Phosphorus Kazakhstan* and EC investigation: *PFS Malaysia*.⁶⁶⁹ In EC investigation: *PFS Malaysia*,⁶⁷⁰ the product imported from Malaysia and Taiwan to the EU was synthetic staple fibres of polyesters (hereafter PSF). The EC terminated an investigation on the grounds that it would not be in the Union's interest to impose anti-dumping duties on the imported PSF.⁶⁷¹ The EC determined that anti-dumping duties would have a significant impact on EU users, who used PSF as a raw material during the production of the goods, and should not be imposed.⁶⁷² The EC held that the overall advantages gained by the Union industry must be weighed against the probable disadvantages to the EU users in particular and, to some extent, to the consumers.⁶⁷³ At the time, there was a supply problem in the Union market for the PSF and the EU producers were not able to meet the demand on their own.⁶⁷⁴ Furthermore, certain users had a very low profit margin and would have passed on any price increase to the consumers.⁶⁷⁵ Based on these findings, the EC held that it is not in the Union's interest to impose anti-dumping duties.⁶⁷⁶

⁶⁶⁷ EC investigation: *Tungsten from China* para 144; EC investigation: *Yarns Lithuania* para 98.

⁶⁶⁸ EC investigation: *Commission Implementing Regulation (EU) of 27 September 2017 imposing a definitive anti-dumping duty on imports of barium carbonate originating in the People's Republic of China following an expiry review*, Reg 2017/1759 in *OJEU* L250/34 para 140 (hereafter EC investigation: *Barium Carbonate China*).

⁶⁶⁹ EC investigation: *Commission Decision of 19 June 2007 terminating the anti-dumping proceeding concerning imports of synthetic staple fibres of polyesters (PSF) originating in Malaysia and Taiwan*, Reg 2007/430 in *OJEU* L160/30 para 5 (hereafter EC investigation: *PFS Malaysia*). See chapter 6 of this study for a discussion on EC investigation: *White Phosphorus Kazakhstan*.

⁶⁷⁰ EC investigation: *PFS Malaysia* para 5.

⁶⁷¹ EC investigation: *PFS Malaysia* para 5.

⁶⁷² EC investigation: *PFS Malaysia* para 39.

⁶⁷³ EC investigation: *PFS Malaysia* para 40.

⁶⁷⁴ EC investigation: *PFS Malaysia* para 40.

⁶⁷⁵ EC investigation: *PFS Malaysia* para 40.

⁶⁷⁶ EC investigation: *PFS Malaysia* para 41.

6.4.3 Interests of importers

Similar to the interests of EU users, the EC also takes advantage of the limited cooperation from importers to make a decision when investigating if anti-dumping duties would not be in the Union's interest.⁶⁷⁷ The EC will generally conclude that an increase in costs due to the imposition of anti-dumping duties, will not seriously affect the importer.⁶⁷⁸

6.4.4 Interests of consumers

In past investigations, the EC generally has not given the interests of consumers a lot of weight, although the commission on occasion has considered the impact on consumers as end-users, as seen in the cases discussed above.⁶⁷⁹ The EC typically interprets the absence of comments from consumers or consumer parties as them having no real concern for the impact of the imposition of anti-dumping duties.⁶⁸⁰ In the past, the EC has also regularly mentioned that additional costs have a limited impact on consumers.⁶⁸¹

⁶⁷⁷ Some importers do not respond to questionnaires or provide evidence in support of or against anti-dumping duties during the investigation. The EC will then use its own discretion and usually impose anti-dumping duties. See chapter 3 of this study for a discussion on the investigation process. See also Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.02.D; see EC investigation: *Aluminium Foils Russia* para 150; EC investigation: *Persulphate China* para 80.

⁶⁷⁸ EC investigation: *Steels China* para 149; EC investigation: *Alloy Steel China* para 204; EC investigation: *Commission Implementing Regulation (EU) of 15 July 2016 imposing a definitive anti-dumping duty on imports of sodium cyclamate originating in the People's Republic of China and produced by Fang Da Food Additive (Shen Zhen) Limited and Fang Da Food Additive (Yang Quan) Limited*, Reg 2016/1159 in *OJEU* L192/23 para 164; EC investigation: *Circular Cross-Section China* para 128.

⁶⁷⁹ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.02.E. See EC investigation: *Atlantic Salmon Norway*.

⁶⁸⁰ Interested parties are given an opportunity to comment on questionnaires during the investigation. See chapter 3 of this study for a discussion on the investigation process. See also Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.02.E; see EC investigation: *Mesh Fabrics Glass Fibres China* para 64; EC investigation: *Council Implementing Regulation (EU) of 2 September 2013 imposing a definitive anti-dumping duty on imports of certain prepared or preserved sweetcorn in kernels originating in Thailand following an expiry review*, Reg 875/2013 in *OJEU* L244/1 para 130 (hereafter EC investigation: *Sweetcorn Thailand*); EC investigation: *Commission Regulation (EC) of 4 July 2008 imposing a provisional anti-dumping duty on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China*, Reg 642/2008 in *OJEU* L178/19 para 113.

⁶⁸¹ EC investigation: *Council Implementing Regulation (EU) of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia*, Reg 1194/2013 in *OJEU* L315/2 para 196 (hereafter EC investigation: *Biodiesel Argentina*); EC investigation: *Sweetcorn Thailand* para 129; EC investigation: *Council Implementing Regulation (EU) of 13 May 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ceramic tableware and kitchenware originating in the People's Republic of China*, Reg 412/2013 in *OJEU* L131/1 para 217 (hereafter EC investigation: *Tableware China*).

In EC investigation: *Cells and Wafers China*, the EC determined that without the commission imposing anti-dumping duties, the Union industry might disappear and consumers would be left with only one source of supply of the imported product.⁶⁸² In such circumstances, the exporter, which has a monopoly, could increase its prices.⁶⁸³ If that occurs, it would have a negative impact on the consumers in the long run, given that the exporter would have absolute discretion to set the product price as the sole supplier of the product in the EU.⁶⁸⁴ Where the relevant product is widely available from various businesses in the EU, anti-dumping duties would also not impact the interest of consumers regarding availability as such duties would not restrict the large number of products available to the consumers that originate from the Union industry.⁶⁸⁵ The EC also held that the burden of duties on consumers spread over the life of a product would be insignificant and the commission subsequently imposed anti-dumping duties.⁶⁸⁶

The EC's Union interest assessments based on the Union interests, user interests, importer interests and consumer interests are not always clear cut, and several cases have been heard before the EU courts relating to the Union interest requirement. The Union interest is considered on a case-by-case basis, based on the facts and circumstances of the relevant matter. The discussion that follows sets out relevant case law.

6.5 EU case law

Sapir⁶⁸⁷ suggests that the Union interest assessment should include an improved economic analysis. However, Van Bael and Bellis⁶⁸⁸ conclude that the EC already has a

⁶⁸² EC investigation: *Cells and Wafers China* para 253.

⁶⁸³ EC investigation: *Cells and Wafers China* para 253.

⁶⁸⁴ EC investigation: *Cells and Wafers China* para 253.

⁶⁸⁵ EC investigation: *Council Regulation (EC) of 14 August 2002 imposing a definitive anti-dumping duty on imports of colour television receivers originating in the People's Republic of China, the Republic of Korea, Malaysia and Thailand and terminating the proceeding regarding imports of colour television receivers originating in Singapore*, Reg 1531/2002 in *OJEU* L231/1 para 224.

⁶⁸⁶ EC investigation: *Council Regulation (EC) of 23 April 2007 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ironing boards originating in the People's Republic of China and Ukraine*, Reg 452/2007 in *OJEU* L109/12 para 53 (hereafter EC investigation: *Ironing Boards China*).

⁶⁸⁷ The EC should assess if a less restrictive approach might be more in the Union's interest than a restrictive approach. See Sapir 2006 *Bruegel Policy Contribution* 5-6.

⁶⁸⁸ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.01.

wide discretion when analysing the Union's interests since it involves complex economic assessments.⁶⁸⁹ As a result, the Union interest assessment has become rather detailed before the EU courts.⁶⁹⁰

The General Court held in EU case: *Volžskij* that the EC should balance the four interests in a transparent manner and justify its findings by clearly stipulating the facts and legal considerations that supported its decision.⁶⁹¹ The purpose of this detailed finding is to ensure that the EU Courts can conclude a fair hearing when it comes to assessing the procedural aspects of the EC's investigation.⁶⁹²

Article 6(1) of the *EU's Anti-Dumping Regulation* states that information that came to light after the investigation period shall, normally, not be taken into account. The Union interest assessment is usually conducted with information provided during the investigation period. However, information that surfaced after the investigation period may be taken into account in certain cases.⁶⁹³ In EU case: *Kazchrome*,⁶⁹⁴ the applicant, Kazchrome, questioned the Union interest assessment that the EC had conducted during the investigation. Kazchrome argued that the EC during their assessment should not have taken into account information that had come to light after the investigation period.⁶⁹⁵ However, the court concluded that article 6(1) of the *EU's Anti-Dumping Regulation* relates only to the assessment of dumping and injury and not to the Union interest assessment.⁶⁹⁶ Furthermore, article 21 of the *EU's Anti-Dumping Regulation* does not stipulate restrictions regarding information to be considered.⁶⁹⁷ The Union interest

⁶⁸⁹ The court has concluded on many occasions that the Union interest assessment involves complex economic situations, necessitating the EC to exercise a wide discretion during their assessment of the Union industry. See EU case: *Transnational Company "Kazchrome" AO and ENRC Marketing AG v Council of the European Union*, T-192/08 (2011) para 227 (hereafter EU case: *Kazchrome*); EU case: *Philips Lighting Poland S.A. and Philips Lighting BV v Council of the European Union*, T-469/07 (2013) para 72; EU case: *Hangzhou* para 118; EU case: *Apache Footwear and Apache II Footwear v Council*, T-1/07 (2009) para 111.

⁶⁹⁰ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.01.

⁶⁹¹ EU case: *Volžskij* para 143.

⁶⁹² EU case: *Volžskij* para 144.

⁶⁹³ Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.02.A; Article 6(1) of the *EU's Anti-Dumping Regulation*.

⁶⁹⁴ EU case: *Kazchrome* para 20.

⁶⁹⁵ EU case: *Kazchrome* paras 216-220.

⁶⁹⁶ EU case: *Kazchrome* para 222.

⁶⁹⁷ EU case: *Kazchrome* para 224.

assessment requires a “forecast” of future developments.⁶⁹⁸ Ultimately, the court concluded that article 21 of the *EU’s Anti-Dumping Regulation* is forward-looking which means that information can be taken into account after the investigation period ends with regard to the Union interest assessment.⁶⁹⁹

In EU case: *T.KUP*,⁷⁰⁰ the validity of the imposition of anti-dumping duties on certain footwear originating from China and Vietnam was considered. T.KUP (the importer) claimed that unequal treatment had occurred seeing that the EC regarded the interests of importers as less important than the interests of EU users, which is an alleged infringement of article 21 of the *EU’s Anti-Dumping Regulation*.⁷⁰¹ The court referred back to the EC’s assessment and stated that the EC had examined the Union interest and had determined that the impact of anti-dumping duties on importers had not been disproportionate and that there were no compelling reasons against maintaining anti-dumping duties.⁷⁰² To assess whether the EC should ease imposing anti-dumping duties, the court must consider two aspects. First, the court needs to determine if the extension of an anti-dumping duty will have negative effects.⁷⁰³ This requires a balance of the negative effects with the advantages of maintaining anti-dumping duties.⁷⁰⁴ Second, the court needs to determine if there are specific indications that the maintenance of anti-dumping duties would constitute a disproportionate burden on the interests of importers.⁷⁰⁵ The court held that there had been no indication or evidence brought forward that the maintenance of anti-dumping duties would constitute a disproportionate burden on importers.⁷⁰⁶ The court further held that the assessment of the Union interest:

constitutes a very strict procedural operation which requires a balancing of the interests of all the parties and the assessment of complex economic situations implying a limited review by the European Union judicature.⁷⁰⁷

⁶⁹⁸ EU case: *Kazchrome* para 224.

⁶⁹⁹ EU case: *Kazchrome* para 221 and 224; see also EU case: *Committee of Polyethylene Terephthalate (PET) Manufacturers in Europe (CPME) v Council of the European Union*, T-422/13 (2017) para 144.

⁷⁰⁰ EU case: *T.KUP* para 1.

⁷⁰¹ EU case: *T.KUP* para 38.

⁷⁰² EU case: *T.KUP* para 39.

⁷⁰³ EU case: *T.KUP* para 41.

⁷⁰⁴ EU case: *T.KUP* para 41.

⁷⁰⁵ EU case: *T.KUP* para 41.

⁷⁰⁶ EU case: *T.KUP* para 41.

⁷⁰⁷ EU case: *T.KUP* para 44.

As indicated above, the EC must take into account the circumstances of each individual case.⁷⁰⁸ When the EC assesses the Union interest, it should assess the seriousness of the interference with competition, the consequences and the effect of the duties on the competition situation in the EU.⁷⁰⁹ The EC has a duty to balance the Union interest and the interest of an importer to not suffer harm which goes beyond the normal commercial risk.⁷¹⁰

As the chapter has discussed the Union interest as a fourth requirement in EU investigations, the discussion that follows explores the possibility of expanding SA's legal framework to consider a public interest requirement during anti-dumping investigations. As a starting point, the next section discusses the Minister of Trade's recent suspension of anti-dumping duties in relation to frozen chicken.

6.6 SA: frozen bone-in chicken imports and developing status

During August 2022, when the Minister of Trade suspended the anti-dumping duties on frozen bone-in chicken imports, some argued in support of this decision and others argued against this decision, as discussed in separate headings below.⁷¹¹

6.6.1 Anti-dumping duties were incorrectly suspended

The SA poultry producers asserted that the suspension of the anti-dumping duties contravenes the *South African Poultry Sector Masterplan* (hereafter *Poultry Masterplan*) which was developed by the Department of Trade Industry and Competition in 2019.⁷¹² The *Poultry Masterplan* provides a framework for growing the poultry sector in SA.⁷¹³ The *Poultry Masterplan* stipulates that there should be action "against unfair forms of trade

⁷⁰⁸ EU case: *European Association of Euro-Pharmaceutical Companies (EAEPC) v European Commission*, T-574/14 (2018) para 73.

⁷⁰⁹ EU case: *Agria Polska sp. z o.o. v European Commission*, T-480/15 (2018) para 60. In EU case: *Italian Republic v Council of the European Union*, C-611/17 (2019) para 75, the Union interest called for intervention in the fisheries sector to ensure sustainable fishing in the long run and to protect the marine environment.

⁷¹⁰ EU case: *Combaro SA v European Commission*, T-752/14 (2017) para 44.

⁷¹¹ GN 1179 in GG 47156 of 1 August 2022.

⁷¹² DTIC *South African Poultry Sector Masterplan*. See also Breitenbach 2022 <https://www.sapoultry.co.za/announcement-on-anti-dumping-duties-disappoints-south-african-poultry-association-members/>.

⁷¹³ DTIC *Poultry Masterplan 2*.

and any attempts to dump poultry products in our market”.⁷¹⁴ The poultry producers therefore asserted that the anti-dumping duties were necessary and action should be taken against the dumping.⁷¹⁵ Furthermore, it was argued that the suspension of duties affected all SACU members, not just SA.⁷¹⁶

According to Izaak Breitenbach, the chief executive officer of SAPA, the suspension of the anti-dumping duties called into question the *Poultry Masterplan* and assumed that dumping was “okay”.⁷¹⁷ Some of the local producers argued that the suspension did not protect the local SA farmers as envisaged by the *Poultry Masterplan*.⁷¹⁸ It was highlighted that SA needs to establish a healthy sustainable poultry industry that creates jobs, which cannot occur if imports take over the poultry industry.⁷¹⁹

SAPA argued that anti-dumping duties would not lead to an increase in the domestic prices of these products.⁷²⁰ It argued that there should be a causal link between the anti-dumping measures and the rising selling prices.⁷²¹ Since poultry prices are rising globally and not just in SA, there is no causal link between the anti-dumping duties and the rising prices of chicken; hence, the suspension of anti-dumping duties is incorrect.⁷²²

⁷¹⁴ DTIC *Poultry Masterplan* 6.

⁷¹⁵ Breitenbach 2022 <https://www.sapoultry.co.za/announcement-on-anti-dumping-duties-disappoints-south-african-poultry-association-members/>.

⁷¹⁶ Dlamini 2022 <https://namibian.com.na/suspension-of-anti-dumping-duty-to-hurt-nam-poultry/>; Immanuel 2022 <https://atf.org.na/2022/10/31/poultry-dumping/>.

⁷¹⁷ Breitenbach 2022 <https://www.sapoultry.co.za/announcement-on-anti-dumping-duties-disappoints-south-african-poultry-association-members/>; Kinsley 2022 <https://www.poultryworld.net/the-industrymarkets/market-trends-analysis-the-industrymarkets-2/s-africa-anti-dumping-duties-suspended-for-some-countries/>.

⁷¹⁸ Breitenbach 2022 <https://www.sapoultry.co.za/announcement-on-anti-dumping-duties-disappoints-south-african-poultry-association-members/>; Opperman *The Citizen* 6; Gumede *Business Day* 1.

⁷¹⁹ Breitenbach 2022 <https://www.sapoultry.co.za/announcement-on-anti-dumping-duties-disappoints-south-african-poultry-association-members/>.

⁷²⁰ Edwards and Stern 2023 <https://www.polity.org.za/article/how-trade-restrictions-affect-consumers-the-case-of-frozen-chicken-2023-01-19>.

⁷²¹ Breitenbach 2022 <https://www.sapoultry.co.za/announcement-on-anti-dumping-duties-disappoints-south-african-poultry-association-members/>.

⁷²² Breitenbach 2022 <https://www.sapoultry.co.za/announcement-on-anti-dumping-duties-disappoints-south-african-poultry-association-members/>.

6.6.2 Anti-dumping duties correctly suspended

As a developing country, SA has a high poverty rate.⁷²³ According to the World Bank, about 63 per cent of the South African population live in poverty.⁷²⁴ Furthermore, over 18 million people live in extreme poverty.⁷²⁵ Poverty is usually associated with food insecurity where people cannot receive enough food.⁷²⁶ This means that many South Africans are experiencing hunger and food insecurity.⁷²⁷ Recently, COVID-19 has added to the food insecurity.⁷²⁸

According to the Office of the High Commissioner for Human Rights, in fighting poverty, people should have sufficient food to meet demand.⁷²⁹ This is echoed in the *Constitution*⁷³⁰ where everyone has the right to have access to sufficient food. The state must protect and promote this right to have access to sufficient food.⁷³¹ Furthermore, Goal One of the United Nation's Sustainable Development Goals is to "end poverty in all its forms everywhere".⁷³² This is read with Goal Two to "end hunger, achieve food security and improved nutrition and promote sustainable agriculture".⁷³³ Frozen chicken is one of SA's most important sources of affordable protein.⁷³⁴ Hume International, importer and distributor of frozen chicken based in SA, stated that SA currently does not produce

⁷²³ Poverty is usually when a person's basic human rights are not being met, such as right to food and having sufficient quantity of food. See OHCHR *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* 2, 28; Mbajjorgu and Odeku 2022 *Obiter* 467.

⁷²⁴ World Bank 2023 <https://www.worldbank.org/en/country/southafrica/overview>.

⁷²⁵ World Data Lab 2023 <https://worldpoverty.io/map>; see also Statista 2023 <https://www.statista.com/statistics/1263290/number-of-people-living-in-extreme-poverty-in-south-africa>.

⁷²⁶ Food insecurity can be caused by multiple factors, such as poverty and conflicts; Sucker "(Southern) African Priorities in international economic law" 14; Mbajjorgu and Odeku 2022 *Obiter* 467; Mtintsilana 2023 <https://theconversation.com/hunger-in-south-africa-study-shows-one-in-five-are-at-risk-199133>.

⁷²⁷ Mbatha, Mnguni and Mubecua 2021 *AJDS* 56; Statssa 2023 <https://www.statssa.gov.za/?cat=28>.

⁷²⁸ This was because the nationwide lockdown impacted supply chains; Mokhutso 2022 *Gender & Behaviour* 19008.

⁷²⁹ OHCHR *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* 2, 28.

⁷³⁰ Section 27(1)(b) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

⁷³¹ Section 7(2) the *Constitution*.

⁷³² The UN established 17 goals that the whole world should work together to achieve by 2030. See UN 2023 <https://sdgs.un.org/goals>.

⁷³³ UN 2023 <https://sdgs.un.org/goals>.

⁷³⁴ GN 1179 in GG 47156 of 1 August 2022; Nkukwana 2018 *South African Journal of Animal Science* 869; Edwards and Stern 2023 <https://www.polity.org.za/article/how-trade-restrictions-affect-consumers-the-case-of-frozen-chicken-2023-01-19>.

sufficient quantities of frozen chicken to satisfy the domestic demand.⁷³⁵ For this reason, SA imports frozen chicken to satisfy the consumer's demand.⁷³⁶ Based on the above discussion and from a constitutional and sustainable development point of view, it could be argued that the Minister of Trade was protecting the rights of poor SA citizens to have access to affordable frozen chicken since the local producers could not meet the current demand, thereby promoting food security in SA.⁷³⁷

Edwards and Stern⁷³⁸ conducted an econometric study based on protective measures (covering increase in tariffs, anti-dumping duties and safeguarding duties) on frozen chicken from 2010 to 2021. Following their econometric study, the authors concluded that the protective measures have raised consumer prices of frozen chicken in SA.⁷³⁹ Their econometric study proves that the protective measures in relation to frozen chicken had a significant negative impact on the poor consumers in SA.⁷⁴⁰ Frozen chicken prices in SA were raised from about nine per cent in 2012 to as much as 53 per cent in 2021.⁷⁴¹ These increased prices are carried by SA's consumers.⁷⁴² Edwards and Steyn's⁷⁴³ study show that there was a 16 per cent rise in consumer prices for imported frozen chicken from the EU from 2012 to 2021. They calculated that the increase in trade duties on frozen chicken

⁷³⁵ Maleke *Pretoria News* 10. See also Lombard and Bahta 2018 *FarmBiz* 7; Edwards and Stern 2023 <https://www.polity.org.za/article/how-trade-restrictions-affect-consumers-the-case-of-frozen-chicken-2023-01-19>. This also relates to Sucker "(Southern) African Priorities in international economic law" 16.

⁷³⁶ Maleke *Pretoria News* 10. See also Lombard and Bahta 2018 *FarmBiz* 7; Edwards and Stern 2023 <https://www.polity.org.za/article/how-trade-restrictions-affect-consumers-the-case-of-frozen-chicken-2023-01-19>.

⁷³⁷ GN 1179 in GG 47156 of 1 August 2022.

⁷³⁸ Edwards and Stern jointly wrote an article for Econ3x3, a research initiative for the University of Cape town in South Africa. Lawrence Edwards is a professor in the School of Economics at the University of Cape Town and a research associate of the South African Labour and Development Research Unit and Policy Research on International Services and Manufacturing. Matthew Stern is the founder and a director of DNA Economics, a private economic and development consulting firm in Pretoria, South Africa. Edwards and Stern 2023 <https://www.polity.org.za/article/how-trade-restrictions-affect-consumers-the-case-of-frozen-chicken-2023-01-19>.

⁷³⁹ Edwards and Stern 2023 <https://www.polity.org.za/article/how-trade-restrictions-affect-consumers-the-case-of-frozen-chicken-2023-01-19>.

⁷⁴⁰ Edwards and Stern 2023 <https://www.polity.org.za/article/how-trade-restrictions-affect-consumers-the-case-of-frozen-chicken-2023-01-19>.

⁷⁴¹ Edwards and Stern 2023 <https://www.polity.org.za/article/how-trade-restrictions-affect-consumers-the-case-of-frozen-chicken-2023-01-19>.

⁷⁴² Edwards and Stern 2023 <https://www.polity.org.za/article/how-trade-restrictions-affect-consumers-the-case-of-frozen-chicken-2023-01-19>.

⁷⁴³ Edwards and Stern 2023 <https://www.polity.org.za/article/how-trade-restrictions-affect-consumers-the-case-of-frozen-chicken-2023-01-19>.

affected the poor the most in SA.⁷⁴⁴ On this basis, they suggested that ITAC should consider a holistic approach in assessing the combined impacts during their investigation to protect the welfare of poor consumers.⁷⁴⁵

The Minister of Trade also took into account that the war in Ukraine and the COVID-19 pandemic disrupted the supply chains and significantly spiked the prices of food.⁷⁴⁶ As discussed in chapter 5, these issues are non-attributable factors that cause injury to the SACU industry.⁷⁴⁷ The Minister of Trade defended the suspension by stating that there is a need to find a “proper balance to ensure that we have food security and to take every reasonable step to protect jobs and assist consumers”.⁷⁴⁸ The Minister of Trade suspended anti-dumping duties to mitigate the rising food prices on poor and vulnerable households for whom chicken is a staple protein.⁷⁴⁹ Mackay⁷⁵⁰ supports the Minister of Trade’s decision to suspend the anti-dumping duties and states that “public interest is a long overdue consideration in anti-dumping investigations.”

In SA case: *Scaw*, the Constitutional Court held that the *ITA Act* “clothes the minister with far-reaching authority in relation to trade policy.”⁷⁵¹ This stems from sections 5 and 59 of the *ITA Act* which empower the Minister of Trade to issue trade policy statements and make trade directives.⁷⁵² The Constitutional Court further confirmed that the *Constitution* allows the Minister of Trade to exercise his authority in terms of the *ITA Act*.⁷⁵³ This means that ITAC is subject to trade policy statements published by the Minister of Trade.⁷⁵⁴ The Minister of Trade has a wide discretion and can accept or reject

⁷⁴⁴ Edwards and Stern 2023 <https://www.polity.org.za/article/how-trade-restrictions-affect-consumers-the-case-of-frozen-chicken-2023-01-19>.

⁷⁴⁵ Edwards and Stern 2023 <https://www.polity.org.za/article/how-trade-restrictions-affect-consumers-the-case-of-frozen-chicken-2023-01-19>.

⁷⁴⁶ Phakathi *Business Day* 3.

⁷⁴⁷ Article 16(5) of *SA’s Anti-Dumping Regulation*.

⁷⁴⁸ Phakathi *Daily Dispatch* 12.

⁷⁴⁹ Maleke *Pretoria News* 10.

⁷⁵⁰ Donald Mackay is the CEO of Global Advisors. Mackay 2023 <https://www.xagta.com/south-africa-moves-to-a-more-carefully-considered-trade-policy-yay/>.

⁷⁵¹ SA case: *Scaw* para 32. Sections 5 and 59 of the *ITA Act*.

⁷⁵² Sections 5 and 59 of the *ITA Act*. This is confirmed in SA case: *Scaw* para 32; SA case: *South Africa Sugar Association v Minister of Trade and Industry* 2017 4 All SA 555 (GP) para 30.

⁷⁵³ SA case: *Scaw* para 42; Sections 85(2)(a), (b) and (e) of the *Constitution*.

⁷⁵⁴ SA case: *Scaw* para 32; Sections 5, 7 and 59 of the *ITA Act*.

ITAC's recommendations.⁷⁵⁵ The Constitutional Court noted that the Minister of Trade can only suspend anti-dumping duties after taking into account ITAC's recommendations.⁷⁵⁶ Following these principles, when the Minister of Trade suspended the anti-dumping duties on frozen chicken, he did take into account ITAC's recommendation and was exercising his powers within sections 5 and 59 of the *ITA Act*.⁷⁵⁷

Following the discussions above, there are valid arguments both for and against the Minister of Trade's suspension of anti-dumping duties. On the one hand, the local producers in SA might suffer if anti-dumping duties are not imposed since imported chicken is cheaper and consumers will opt to buy the cheapest option. This will result in local producers in SA losing market share as consumers will not buy their products. Jobs in the domestic poultry industry will then be at risk. On the other hand, poor consumers will be affected if anti-dumping duties are imposed as the chicken prices will rise significantly and they will not be able to purchase a staple protein.

6.7 SA public interest

In light of the arguments in favour and against the Minister of Trade's suspension of anti-dumping duties, it is clearly necessary to balance the different needs of the domestic producers and consumers in SA, especially when dealing with a basic food product. This study submits that this balance should not be the sole responsibility of the Minister of Trade, but that ITAC should also be involved at the start of the anti-dumping investigation in considering the interests of consumers in a similar fashion as the EU's Union interest.

In terms of the *EU's Anti-Dumping Regulation*, during an anti-dumping investigation, the EC will examine if anti-dumping duties will be beneficial or detrimental to the relevant

⁷⁵⁵ SA case: *Scaw* para 98, 110; SA case: *South Africa Sugar Association v Minister of Trade and Industry* 2017 4 All SA 555 (GP) para 31.

⁷⁵⁶ SA case: *Scaw* para 109.

⁷⁵⁷ In: *Minister of Health v Alliance of Natural Health Products (South Africa)* 2022 JOL 52860 (SCA) para 26, it was found that the Minister of Health acted *ultra vires* by publishing certain provisions that did not fall within his power provided by the relevant legislation. *Ultra vires* means acting beyond or outside a given authority's powers. See Nickerson 2021 *Columbia Law Review* 2522. However, in SA case: *Consumer Goods and Services Ombud NPC v Voltex (Pty) Ltd* 2021 JDR 0660 (GP) paras 62, 63, 68, 72, it was held that the Minister of Trade acted within his power as provided for by the relevant legislation and was not *ultra vires* when he also published certain provisions. Following these two case laws, this study concludes that if national legislation provides a Minister with certain powers and he publishes certain provisions in accordance with the said legislation, he is acting within his power.

Union industry which includes, amongst others, consumers of the relevant product.⁷⁵⁸ This is referred to as the Union interest or, globally, the public interest. There is currently no obligation in *SA's Anti-Dumping Regulation* or *ITA Act* to consider the public interest. However, during anti-dumping investigations, ITAC takes into account interested parties' comments on the imposition of anti-dumping duties.⁷⁵⁹ Article 1 of *SA's Anti-Dumping Regulation* includes interested parties, such as SACU producers, exporters, foreign producers, importers, trade or business associations, and export countries' governments. These interested parties overlap with the EU's Union interest interested parties. The interests of consumers are not specifically included in article 1 of *SA's Anti-Dumping Regulation*. However, article 1 of *SA's Anti-Dumping Regulation* further states that:

This does not preclude the Commission from accepting other parties as interested parties at the behest of the Commission in an anti-dumping investigation.

Article 1 of *SA's Anti-Dumping Regulation* provides ITAC with a discretion to take into account other parties' interests during anti-dumping investigations. This study suggests that this article empowers ITAC to take into account consumers' interests as "other parties as interested parties" during anti-dumping investigations. Ultimately, during ITAC's anti-dumping investigation, ITAC should examine if anti-dumping duties will be beneficial or detrimental towards the relevant SACU industry, users (producers), importers and consumers. Specifically, since SA is a developing country with a high poverty rate, the interests of consumers and producers are of specific importance, especially, in the context of essential consumer products such as food.

Against this background, this study submits that it would be beneficial to consider developing SA's *ITA ACT* and *Anti-Dumping Regulation* to include a similar requirement of public interest as with the *EU's Anti-Dumping Regulation*. However, as things currently stand, there are possible challenges to developing SA's legislation, as illustrated below.

⁷⁵⁸ Article 21 of the *EU's Anti-Dumping Regulation*; Van Bael and Bellis *EU Anti-Dumping and Other Trade Defence Instruments* para 6.02.A.

⁷⁵⁹ Article 29 of *SA's Anti-Dumping Regulation*; section 26(5) of the *ITA Act*.

6.7.1 Possible challenges

In 2009, Brink⁷⁶⁰ stated that it would not be in SA's interests to include a fourth requirement of public interest because it might delay the investigation process as it places an additional administrative task on ITAC. However, if a public interest assessment had been conducted by considering the interests of producers and poor consumers during ITAC: *Investigation 695 Frozen Chicken*, ITAC might have come to the same conclusion as the Minister of Trade, which would have made the process smoother without the Minister of Trade intervening and suspending the anti-dumping duties.

Since ITAC currently conducts the anti-dumping investigation on behalf of the SACU industry, if public interest is added as a fourth requirement, ITAC would be required to consider the interests of the whole SACU industry including the interests of Botswana, Lesotho, Namibia and Eswatini. This would require assistance from the Tariff Board. However, without the operation of the Tariff Board, this will be a hefty task which cannot be ITAC's sole responsibility. If the Tariff Board is established, considering the interests of the whole SACU industry might be possible in the future. Then, the *ITA Act* and *SA's Anti-Dumping Regulation* can be amended to include a public interest requirement, namely a SACU interest requirement. This would mean that anti-dumping duties cannot be imposed if it can be clearly concluded that it is not in SACU's interests to impose anti-dumping duties. This will also depend on how the Tariff Board will interpret such a SACU interest. At this stage, however, Brink's concerns regarding severe delays in the investigation process remain warranted.

Furthermore, anti-dumping investigations are already complex by nature and adding a fourth requirement might make the process more complex. It will become even more complex if ITAC must assess all of SACU's interests, namely the interests of all the consumers within SA, Botswana, Lesotho, Namibia and Eswatini. This might mean that all the SACU member countries' interests would not be equally or adequately assessed, especially if interests conflict or do not align with each other. On a practical level, it would be difficult for interested parties throughout the other SACU countries to provide

⁷⁶⁰ Brink listed six reasons. See Brink 2009 *SALJ* 358. See also Aggarwal 2004 *Indian Council for Research on International Economic Relations* 3.

comments to ITAC regarding all of SACU's interests. This is where the Tariff Board might pose possible solutions. However, if the Tariff Board is to be established, it will have to determine how this assessment will be conducted and put the required procedures and timeline in place.

6.7.2 Possible public interest

In arguing for the inclusion of public interest as an additional factor, Aggarwal⁷⁶¹ states that the three basic requirements during an anti-dumping investigation only consider whether the domestic industry is being harmed by the dumped imports. The public interest requirement should take into account that the dumped imports can actually benefit other interests, such as the consumers' interests.⁷⁶² Aggarwal⁷⁶³ mentions that the public interest is necessary to balance the domestic producers' interests with the consumers' interests. If not, producers' interests are protected at the expense of the interests of other interested parties, such as consumers.⁷⁶⁴ This links to the Minister of Trade's decision to protect SA's consumers.

This study recommends that ITAC considers the consumers' interests as "public interest" in terms of article 1 of *SA's Anti-Dumping Regulation* for the time being until the Tariff Board is established. In terms of section 26 of the *ITA Act*, any person can provide additional information to ITAC regarding the anti-dumping investigation.⁷⁶⁵ This means that relevant consumers or consumer parties can submit additional information to ITAC. The interests of SA consumers and producers are of specific importance in SA, as discussed below with specific reference to the EC's assessment of these interests during the Union interest assessment and to ITAC: *Investigation 695 Frozen Chicken*.

⁷⁶¹ Aradhna Aggarwal is a professor at Copenhagen Business School (Economic Department). Prior to this, she was a professor at the University of Delhi (Economic Department). Even though this case relates to India and anti-dumping, the discussion regarding a public interest requirement still relates to SA. See Aggarwal 2004 *Indian Council for Research on International Economic Relations* 5.

⁷⁶² Aggarwal 2004 *Indian Council for Research on International Economic Relations* 5.

⁷⁶³ Aggarwal 2004 *Indian Council for Research on International Economic Relations* 5.

⁷⁶⁴ Aggarwal 2004 *Indian Council for Research on International Economic Relations* 5.

⁷⁶⁵ Section 26(5) of the *ITA Act*.

6.7.2.1 Interests of SA producers

Seeing that ITAC conducts the anti-dumping investigation on behalf of the relevant SACU industry, it needs to consider the interest of the SACU industry producer that lodged the application with ITAC. Following EC investigations, this study proposes that ITAC considers whether imposing anti-dumping duties would safeguard employment in SA, prevent distortion on the market and improve SA's financial situation, prevent closure of SA's factories, protect the environment, and encourage investment in technology.⁷⁶⁶

With reference to ITAC: *Investigation 695 Frozen Chicken*, considering the interests of SA producers might have led ITAC to safeguard employment of the local farmers and their employees in SA. The Minister of Trade would then most likely have considered the interests of the producers before suspending the anti-dumping duties.

In contrast, in EC investigation: *PFS Malaysia*, the EC terminated an investigation on the grounds that there was a supply problem in the Union market for the product and the Union producers were not able to meet the demand on their own.⁷⁶⁷ Following EC investigation: *PFS Malaysia*, ITAC might have considered the supply problem regarding locally produced chicken in SA and not imposed anti-dumping duties. However, ITAC would have to weigh the possible harm suffered by the local poultry producers (interest of producers) against the poor consumers who cannot afford a price increase (interests of consumers). Since SA is a developing country with a high poverty rate, the weight of the interests of consumers would most likely outweigh the interests of producers, especially if food security is at risk. Following this principle, this study submits that the Minister of Trade made the correct decision to suspend the anti-dumping duties.

6.7.2.2 Interests of SA consumers

The EC regularly has mentioned that additional purchase costs of a product due to anti-dumping duties have a limited impact on the consumers.⁷⁶⁸ In SA, a developing country

⁷⁶⁶ EC investigation: *Crystalline Silicon China*; EC investigation: *Chamois Leather China*; EC investigation: *Alloy Steel China*; EC investigation: *Tungsten China*.

⁷⁶⁷ EC investigation: *PFS Malaysia* para 40.

⁷⁶⁸ EC investigation: *Biodiesel Argentina* para 196; EC investigation: *Sweetcorn Thailand* para 129; EC investigation: *Tableware China* para 217; EC investigation: *Ironing Boards China* para 53.

with a high poverty level, an increase in purchase costs will have a more significant impact on consumers and the broader public interest as the poverty rate is significantly higher than in the EU. The Minister of Trade specifically based his decision on the impact on the poor citizens of SA, which make up a significant portion of the country's population. In this regard, the average consumer's pocket and spending power looks different in SA than the average consumer's in the EU.

In EC investigation: *Atlantic Salmon Norway*, the EC determined that if anti-dumping duties were to be imposed, the price increase of the imported product would have a negative impact on the importers, producers and consumers.⁷⁶⁹ The EC held that the imposition of anti-dumping duties would result in a price increase and a decrease in consumer purchases, specifically by lower-income consumers.⁷⁷⁰ Furthermore, one of the importers in the EU also processes salmon and the imposition of anti-dumping duties against the imports would place a risk on thousands of jobs in the EU food processing industry.⁷⁷¹ Following EC investigation: *Atlantic Salmon Norway*, ITAC might have come to a similar conclusion as the EC that the price increase of the frozen chicken would have a negative impact on poor consumers.

6.8 Conclusion

This chapter set out a discussion regarding the Union interest requirement in terms of the *EU's Anti-dumping Regulation*, followed by a discussion of the possible inclusion of a "public interest" requirement in terms of SA legislation. The EC mostly imposes anti-dumping duties because the Union interest calls for intervention. However, there are a few significant cases where the EC terminated anti-dumping duties based on the Union interests.

In SA, public interest is not currently specifically included as a requirement in domestic legislation or considered by ITAC during anti-dumping investigations. There are arguments in support of and against the Minister of Trade's decision to suspend anti-dumping duties on frozen bone-in chicken imports. Ultimately, this study submits that the

⁷⁶⁹ EC investigation: *Atlantic Salmon Norway* para 238.

⁷⁷⁰ EC investigation: *Atlantic Salmon Norway* para 232.

⁷⁷¹ EC investigation: *Atlantic Salmon Norway* para 228.

Minister of Trade acted within his powers as provided for by section 59 of the *ITA Act* which justified the suspension of anti-dumping duties on the broader “public interest” in SA. However, this study further submits that the consideration of consumer interests should not necessarily be the sole responsibility of the Minister of Trade. ITAC should investigate the impact of the imposition of anti-dumping duties on all interested parties as provided for in article 1 of *SA’s Anti-Dumping Regulation*. Specifically, ITAC should, during the investigation process, balance the interests of the consumers and producers. Of course, the considerations would be limited to the properly submitted documentation from all interested parties.

The next and final chapter of this study sets out a conclusion and recommendations.

CHAPTER 7 CONCLUSION AND RECOMMENDATIONS

7.1 Overview

The study set out to answer the following research question: When comparing the requirements for imposing anti-dumping duties in the EU and SA, respectively, how does SA legislation align with EU legislation? This chapter starts by providing a brief overview of the study, followed by setting out the main findings of this comparative study, keeping the research question in mind, and finally making recommendations.

The EU and SA, as WTO member states, are trading partners and have imposed anti-dumping duties against each other.⁷⁷² Of specific relevance to this study is SA imposing anti-dumping duties on frozen bone-in chicken meat imports from four countries in the EU following ITAC: *Investigation 695 Frozen Chicken*. The Minister of Trade subsequently suspended the anti-dumping duties, taking into account the negative impact on the poor citizens in SA.⁷⁷³ This is in line with Okonjo-Iweala's statement that "trade is a significant driver for economic growth and poverty reduction and ultimately for development".⁷⁷⁴

Then again, anti-dumping duties are necessary when dumping occurs since the domestic producers of goods will have trouble competing with cheaper imported products.⁷⁷⁵ Anti-dumping duties are in place to prevent unfair competition and protect the domestic producers from facing a foreign monopoly.⁷⁷⁶ Protecting the interests of the producers and consumers requires a balancing act, especially in a developing country such as SA.

The history of anti-dumping has come a very long way from the *GATT* to the establishment of the WTO and the creation of the *ADA*. The *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* were both created with the aim to align with the *ADA*.

⁷⁷² EC 2022 https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/south-africa_en.

⁷⁷³ It is important to note that on 2 August 2023, the Minister of Trade resumed the imposition of anti-dumping duties and requested SARS to impose anti-dumping duties against the four EU member states. The Minister of Trade in the Government Gazette did not expand on reasons for resuming the imposition of anti-dumping duties, just indicating that it is warranted under the "circumstances". See GN 1925 in GG 49065 of 2 August 2023; GN 1179 in GG 47156 of 1 August 2022.

⁷⁷⁴ WTO 2022 https://www.wto.org/english/news_e/news21_e/devel_10nov21_e.htm.

⁷⁷⁵ Lester, Mercurio and Davies *World Trade Law* 513.

⁷⁷⁶ Lester, Mercurio and Davies *World Trade Law* 513.

For the most part, *SA's Anti-Dumping Regulation* and the *EU's Anti-Dumping Regulation* are aligned regarding the requirements for imposing anti-dumping duties. However, there are certain differences between the requirements to impose anti-dumping duties in the EU and SA. The parts that are either aligned or not are set out below in the main findings.

7.2 Main findings

This critical comparative study determined the similarities and differences between SA's and the EU's legal requirements to impose anti-dumping duties against the backdrop of Article VI of the *GATT* and the *ADA*. The discussion that follows sets out the main findings of this study.

7.2.1 Investigation process

Overall, the core processes of anti-dumping investigations according to the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* are aligned. ITAC publishes a preliminary and final determination in the Government Gazette whereas EC publishes the determinations in the form of a regulation in the *OJEU*. In the EU, the national customs authorities will impose anti-dumping duties in their respective countries by relying on the regulation published by the EC. In SA, the Minister of Trade directs SARS to impose anti-dumping duties in SA and national customs authorities in the other SACU countries will follow SARS's lead and impose anti-dumping duties in their respective countries.

One noticeable difference is the inactiveness of the Tariff Board in SA. In the EU, the EC takes into account the TDI Committee's opinions during the investigation process. In SA, such support is supposed to be provided by the Tariff Board. Since the SACU council delegated its powers to ITAC, there is no group such as the TDI Committee to assist in ITAC's decision-making process. ITAC is supposed to consider the whole SACU industry during their investigation. However, the missing element of the Tariff Board raises the question of how effective this investigation process is. Furthermore, the *SACU Agreement* only provides for ITAC making recommendations to the Tariff Board regarding anti-dumping duties. There are no provisions or steps related to the actual investigation process.

7.2.2 Establishing dumping

Article 2 of the *EU's Anti-Dumping Regulation* and article 8 of *SA's Anti-Dumping Regulation* set out four methods to calculate the normal value of an imported product. Article 2 of the *ADA* sets out three methods to calculate the normal value. The EC and ITAC first use the primary method to determine the normal value. If this is not possible, they will use the second method. This second method is not mentioned in the *ADA*. If it is not possible to use the primary or second method, the EC and ITAC will use a constructed normal value as the third method to calculate the normal value. The fourth method is not used often by the EC or ITAC. ITAC tends to use the primary method during investigations whereas the EC tends to use the third method. This shows a slight difference between the EU and SA.

The EC and SA legal frameworks are aligned when it comes to determining the export price. ITAC and the EC calculate the export price based on the actual existing export price or a constructed export price.

The *EU's Anti-Dumping Regulation* requires a fair comparison of the normal price and export price. *SA's Anti-Dumping Regulation* does not specifically state that there should be a fair comparison. However, ITAC during past investigations has confirmed that there should be fair comparison.⁷⁷⁷ There are five factors listed in *SA's Anti-Dumping Regulation* that can affect price compatibility,⁷⁷⁸ whereas the *EU's Anti-Dumping Regulation* has eleven factors that can affect price compatibility.⁷⁷⁹ This shows a slight difference between *SA's Anti-Dumping Regulation* and the *EU's Anti-Dumping Regulation*.

The process of calculating the dumping margin is significantly different in the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation*. The *EU's Anti-Dumping Regulation* stipulates that the dumping margin is the weighted average of prices of all

⁷⁷⁷ ITAC: *Investigation 695 Frozen Chicken* para 4.3.1.

⁷⁷⁸ Article 11(1) of *SA's Anti-Dumping Regulation*; article 2(4) of the *ADA*.

⁷⁷⁹ Article 2(10) of the *EU's Anti-Dumping Regulation*.

export transactions or on a transaction basis.⁷⁸⁰ In contrast, *SA's Anti-Dumping Regulation* allows the calculation of the dumping margin of each product separately.⁷⁸¹

There are some similarities and some differences between the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* processes to establish dumping during anti-dumping investigations. As a result, the process of establishing dumping during the anti-dumping investigation outlined in *SA's Anti-Dumping Regulation* and *ITA Act* aligns only in some parts with the anti-dumping investigation process outlined in the *EU's Anti-Dumping Regulation*.

7.2.3 Establishing injury and causation

The obligation to determine injurious dumping is set out in article 3(1) of the *ADA* and article 3(1) of the *EU's Anti-Dumping Regulation*. *SA's Anti-Dumping Regulation* provide factors that ITAC must consider during its determination of injury, which indicates that injury is a requirement in terms of SA law.⁷⁸²

ITAC and the EC will consider whether there has been a significant increase in dumped imports relevant to the production or consumption in the importing country in order to determine injurious dumping.⁷⁸³ ITAC and the EC can conduct a cumulative assessment if the margin of dumping relating to the imports from each country is more than *de minimus*, the volume of imports from each country is not negligible and a cumulative assessment is appropriate considering the competition between the imported products and the like product of the domestic industry.⁷⁸⁴

SA's Anti-Dumping Regulation stipulates that the volume of dumped imports is negligible if the volume of dumped imports from a country is less than three per cent of the total imports of the like product in the SACU market.⁷⁸⁵ In contrast, the *EU's Anti-Dumping*

⁷⁸⁰ Article 2(4) of the *ADA*; A 2(11) of the *EU's Anti-Dumping Regulation*.

⁷⁸¹ Article 12 of *SA's Anti-Dumping Regulation*.

⁷⁸² Articles 13(2) and 28(2) of *SA's Anti-Dumping Regulation*.

⁷⁸³ Article 3(3) of the *EU's Anti-Dumping Regulation*; A 3(2) of the *ADA*.

⁷⁸⁴ Article 3(3) of the *EU's Anti-Dumping Regulation*; A 16(1)(b) of *SA's Anti-Dumping Regulation*; A 3(2) of the *ADA*.

⁷⁸⁵ Article 16(2) of *SA's Anti-Dumping Regulation*; A 5(8) of the *ADA*.

Regulation provides for less than one per cent.⁷⁸⁶ Furthermore, *SA's Anti-Dumping Regulation* provides that if there is more than one country involved, the volume of dumped imports is negligible if the volume of dumped imports from the countries collectively account for less than seven per cent of imports of the like product in the SACU market.⁷⁸⁷ In contrast, the *EU's Anti-Dumping Regulation* provides for less than three per cent.⁷⁸⁸ This is a noticeable difference between the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* in that they are not aligned regarding the percentage.

Both the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* provide that the EC and ITAC respectively must evaluate 15 economic factors during their examination of injury.⁷⁸⁹ The EC evaluates these factors under the same heading in its anti-dumping investigation reports. However, ITAC does not evaluate these 15 factors under one heading in its anti-dumping investigation reports.⁷⁹⁰ This is not a legislative difference but rather a practical difference.

The *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* are in agreement regarding the attributable analysis and non-attributable analysis to assess causality.⁷⁹¹ *SA's Anti-Dumping Regulation* lists seven factors that ITAC should consider in the causality assessment in contrast to the *EU's Anti-Dumping Regulation* which lists five factors.⁷⁹² However, *SA's Anti-Dumping Regulation* split one factor into two and also added one additional factor, namely that ITAC can consider other factors affecting SACU price.⁷⁹³ Nonetheless, the processes for assessing causality in the EU and SA are still aligned.

⁷⁸⁶ Article 5(7) of the *EU's Anti-Dumping Regulation*.

⁷⁸⁷ Article 16(2) of *SA's Anti-Dumping Regulation*; A 5(8) of the *ADA*.

⁷⁸⁸ Article 5(7) of the *EU's Anti-Dumping Regulation*.

⁷⁸⁹ Article 3(5) of the *EU's Anti-Dumping Regulation*; A 13(2) and 16(1) of *SA's Anti-Dumping Regulation*; A 3(4) of the *ADA*.

⁷⁹⁰ ITAC: *Investigation 695 Frozen Chicken* paras 4, 5.5, 5.6.

⁷⁹¹ Articles 3(6)-(7) of the *EU's Anti-Dumping Regulation*; A 16(4)-(5) of *SA's Anti-Dumping Regulation*; A 3(5) of the *ADA*.

⁷⁹² Article 3(7) of the *EU's Anti-Dumping Regulation*; A 16(5) of *SA's Anti-Dumping Regulation*; A 3(5) of the *ADA*.

⁷⁹³ Article 16(5) of *SA's Anti-Dumping Regulation*.

Ultimately, the wording of the *EU's Anti-Dumping Regulation* and *SA's Anti-Dumping Regulation* are not exactly aligned in some parts. However, the result of determining injurious dumping is ultimately the same.

7.2.4 Public interest as a fourth requirement

The EC takes into account the public interest as "Union" interest during the anti-dumping investigation process. There is no provision in the *ITA Act* or the *SA's Anti-Dumping Regulation* that permits a suspension of anti-dumping duties by taking into account the interest of poor citizens (consumers). However, section 59 of the *ITA Act* does provide the Minister of Trade with the authority to publish trade directives. It is submitted that the Minister of Trade's decision to suspend anti-dumping duties does fall in line with section 59 of the *ITA Act*. This decision to take into account the interest of poor citizens (consumers) links with the *EU's Anti-Dumping Regulation* of Union interest.

It would be in SA's interest to align with the EU and include a possible fourth requirement of considering SACU's interests during anti-dumping investigations. However, following the inactiveness of the Tariff Board, this is not practically feasible at this moment. Nevertheless, ITAC should still consider SA's interest during the investigations in a similar fashion as the EC considers Union interest. Specifically, ITAC should determine the impact of anti-dumping duties on interested parties, such as the relevant SACU industry, SA consumers, SA producers and SA importers. It is, however, problematic that the interests of the other SACU countries may be overlooked.

This study calls upon the Tariff Board to be established to assist in this regard. Until this is realised, the fourth requirement, as provided in the *EU's Anti-Dumping Regulation*, cannot be fully incorporated into SA's anti-dumping legislation. However, in terms of section 1 of *SA's Anti-Dumping Regulation*, ITAC arguably has the authority to take into account the interests of interested parties including the interests of consumers, producers, the SACU industry and importers.

7.3 Recommendations

Based on the above findings it is recommended that:

- The *ITA Act* be amended to include the obligation to determine injurious dumping, specifically to bring legal certainty that injury is a requirement in SA law.
- The *ITA act* be amended to add causality, specifically as a requirement during anti-dumping investigations to bring legal certainty that causality is a requirement in SA.
- ITAC considers all the 15 material injury factors in terms of sections 13(2) and 16(1) of *SA's Anti-Dumping Regulation* under the same heading during its investigations for practicality and not under separate headings.
- ITAC considers the interests of interested parties in terms of article 1 of the *SA's Anti-Dumping Regulation* during the anti-dumping investigation, specifically to weigh the interests of consumers against the interests of producers.
- The Tariff Board is established.
- Once the Tariff Board is established, *SA's Anti-Dumping Regulation* and *ITA Act* are revisited to include a fourth requirement of SACU interests.
- Once the Tariff Board is established, the possibility of evaluating a fourth requirement of SACU interests is determined.

7.4 Areas for further research

There are two possible areas for further research available: first, investigate the public interest requirement as applied by other countries such as Canada, China and Brazil; second, investigate the public interest requirement in terms of the other trade remedies and not just anti-dumping.

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