THE COMPATIBILITY OF SOUTH AFRICAN ANTI-DUMPING LAWS WITH WTO DISCIPLINES

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I. INTRODUCTION

Laws to govern anti-dumping are regulated by national and international disciplines on the same. Hence, while countries enact laws to outline disciplines on anti-dumping, these may often result in a clash with their international obligations. International anti-dumping regulations consequently restrict the application of domestic anti-dumping laws, thereby making it mandatory for countries to align domestic disciplines with those of internationally accepted standards.[1] In general, the anti-dumping regime has been pivotal to the world trading system in order to sustain fair trading relations among its Members.

In the current era, the World Trade Organisation (WTO)[2] governs the regulation of dumping.[3] Accordingly, the WTO's Anti-Dumping Agreement (ADA),[4] read along with Article VI of the General Agreement on Tariffs and Trade (GATT),[5]

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1 W. Jingqi, *China and Foreign Countries Antidumping Laws and Practicality*, Beijing People's Court (2000), 17–19.

2 Marrakesh Agreement establishing the World Trade Organisation (15 April 1994).

3 See the Preamble to the Marrakesh Agreement Establishing the World Trade Organisation.

4 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 1868 UNTS 279, 33 ILM 1125 (1994) [hereinafter AD Agreement]. This Agreement was negotiated in order to improve upon the existing rules under the Anti-Dumping Agreement negotiated under the Tokyo Round.

5 The General Agreement on Tariffs and Trade, which was the predecessor to the WTO, regulated dumping via Article VI. It permitted the imposition of anti-dumping duties, but nonetheless did not provide a proper understanding of the scope of, *inter alia*, domestic industry, the

African Journal of International and Comparative Law 25.3 (2017): 347–370
Edinburgh University Press
DOI: 10.3366/ajicl.2017.0199

www.euppublishing.com/ajicl

is the relevant international law on the subject matter. Interestingly the ADA does not per se prohibit dumping, but on the contrary merely provides remedial action against the exporter in the event that dumped imported products cause or threaten to cause material injury to the domestic industry of the importer. Being a multilateral agreement, it imposes an obligation upon its Members to harmonise their respective domestic laws within the parameters of this Agreement.[6]

At the national level, anti-dumping is currently regulated in South Africa by means of the International Trade Administration Act 2002 (ITAA)[7] and its pertinent regulations, namely the Anti-Dumping Regulations of 2003 (ADR).[8] The South African anti-dumping regime is considered to be one of the oldest and entered its centennial year in 2014. Although the country's participation in the WTO remains dismal because of the fact that it has not initiated even a single dispute in the WTO, the procedures that this country has adopted for the purpose of investigating dumping and material injury caused thereby, has often been a contentious issue. Hence, while it has been involved in merely four disputes in the WTO as a respondent, all these have pertained to South Africa's domestic anti-dumping regulation and its non-compliance with the WTO disciplines in this regard.[9]

Despite the fact that South Africa has been making considerable efforts to bring its domestic anti-dumping legislation in line with its international obligations set forth in the WTO, foreign governments have often raised objections in the WTO's dispute settlement and alleged that the country's anti-dumping laws do not fully comply with the WTO disciplines in this regard. This article accordingly evaluates South Africa's national anti-dumping regime and its compatibility with WTO disciplines on the subject and points out glaring inconsistencies with the multilateral Agreement.

II. WHEN IS DUMPING CONSIDERED TO HAVE OCCURRED?

Since dumping has both economic and legal implications, the concept has been defined both economically and legally. Consequently, for the purpose of

determination of injury and the procedure for levying such duties. See GATT, Annex 1A, The Legal Texts: The Results of the Uruguay Round of the Multilateral Trade Negotiations (15 April 1994).

6 Article II.2 of the Marrakesh Agreement.

7 International Trade Administration Act 71 of 2002.

8 International Trade Regulations N3197 of 2003 in Government Gazette GG 25684 of 14 November 2003. Even though Proposed Amendments to the Anti-Dumping Regulations 2003 were published in 2005, they are not yet promulgated in a law. This leaves the current Anti-Dumping Regulations of 2003 as the law.

9 The four disputes are: *South Africa – Antidumping Duties on Certain Pharmaceutical Products from India*, DS168 (13 April 1999); *South Africa – Definitive Antidumping Measures on Blanketing from Turkey*, DS288 (15 April 2003); *South Africa – Antidumping Measures on Uncoated Woodfree Paper*, DS378 (16 May 2008); and *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil*, DS439 (25 June 2012). Interestingly though, none of these disputes went beyond the consultation stage, with no panel being established in any of these matters.

economics, Viner defines dumping as a form of price discrimination where differential pricing is adopted to sell different units of the same good at different prices in different markets.[10] Viner's definition has served as a foundation for the legal definition of dumping. Accordingly, the GATT's definition of dumping[11] is currently the most authoritative.[12] The GATT provides that:

> For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another
>
> (a) is less than the 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.[13]

In the present era, the imposition of anti-dumping measures has become a significant characteristic in the international regulation of trade because of the political reinforcement that these measures are backed by.[14]

Accordingly, dumping would be ruled if, on the basis of a comparison of 'like' products, the home market price (referred to as the normal value) exceeds the export price.[15] The concept of 'like' products has been defined in the text of the Agreement itself and is interpreted to mean products that are identical in all respects to or have characteristics closely resembling those of the product under consideration.[16]

10 J. Viner, *Dumping: A Problem in International Trade*, Augustus M. Kelley (reprint 1966), pp. 35–68

11 Article VI of the GATT 1994 must be read along with Article 2.1 of the ADA, the latter being an interpretation of the former. See Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (30 April 2008), para. 96 (*US – Stainless Steel*) The Appellate Body found that the definition of 'dumping' has been provided in Article 2.1 of the WTO Anti-Dumping Agreement.

12 The definition is authoritative because of the fact that it is set forth in a multilateral Agreement, making it incumbent on its Members to restrict the definition of dumping in their domestic legislations within the parameters of the Anti-Dumping Agreement.

13 Article VI.1 of the GATT 1994.

14 See Patrick Osode, 'An Assessment of the WTO-Consistency of the Procedural Aspects of South African Anti-Dumping Law and Practice', 22 *Penn State International Law Review* (2003), 19, at p. 19.

15 Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R (22 December 2000) para. 6.90–6.91 (*US – Stainless Steel*).

16 Article 2.6 of the Anti-Dumping Agreement. The jurisprudence of the concept of 'likeness' evolved in the case of *Border Tax Adjustment* wherein the Panel laid down the guidelines to

The difference between the export price and the normal value is hence considered to be the margin of dumping.[17] However, the Agreement authorises a Member to construct the export price in circumstances when either the export price is unavailable or when such a price is 'unreliable due to a compensatory arrangement between the exporter and the importer and a third party'.[18] The export price may consequently be constructed on the basis of the price at which the imported product is first resold to an independent buyer.[19] The test to determine the normal value is fourfold:[20] first, the sale must occur in the 'ordinary course of trade'; second, the products must be 'like'; third, the products must be 'destined for consumption in the exporting country'; and last, this price must be 'comparable'.[21]

In the event that there are no or insufficient sales of like products in the 'ordinary course of trade' in the exporting country's domestic market, the Agreement on Anti-Dumping permits the determination of dumping on the basis of (a) 'comparison with a comparable price of a like product sold to a third country provided that price is representative'; or (b) 'with the cost of production in the country of origin [which could also be the exporting country] plus a reasonable amount for administrative, selling and general costs and for profit'.[22]

Hence, there must be a fair comparison between the normal value and the export price, at the same level of trade, for sales made at nearly the same time.[23]

III. THE ANTI-DUMPING ENVIRONMENT IN SOUTH AFRICA

The anti-dumping legislation in South Africa dates back to the year 1914 by virtue of the Customs and Tariff Act,[24] making it the fourth country in the world to

determine 'like' goods by following four general criteria: (1) the property, nature and quality of the products; (2) the end uses of the product; (3) consumer tastes and habits; and (4) tariff classification of the products. Hence the physical properties, the extent to which the product may be perceived as serving the same end use, the extent to which consumers perceive and treat the products as an alternative and the international classification of the products for tariff purposes is what ought to be taken into account. See Working Party on *Border Tax Adjustments*, BISD 18S/97, para. 18.

17 Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* WT/DS141/RW (29 November 2002), para. 51.

18 Article 2.3 of the Anti-Dumping Agreement.

19 *Ibid*.

20 Article 2.1 of the Anti-Dumping Agreement.

21 *US – Stainless Steel*, *supra*, note 15, paras 6.90–6.91.

22 Article 2.2 of the Anti-Dumping Agreement. The Article also permits the use of the two criteria mentioned above when, besides sales not being in the ordinary course of trade, such sales may also not permit a proper comparison because of a particular market condition or there is a low volume of sales in the domestic market of the exporting country. Also see Article 2.2.2 of the Anti-Dumping Agreement for the calculation of administrative, selling and general costs, and profit.

23 Article 2.4 of the Anti-Dumping Agreement. Also see *US – Stainless Steel*, *supra*, note 15, para. 166, 167 and 169, which underscored that the purpose of Article 2.4 of the Agreement is to enable investigating authorities to ensure that the sale was not made by the producer or exporter, but instead by another party.

24 Act 26 of 1914.

enact legislation on anti-dumping.[25] After several amendments and legislation being enacted over a period of time,[26] anti-dumping is currently regulated by virtue of the International Trade Administration Act 2002 (ITAA), read along with the Anti-Dumping Regulations 2003 (ADR). However, the Customs and Excise Act 1964 continues to regulate the imposition of anti-dumping duties on dumped imports.[27] The Act and the Regulations have been passed in order to comply with the obligations imposed by the WTO's Anti-Dumping Agreement.[28] Accordingly, the International Trade Administration Commission (the Commission) currently administers the regulation of the provisions of the Act and its pertinent Regulations.[29]

South Africa has been one of the most prolific users of anti-dumping measures.[30] Even though it is has been a Member of the WTO since the latter's inception in 1995, whether or not the WTO's Anti-Dumping Agreement is a part of South African municipal law has been a matter of contention, given that the Agreement has not yet been specifically promulgated as a municipal law in South Africa.[31] Nevertheless, the country's Constitution specifically provides that the

25 Viner, *supra*, note 10, at pp. 209–10. Canada, Australia and New Zealand were the three countries to adopt anti-dumping legislation before South Africa.

26 For a historical analysis of the anti-dumping regime in South Africa, see generally UNCTAD/WTO International Trade Centre, *Business Guide to Trade Remedies in South Africa and the Southern African Customs Union*, International Trade Centre, Switzerland (2003); O. S. Sibanda, 'An Assessment of WTO Compliance by the South African Anti-Dumping Regime in Respect of the Determination of Causation', 76 *Journal of Contemporary Roman-Dutch Law* (2013),173, at pp. 178–9; and G. Brink, *Anti-dumping and Countervailing Investigations in South Africa: A Practitioner's Guide to the Practice and Procedures of the Board on Tariffs and Trade*, Gosh Trading (2002).

27 Customs and Excise Act 91 of 1964, Chapter 6, Sections 55–55A of the Act regulates the imposition of anti-dumping measures in South Africa. Also see generally P. Osode, 'The Scope of Interested Parties' Rights to Procedural Fairness in the Enforcement of South African Anti-Dumping Law: *Board on Tariffs and Trade and Others* v. *Brenco Inc. and Others*', 16 *Speculum Juris* (2002), 290.

28 Both the Act and the Regulations are notified under the WTO laws. See WTO, *Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements*, Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures G/ADP/N/1/ZAF/2 (20 January 2004); read along with General Notice 3197 of 2003.

29 See generally G. Brink, *Anti-Dumping in South Africa*, TRALAC Working Paper D12WPO7 (2012), at p. 2.

30 G. Brink, 'A Theoretical Framework for Anti-Dumping Law in South Africa', unpublished LLD thesis, University of Pretoria), 54–5, which elucidates that South Africa had imposed at least 137 anti-dumping investigations by the advent of the GATT. In the period between 1921 and 1994 itself, South Africa initiated at least 851 anti-dumping investigations. See Brink, *supra*, note 26, at p. 3. Besides, the WTO website states that the country is among the top ten users of anti-dumping, initiating 229 investigations between 1995 and 2014. See http://www.wto.org/english/tratop_e/adp_e/adp_e.htm.

31 See section 231(2) of the Constitution Act 1996, which provides that 'an international Agreement binds the Republic [of South Africa] only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an Agreement of a technical, administrative or executive nature, referred to in subsection 3'. Also see Debates of the Senate of South Africa, column 554 (6 April 1995); Debates of the National Assembly of South Africa, columns 642 and 653 (6 April 1995); Brink, *supra*, note 29, at p. 4; and N. Joubert, *The Reform in South Africa's Anti-Dumping Agreement*, available at https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm, at 2 (accessed 2 June 2014).

courts, while interpreting any legislation, must prefer the interpretation that is consistent with international law to the interpretation that is inconsistent.[32] The Court, in the *Chairman of the Board of Tariffs and Trade* v. *Brenco*,[33] indicated that the obligations set forth by the WTO's Anti-Dumping Agreement offer some assistance in adjudging the fairness of the investigating authorities in the matter of anti-dumping investigations.[34] The Supreme Court of Appeals, in *Progress Office Machines* v. *SARS*,[35] provided much more clarity as to South Africa's relationship with the Anti-Dumping Agreement. It elucidated that an international agreement would only become a law in the Republic of South Africa when it is enacted by the national legislation. However, the passing of the ITAA and the ADR indicate the intention of the South African Parliament to give effect to the provision of the treaties (in this case being the WTO's Anti-Dumping Agreement), provided that the latter is in conformity with section 233 of the South African Constitution.[36]

Hence it remains vital that the provisions of the ITAA, read along with the ADR 2003, are in conformity with the obligations set forth by the WTO in this regard.

IV. EVALUATING THE COMPATIBILITY OF THE SOUTH AFRICAN ANTI-DUMPING REGIME WITH THE WTO DISCIPLINES

A. The Meaning of 'Dumping' According to South African Laws vis-à-vis the WTO Disciplines

The ITAA 2002 defines 'dumping' as:

> The introduction of goods into the commerce of the Republic or the Common Customs Area at an export price contemplated in section 32(2)(a) that is less than the normal value, as defined in section 32(2) of those goods.[37]

The regulation of anti-dumping is therefore not merely limited to the Republic of South Africa, but is also extended to the Southern African Customs Union (SACU) which is comprised of Botswana, Lesotho, Namibia and

32 Section 233 of the Constitution Act 1996. Besides the South African Constitution, the Promotion of Access to Information Act 2 of 2000 along with the Promotion of Administrative Justice Act 3 of 2000 also impact anti-dumping investigations. Accordingly, section 36(1)(b) and (c) of the former provides the right to access information held by either the state or individuals, unless it relates to 'financial, commercial or scientific or technical information … of a third party, disclosure of which would be likely to cause harm to the commercial or financial interests of that party'. The latter Act provides for administrative action on the basis of natural justice.

33 *The Chairman of the Board of Tariffs and Trade* v. *Brenco* 2001(4) SA 511.

34 *The Chairman of the Board of Tariffs and Trade* v. *Brenco* 2001(4) SA 526 (A).

35 *Progress Office Machines* v. *SARS* (2007) SCA 118.

36 *Progress Office Machines* v. *SARS* (2007) SCA 118 para. 6; and *International Trade Administrative Commission* v. *SCAW (Pty) Ltd* CCT 59/09 (2010) ZACC 6 para. 2. Also see International Trade Centre, *supra*, note 26, at p. 3. Interestingly, the Reports of the Commission also indicate that the investigation procedure is conducted in accordance with the ITAA 2002 and the Anti-Dumping Agreement.

37 Section I(1) of the ITAA.

Swaziland (commonly referred to as BLNS countries) apart from South Africa.[38] Accordingly, the Commission is responsible for the investigation, determination of dumping, injury, causality and the duties, on the basis of which it makes recommendations to the Minister of Trade and Industry (South Africa).[39] The final decision-making power as to whether or not to implement the anti-dumping duty nevertheless rests with the latter.[40] Consequently, the determination of whether a product has been dumped in the SACU industry would in turn depend on whether the export price of such a 'like' product[41] is less than the normal value.

B. The Determination of Normal Value and the Export Price

While the terms 'export price' and 'normal value' have been defined in the ITAA 2002, the ADR 2003 sets out detailed guidelines for the evaluation of these.

1. Export Price

The ITAA 2002 defines 'export price' as:

> the price actually paid or payable for goods sold for export, net of all taxes, discounts and rebates actually granted and directly related to that sale.[42]

2. Constructed Export Price

The ADR 2003 additionally sets out the manner in which a 'constructed export price' may be calculated in the presence of certain circumstances.[43] Hence, when there is no export price, or when the exporter or the foreign producer and importer are related, or the invoiced export price appears to be unreliable for any other reason, the export price may be constructed from the first point of resale to an independent buyer.[44] Accordingly, the Commission is required to deduct the costs that have been incurred between the exporter's ex-factory price and the price at

38 The SACU has been defined by the Customs and Excise Act 91 of 1964 as a 'state or territory with the government of which an Agreement has been concluded under Section 51 of the Customs and Excise Act 1964'. Also 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 476 (26 May 2014), in which the Minister of Trade and Industry was requested to direct the ITAC to investigate alleged injury caused to the sole manufacturer of soda ash in Botswana as a result of dumping of soda ash by exporters in the USA.

39 G. Brink, 'South Africa', in Derk Bienen et al. (eds), *Guide to International Anti-Dumping Practice*, Kluwer Law International (2013), p. 522. On the other hand, the ITAA provides for complete independence of the Commission, requiring it to take decisions in its own right. See generally G. Brink, 'The Roles of the SACU Agreement, the International Trade Administration Commission and the Minister of Trade and Industry in the Regulation of South Africa's International Trade', 3 *Journal of South African Law* (2013), 419–36.

40 *Ibid*.

41 ADR 1, 2003.

42 Section 32(2)(a) of the ITAA.

43 ADR 10, 2003.

44 *Ibid*., Regulation 10.1.

which the product is first sold to an independent buyer, plus a reasonable profit that has been realised by the importer.[45] The construction of such an export price thus requires 'the allocation of profits in the same ratio as the costs incurred by the two parties'.[46]

The ADR outlines the method for the calculation of the reasonable profit on the basis of (1) the total cost by the exporter/producer; (2) the total cost by the importer, plus the costs from the ex-factory export point of the exporter/producer; and (3) the total profit realised by both the exporter/producer and importer. Furthermore, the ADR allocates the profit in the same ratio as the cost incurred by the parties,[47] as a result of which the constructed export price could actually be lower than the invoiced export price. This method by which South Africa calculates its constructed export price was a matter of contention in the WTO dispute of *South Africa – Anti-Dumping Duties on the Import of Certain Pharmaceutical Products from India*, in which India argued that the manner in which South Africa reaches its constructed export price is unreasonable because it results in a higher margin of dumping.[48]

Brink elucidates this situation by illustrating that if the total cost of the exporter is, for instance, $900 (excluding the exporter's profit of $120), and the total cost of the importer is $450 (including all the ex-factory costs from the export point), with a profit of $30, the allocated profit to the importer would be $900 + $450 = $1,350.[49] This amount ($450) (the importer costs) would then be divided by $1,350 (total cost in chain) to derive the allocated profit. The importer's allocated profit would thus be 33.3 per cent or $50.[50] Given the fact that the export price must be constructed on the basis of the price at which the goods are first sold to an independent buyer after deducting the costs (and the allocated profit) incurred by the importer, the result would then be a deflated export price.[51] Consequently, suppose the selling price to an independent buyer is $1,500, and if the costs incurred between exportation and resale (being $450, as mentioned) plus the allocated profit ($50) have been deducted, the constructed export price would only be $1,000 as against $1,020 (that is $900 + $120: being the exporter's profit).[52]

3. Normal Value

The term 'normal value' has been defined by the ITAA 2002 to mean 'the comparable price paid or payable in the ordinary course of trade for like goods intended

45 ADR 10.2 and 10.3, 2003.
46 *Ibid*., Regulation 10.3(c).
47 *Ibid*., Regulation 10.3(c).
48 WTO, *South Africa – Anti-Dumping Duties on the Import of Certain Pharmaceutical Products from India*, Request for Consultation by India WT/DS168/1 (13 April 1999). The dispute did not reach the stage of being considered by the Panel on being withdrawn by virtue of an amicable solution between the governments of India and South Africa.
49 Brink, *supra*, note 29, at pp. 15–16. Also see G. Brink, 'The 10 Major Problems with the Anti-Dumping Instrument in South Africa', 39 (1) *Journal of World Trade* (2005), 147, at p. 155.
50 *Ibid*.
51 *Ibid*.
52 *Ibid*.

for consumption in the exporting country or country of origin'. Besides, the ADR clarifies the definition of normal value, as provided in the ITAA 2002, to mean:

> (a) the price paid for like goods in the ordinary course of trade for home consumption in the country of export or the country of origin by the exporter, the producer or its related party under investigation; or
> (b) where such price is not known, the price at which such like goods are sold on the same market by another seller or sellers in that market.[53]

4. Constructed Normal Value

Similar to the WTO's Anti-Dumping Agreement, the ITAA 2002 bases the evaluation of the normal value on whether the 'like goods' are sold in the 'ordinary course of trade', in the absence of which it (that is the normal value) can be calculated with the help of either:

> i. the constructed cost of production of the goods in the country of origin when destined for domestic consumption, plus a reasonable addition for selling, general and administrative costs and productions; or
> ii. the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative.[54]

While the determination of 'normal value' is in line with WTO disciplines in some instances,[55] at the same time, the establishment of the same is seriously flawed in several other respects, rendering it WTO incompatible on the whole.

First, the Anti-Dumping Agreement stipulates that if there are no sales of a like product in the ordinary course of trade, the calculation of the normal value shall be determined by primarily:

> a comparison with the comparable price of a like product when exported to an appropriate third country; or with the comparison with the cost of production in the country of production, plus the reasonable addition for the administrative, selling, general costs and profit.

53 ADR 8.1, 2003.

54 Section 32(2)(b) of the ITAA.

55 The ADR are based on the Anti-Dumping Agreement as far as issues such as: the definition of a like product (ADR 1 and Article 2.6 of the Anti-Dumping Agreement); when sales of a like product in the domestic market in the exporting country may be considered sufficient (Regulation 8.3 and footnote 2 of Article 2.2 of the Anti-Dumping Agreement); the basis on which costs shall be calculated for the determination of dumping (ADR 8.11 and Article 2.2.1.1 of the Anti-Dumping Agreement); and the provision for the investigation to be limited to a reasonable number of parties or products in situations where the number of producers, exporters, importers or products is large (ADR 8.6 and Article 6.10, 6.10.1 and 6.10.2 of the Anti-Dumping Agreement).

The ITAA 2002 on the contrary gives primacy to the constructed normal value over the price of the like product when exported to an appropriate third country. The method of calculating the normal value was similarly objected to by India in *South Africa – Pharmaceutical Products from India*, when the Board of Tariffs and Trade, South Africa made a determination of dumping of ampicillin and amoxycillin into SACU. India claimed that this resulted in a higher margin of dumping.[56]

Second, the ITAA permits the calculation of the margin of dumping on the basis of either the export price to a third country or a surrogate country.[57] This provision falls outside the parameters stipulated by the WTO because the Anti-Dumping Agreement merely permits the determination of the margin of dumping on the basis of the export price in a third country and not alternatively on the basis of a surrogate country. Also, the term 'surrogate' has nowhere been defined in either the ITAA 2002 or the ADR 2003. In a similar context, the Act permits the use of the normal value in a third or surrogate country when 'the normal value in the exporting country or country of origin cannot be established according to free market principles due to government intervention'.[58] This provision creates difficulties in evaluating the circumstances in which the normal value in the exporting country or country of origin cannot be established according to free market principles because of government intervention, given that neither the term 'free market principles' nor 'government intervention' has been defined. Hence, even though the ITAA 2002 proposes a solution to the situation stipulated in the Anti-Dumping Agreement, namely when the normal value in the exporting country is difficult to determine due to a complete monopoly, where prices have been fixed by the state[59] the failure to define these terms raises substantial ambiguities.

Interestingly, the Anti-Dumping Agreement does not define the term 'ordinary course of trade' but on the contrary only outlines circumstances in which sales below cost would not be considered to have occurred in the ordinary course of trade. Hence, when such sales (below cost) have occurred (1) during extended periods of time; (2) in substantial quantities; and (3) at prices that do not provide for recovery of all costs within a reasonable period of time; they would not be considered to be in the ordinary course of trade.[60]

On the other hand, the ADR additionally permits the Commission to deem such sales as not being in the ordinary course of trade if they do not reflect 'normal commercial quantities'. However, what is meant by 'normal commercial quantity'

56 WTO *South Africa – Anti-Dumping Duties on the Import of Certain Pharmaceutical Products from India*, Request for Consultation by India WT/DS168/1 (13 April 1999).

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

58 *Ibid*., section 32(4).

59 ADR 8.4, 2003.

60 Article 2.2.1 of the Anti-Dumping Agreement. Also see Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R (16 November 2007), paras 7.274–7.277 (EC–Norway); and Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (24 July 2001), paras 139–40.

has not been defined in the Regulations. Besides, the Regulations also fail to take account of sales not being in the ordinary course of trade when they 'are at prices that do not provide for recovery of all costs within a reasonable period of time'.[61]

Fourth, the Regulations are additionally inconsistent with the WTO obligations in the manner in which they prescribe the calculation of the margin of dumping[62] in situations where the goods are not shipped directly from the country of origin, but rather from an intermediate country.[63] The Anti-Dumping Agreement provides that the margin of dumping shall be determined by comparing the comparable price at which the products are sold in the exporting country (namely the intermediate country), unless they are merely transshipped through that country, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.[64] On the contrary, the ADR permits a comparison with the comparable price of products in *either* the country of origin *or* the exporting country, making it WTO inconsistent.[65] Consequently, while the Anti-Dumping Agreement provides for a comparison with the comparable price in the intermediate country, except in the presence of the three situations mentioned above, the Regulations permit the Commission to compare the products with the comparable price in either the country of origin or the exporting country (namely the intermediate country).[66]

C. The Determination of Material Injury and a Causal Relationship in the South African Anti-Dumping Regime vis-à-vis the WTO Disciplines

ADR 13–16 regulate the ITAC's evaluation of causality and material injury in anti-dumping investigations.

61 Cf. Article 2.2 of the Anti-Dumping Agreement. Hence, if it were found that more than 20 per cent of the sales are made at a loss over a period of more than six months, with the full expectation that these costs would be recouped in a short period, such sales would be in the ordinary course of trade. In other words, according to South African Anti-Dumping Laws, these would be outside the ordinary course of trade. The Panel in *EC – Salmon* interpreted the phrase to mean all sales that are below the weighted average costs during the period of investigation, and do not provide the recovery of costs within a reasonable period of time. 'Reasonable period of time' would in turn be equivalent to the period of investigation. See *EC – Salmon*, paras 7.275 and 7.277.

62 The margin of dumping is the difference between the normal value and the export price and is defined in Article 2.4 of the Anti-Dumping Agreement. Also see Panel Report *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R (8 August 2002), para. 7.335; and G. N. Horlick and P. A. Clarke, 'Standards of Panels Reviewing Anti-Dumping Determinations under the GATT and the WTO', in E.-U. Petersmann (ed.), *WTO Jurisprudence and Policy: Practitioners' Perspectives* (2004) at 418 which defines a dumping margin as 'a comparison of individual prices to individual prices or weighted average prices to weighted average prices'.

63 See ADR 8.4, 2003.

64 Article 2.5 of the Anti-Dumping Agreement.

65 ADR 8.4, 2003.

66 This implies that the comparison with the comparable price in the country of origin may be established even in the absence of the three scenarios mentioned in the Anti-Dumping Agreement, namely when goods are not merely transshipped through the country of export, or they are produced in the country of export, or there is a comparable price for them in the country of export. Cf. Article 2.5 of the Anti-Dumping Agreement.

1. Material Injury and Causality

The Agreement does not define the term 'injury'[67] but only sets forth the circumstances in which 'material injury' would be considered to have occurred, namely on the basis of positive evidence and an objective examination of both the volume of dumped imports and their effect on prices in the domestic market for like products, and also the consequent impact of these imports on the domestic producers of such products.[68] Hence, the volume of dumped imports must be considered on the basis of whether there has been a significant increase in dumped imports, either absolutely or relatively, to the production or consumption in the importing Member.[69] Next, after the volume of the dumped imports has been examined, the investigating authority must then examine the effect of the dumped imports, and whether these result in significant price undercutting in comparison to the price of the like product in the importing country,[70] significant price depression or significant price suppression.[71]

Although the determination of material injury under the ADR is similar to that provided for in the Anti-Dumping Agreement, namely the proof of actual material injury, a threat to material injury or the material retardation of the establishment of an industry,[72] there appears to be several inconsistencies with the WTO disciplines in this regard. Even so, as far as the purpose of evaluating whether the dumped imports have caused material injury to the domestic industry is concerned, the Regulations appear to be more detailed than the Anti-Dumping Agreement in so far as they empower the Commission to consider the market share of the dumped products,[73] the magnitude of the margin of dumping[74] and the price of undumped imports in the market.[75] The Regulations additionally empower the Commission to 'consider' whether there has been a change in the volume of dumped imports either absolute or relative to the production or consumption in the SACU market, and whether this affects the SACU industry in terms of price undercutting experienced by the latter.[76] The ADR is thus inconsistent with the Anti-Dumping Agreement, because it does not mandate an evidence of either

67 Article 3, footnote 9 of the Anti-Dumping Agreement. The Agreement defines 'injury' to mean *material injury to a domestic industry, threat of material injury to a domestic industry or material retardation to the establishment of such an industry*, unless otherwise specified.

68 Article 3.1 of the Anti-Dumping Agreement.

69 *Ibid*., Article 3.2.

70 *Ibid*. Also see Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R (26 February 2013), paras 7.50–7.57; Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat Rolled Electric Steel from the United States*, WT/DS414/R (15 June 2012), para. 7.530; and Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R (3 December 2010), para. 7.328.

71 *Ibid*. On the other hand, the ADR mandates the consideration of price undercutting, price depression and price suppression, and not any one factor.

72 ADR 1, 2003.

73 *Ibid*., Regulation 16.1(c).

74 *Ibid*., Regulation 16.1(d).

75 *Ibid*., Regulation 16.1(e).

76 *Ibid*., Regulation 16.1(a) and (b).

a 'significant change' in the volume of dumped exports or a 'significant price undercutting' by dumped export.[77]

Another serious deficiency with respect to the determination of injury in anti-dumping investigations has been the Commission's failure to 'compare' the significant price undercutting by the dumped imports with the price of the like product in the SACU industry, and consider the differences between these products. However, an analysis of the Commission's procedures shows that it has defaulted in this respect. For instance, in the recent investigation into the alleged dumping of wheelbarrows from China, the Commission imposed preliminary duties on three producers from China, without considering either the differences in prices between steel and PVC steel wheelbarrows or the differences in sizes between the wheelbarrows that were actually exported and the ones that were meant for sale in the domestic market. In other words, the Commission considered all these as 'like' products.[78] Similarly, in the *Poultry (Brazil)* dispute, the Commission failed to consider the differences within each of the categories of whole bird and boneless cuts resulting in differences in prices between these while determining the normal value.[79] Likewise, in *Threaded Rod (China)*, the Commission similarly overlooked the differences in size that existed in the threaded rods imported from China, or for that matter even in the types of threaded rods (being mild steel, galvanized, black steel or stainless steel).[80] The Commission ruled that the imported product was like the domestic product and would be considered as direct substitutes for the purpose of the investigation.[81] Accordingly, even though the Commission concluded that the imports caused material injury to the SACU industry and yet were not dumped,[82] it erred in this respect so far as it considered threaded rods of 1m and 3m to be directly substitutable.[83]

The determination of material injury additionally mandates the examination of the impact of dumped imports by means of an evaluation of all the 15 relevant economic factors and indices having a bearing on the state of the industry, as listed in Article 3.4 of the Anti-Dumping Agreement.[84] Even as the South African ADR

77 In other words, the Regulations merely mandate the investigating authority to consider, *inter alia*, whether there is a change in the volume of dumped imports (as against a 'significant' change), and the SACU industry experiences price undercutting by dumped imports (as against 'significant' price undercutting). Cf. Article 3.2 of the Anti-Dumping Agreement.

78 ITAC, *Investigation into the Alleged Dumping of Wheelbarrows Originating in or Imported from the People's Republic of China (China): Preliminary Determination* (28 January 2015).

79 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 399 (2013) (*Poultry – Brazil*).

80 ITAC, *Investigation into the Alleged Dumping of Fully Threaded Screws with Hexagon Heads, Excluding those of Stainless Steel, Originating in or Imported from the People's Republic of China: Final Determination* (Report 408) (2012).

81 *Ibid*., para. 2.3.2.

82 *Ibid*., paras 1.10 and 4.5

83 Also see G. Brink, 'X-Raying Injury Findings in South Africa's Anti-Dumping Investigations', 23 (1) *African Journal of International and Comparative Law* (2015), 144, at p. 162.

84 The 15 factors listed in the Anti-Dumping Agreement are 'the actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity;

lists the factors that must be taken into account while determining the material injury to the domestic industry,[85] there are glaring inconsistencies with the WTO disciplines in this regard. First, while on the one hand the WTO mandates an 'evaluation' of *all* the relevant factors that are listed,[86] the ADR on the contrary merely obligates the Commission to 'consider' these factors.[87] In a similar context, while the WTO obligates the investigating authority to evaluate the determination of injury to the domestic industry in terms of the 'actual and potential decline in sales',[88] the Regulations merely mandate the Commission to consider the change in domestic performance of the SACU industry in terms of the 'sales volume'.[89] In other words, while the WTO disciplines require the evaluation of the actual and potential decline in the price at which the domestic like products would be sold, the Regulations on the contrary merely require the consideration of whether the sales in domestic like products have been impacted in terms of quantity. However, the fact that the ADR requires the Commission to merely consider the factors as against evaluating the same has led to serious implications, rendering it largely WTO inconsistent. For instance, in the recent investigation of dumping of Portland cement in the SACU industry by Pakistan-based cement companies, the Commission failed to conduct an *evaluation* of the effect of all the 15 factors on the domestic industry so as to cause material injury in the latter.[90] Instead, the Commission merely provided a list of the performance of the SACU cement industry in terms of the 15 factors, without providing a thorough examination of how these factors, individually and combined, affect the SACU industry so as to cause material injury. As a result, the Commission imposed preliminary duties on bagged Portland cement ranging from 14.29 per cent to 77.15 per cent.[91] For considering the effect of the dumped cement in terms of price undercutting, price suppression and price depression, it merely ruled on the existence of these, without taking into account whether these were 'significant' in accordance with the Anti-Dumping Agreement.[92]

factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth and ability to raise capital on investments'.

85 See ADR 13.2, 2003.

86 See Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R (28 September 2000), para. 7.236; Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R (8 August 2002), paras 7.42–7.45; and Panel Report, *European Communities – Anti Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/RW (29 November 2002), para. 6.162.

87 Article 3.4 of the Anti-Dumping Agreement and South African Anti-Dumping Regulation 13.2.

88 Article 3.4 of the Anti-Dumping Agreement.

89 ADR 13.2(a), 2003.

90 ITAC, *Investigation into the Alleged Dumping of Portland Cement Originating in or Imported from Pakistan: Preliminary Determination*, Report 495 (29 April 2015), paras 5.3.3–5.3.4.

91 *Ibid*., para. 10.

92 *Ibid*., para. 5.3.2. In addition, while it was alleged that there was injury caused to the KZN region, in fact prices in this region were significantly lower than the dumped imports, in turn implying that there was indeed no price undercutting. However, the Commission failed to consider this factor while determining a casual relationship with the dumped imports.

Furthermore, in the recent investigation concerning the alleged dumping of frozen bone-in chicken from Germany, the Netherlands and the United Kingdom, the Commission, while considering the impact of the dumped imports in terms of price undercutting, price depression and price suppression, merely considered the negative trends in terms of price undercutting and price suppression, without explicitly explaining how these negative trends actually result in material injury to the SACU industry.[93]

The failure of South African authorities (in this case the Commission) to confirm to this obligation renders its decisions imposing anti-dumping duties (whether preliminary or definitive), in violation of its WTO obligations.

Similarly, the Commission's mere 'consideration' of relevant factors as against the 'evaluation' of these caused Brazil to initiate consultations in the WTO in the dispute of *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil*.[94] Brazil's main contentions were that South Africa violated its obligations in the WTO by the manner it, *inter alia*, determined injury.[95] Brazil argued that the Commission's decision regarding the material injury caused by the poultry (that is whole birds and boneless portions) imported from Brazil was flawed in so far as it was not based on an objective examination of the impact of the dumped imports on the domestic producers.[96] The Commission on the contrary merely listed the injury caused to the domestic industry in terms of the various factors.[97] No analysis with respect to the role played by each of these factors in causing material injury to the domestic industry by these imports (being whole birds and boneless portions) from Brazil was undertaken.[98]

The determination of a causal relationship between the dumped imports and the injury consequently caused remains the *sine qua non* in anti-dumping investigations. For the purpose of determining a causal relationship, both the Anti-Dumping Agreement and the ADR contain similar provisions, so as to base

93 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 492 (23 January 2015), paras 5.4.3–5.4.3.3. Also see ITAC, *Investigation into the Alleged Dumping of Wheelbarrows Originating in or Imported from the People's Republic of China (China): Preliminary Determination* (28 January 2015), para. 5.2.2.

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

95 *Ibid*., at p. 2.

96 *Ibid*.

97 See *Poultry (Brazil)*, ITAC Report 389, paras 5.3.1–5.3.16. Interestingly, while most of the factors showed no injury, the ITAC determined injury only on the basis of the few factors that showed injury, without indicating why an injury in terms of the latter factors outweighed the positive factors. See Panel Report, *China – X-ray*, *supra*, note 70, paras 7.190–7.217. Also see Brink, *supra*, note 83, at pp. 163–6; and G. Brink, 'One Hundred Years of Anti-Dumping in South Africa', 49 (2) *Journal of World Trade* (2015), 325, at p. 343, which highlights how the ITAC defaulted when it was unable to prove price depression and, additionally, the only indicators that showed injury were increased imports and import market share.

98 *Ibid*. Also see, for instance, WTO Panel Reports in *Guatemala – Cement II*, *Mexico – HFCS*, *EC – Bed Linen* and *China – X-Ray Equipment*, which affirm that there must be an evaluation of all the factors for the purpose of determination of injury.

the demonstration of such a causal relationship[99] on the consideration of all relevant evidence before the authorities.[100] However, while the WTO mandates the authority to *examine* any known factors other than dumped imports that are at the same time causing injury to the domestic industry[101] and not attribute these to dumped imports, the ADR on the other hand obligates the Commission to merely 'consider' (as against examining) the other known factors that may be causing injury to the domestic industry.[102]

While determining the existence of a causal relationship between the dumped imports and material injury consequently caused, the WTO mandates the investigating authority to terminate the investigation if the margin of dumping is *de minimis* or if the volume of exports is negligible.[103] The ADR are based on the WTO disciplines in this regard in so far as they stipulate that the Commission shall consider the volume of dumped imports from a particular country to be negligible if they:

> account for less than three percent of the total imports into the SACU industry; unless the countries which individually account for less than three percent of the total imports of the like product into the SACU industry collectively account for more than seven percent of the total imports of the like product into the SACU market.[104]

Nevertheless, the ADR differs substantively in so far as it obligates the Commission not to even initiate the investigation,[105] while the Anti-Dumping

99 The 'demonstration of causal relationship' has been elucidated by the Appellate Body in *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414AB/R (18 October 2012), para. 226 (*China – GOES*), which clarifies that price correlation becomes important in order to ascertain competition between the dumped imports and the like products in the domestic industry. Hence substantial divergences between the imports and the domestic products may mean that the two products are not in competition with one another. Also see, Panel Report, *China – Autos (US)*, WT/DS440/R, para. 7.262. However, the Panel in the *China – X-Ray Equipment* dispute clarified the existence of a 'causal relationship' to mean an illustration of the effects of the dumped imports on domestic like products. It is more than a mere correlation or coincidence between the dumped imports and the domestic products, and requires a reasoned and adequate explanation of how the dumped imports have caused injury in the domestic industry. See Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R (26 February 2013), paras 7.245–7.251 (*China – X-Ray Equipment)*.

100 Article 3.5 of the Anti-Dumping Agreement and ADR 16.5, 2003.

101 See Article 3.5 of the Anti-Dumping Agreement and ADR 16.5 for the 'other known factors' that must not be attributed as having caused injury to the domestic industry. The only difference between the WTO disciplines and the ADR is that while the latter obligates the ITAC to merely consider those other factors to the extent that the interested party has submitted or that it itself has information on such factor(s), the former does not make any such stipulation. Nevertheless, the Panel in *China – X-Ray Equipment* pointed that in the event a party has not substantiated the information with regard to 'other known factors' causing injury to the domestic industry, the investigating authority is not obligated to consider such factors. See *China – X-Ray Equipment*, *supra*, note 70, para. 7.267; and Brink, *supra*, note 83, at p. 150.

102 Article 3.5 of the Anti-Dumping Agreement and ADR 16.5, 2003.

103 Article 5.8 of the Anti-Dumping Agreement

104 ADR 16.2, 2003.

105 Cf. Article 5.8 of the Anti-Dumping Agreement.

Agreement stipulates that the investigation would only be terminated (yet the investigation must be initiated).

D. Investigation and Relief Under the South African Anti-Dumping Regime vis-à-vis the WTO Disciplines

1. Investigation Procedures

(a) Oral Information

During the investigation phase, the Anti-Dumping Agreement, *inter alia*, permits the parties to present oral information regarding the information requisite to the anti-dumping investigation.[106] Such oral information must nonetheless be subsequently substantiated with a written representation.[107] Although the ADR provides for oral hearings on the request of an interested party during the preliminary and final investigation phase, it additionally mandates the interested parties to submit a non-confidential version of the documents it would rely on during such oral hearing, along with the request for the hearing.[108] Consequently, the ADR is WTO incompatible by reason that it mandates the presentation of the non-confidential version of the documents at the time of the request, whereas, on the contrary, the Anti-Dumping Agreement requires written information of the same to be submitted after such hearing.[109]

(b) Relief in the Form of Provisional Measures

The South African ADR authorises the Commission to impose provisional measures, provided a publication in the Government Gazette that is investigating the imposition of anti-dumping duties on goods imported from a supplier or a territory has been made in accordance to the provisions of the Customs Act 91 of 1964.[110] Accordingly, a provisional measure may be imposed in the form of a provisional payment, serving as a security for the anti-dumping duty[111] and would be refunded in so far as it exceeds the amount of the anti-dumping duty,[112] or in the event that the Commission decides (before the expiration of the such provisional payment) that no final anti-dumping duty would be imposed.[113] Such measures may consequently be imposed for a period of six months,[114] extendable to nine months in certain circumstances.[115] Although the Anti-Dumping Agreement similarly provides for the imposition of provisional measures, the South African anti-dumping regime fails to address several aspects stipulated by the former. Thus where the Anti-Dumping Agreement specifically stipulates that investigating

106 Article 6.2 of the Anti-Dumping Agreement.
107 *Ibid*., Article 6.3.
108 ADR 5.4, 2003.
109 A similar view has also been supported by Brink – see *supra*, note 31, at p. 36.
110 Section 57A(1) of the Customs Act 91 of 1964.
111 *Ibid*., section 57A(3).
112 *Ibid*., section 57A(5).
113 *Ibid*., section 57A(4).
114 ADR 33.2, 2003.
115 *Ibid*., Regulation 33.3.

authorities may only impose provisional measures, *inter alia*, after the preliminary determination of dumping, the consequent injury caused[116] and the necessity of preventing such injury,[117] both the ADR and the Customs Act are silent with respect to the Commission's obligation to take these factors into account. Also, the omission of a specific clause mandating the Commission to impose such duties only when it is necessary to prevent injury to the SACU industry could result in arbitrariness and the Commission overstepping its duties. Likewise, such provisional payments under the South African regime can only take the form of a security for an anti-dumping duty, which may be retrospectively applied,[118] making it limited in its scope in so far as the latter additionally permits a security in the form of a cash deposit or bond.[119]

The ADR stipulates that the validity of provisional payments would normally be six months,[120] making it WTO incompatible insofar as the latter specifically mandates investigating authorities to imposes these for a period not exceeding four months, except when there is a request by exporters representing a significant percentage of trade involved.[121] In such circumstances, the maximum time for which the provisional payment can be imposed would be six months.[122] On the contrary, the ADR authorises the Commission to extend the validity of such provisional payments to nine months when there is a request by any interested exporter,[123] in violation of its obligations under the Anti-Dumping Agreement, which obligate that such extensions may only be permitted when a request is made by exporters of a significant percentage of trade. Accordingly, as per the WTO disciplines, the period of provisional payment may only be extended to nine months when the investigating authority 'examines, in the course of the investigation whether a duty lower than the margin of dumping would be sufficient to remove injury' and the investigating authority decides upon a request by the exporters representing a significant percentage of trade that the period should be extended to nine months.[124]

116 Article 7.1(ii) of the Anti-Dumping Agreement.
117 *Ibid*., Article 7.1(iii).
118 Section 57A(3) of the Customs Act 91 of 1964.
119 See Article 7.2 of the Anti-Dumping Agreement.
120 ADR 33.2, 2003.
121 Article 7.4 of the Anti-Dumping Agreement. The Panel in the *Mexico – Corn Syrup* dispute affirmed that provisional measures could only be applied for a maximum of four months, unless there is a request by exporters who represent a significant percentage of trade, in which circumstance this period may be extended to six months. A provisional measure therefore imposed beyond this period would be WTO-inconsistent. See Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (28 January 2000), at paras 7.181–7.182.
122 *Ibid*.
123 ADR 33.3, 2003. Also see Regulation 36 which permits exporters to request the Commission to extend the validity of the provisional measure to nine months, for the purpose of submitting additional information to address any deficiencies. This Regulation is also WTO-incompatible.
124 Article 7.4 of the Anti-Dumping Agreement. According to the Agreement, the period of four and six months mentioned above, may be extended to six and nine months only if the lesser duty rule is considered. Accordingly, because the lesser duty rule is recognised in South Africa, the ITAC may impose provisional measures for six months. However, in practice, in South Africa,

(c) Price Undertakings

While the Anti-Dumping Agreement permits investigating authorities to suspend or terminate anti-dumping proceedings without the imposition of provisional measures or anti-dumping duties, when it receives a satisfactory *voluntary* undertaking from an exporter in accordance with Article 8.1 of the Agreement, the ADR on the other hand is vague and ambiguous insofar as it remains silent on whether the Commission is empowered to suspend or terminate the proceedings without the imposition of provisional measures or anti-dumping duties.[125] Secondly, the ADR permits proceedings to be terminated or suspended on the receipt of satisfactory price undertakings, irrespective of whether they are voluntary or not,[126] rendering it WTO incompatible because it leaves scope for the Commission to impose such undertakings on exporters. Likewise, while the Agreement mandates the authorities to accept price undertakings in the form of price increases, these must in no case be higher than necessary to eliminate the margin of dumping.[127] South African Regulations remain silent on this aspect.[128]

(d) Imposition of Definitive Anti-Dumping Duties

The imposition and collection of definitive anti-dumping duties is regulated by Article 9 of the Anti-Dumping Agreement, obligating the investigating authority to, *inter alia*, facilitate the prompt refund of such duties that are assessed on a prospective basis and are in excess of the margin of dumping.[129] In this respect, the South African anti-dumping regime is WTO incompatible insofar as the Customs Act, the ITAA or the ADR do not provide for the refund of anti-dumping duties collected in excess of the margin of dumping.[130]

(e) Rationalisation of the Determinations

The Anti-Dumping Agreement mandates investigating authorities to provide sufficient details on findings and conclusions on all issues of fact and law, while

the lesser duty rule can only be applied if both the exported and the importer cooperate. In cases when they fail to cooperate, ITAC cannot impose provisional measures for six months, and must only impose them for four months, according to the provisions of the Anti-Dumping Agreement. Hence in every circumstance that the ITAC imposes a provisional measure for more than four months, even when the lesser duty rule is not considered in a given investigation, it (the ITAC) violates the mandate of the WTO.

125 ADR 39.1, 2003. Cf. Article 8.1 and 8.5 of the Anti-Dumping Agreement.

126 *Ibid*.

127 Article 8.1 of the Anti-Dumping Agreement.

128 ADR 39.1, 2003.

129 Article 9.3.2 of the Anti-Dumping Agreement.

130 See section 56 of the Customs Act 91 of 1964, read along with ADR 38, 2003. Also see ADR 65 and 66, which permits an importer to request reimbursement of the anti-dumping duties collected *if it is shown that the anti-dumping margin has been eliminated or reduced to a level, which is below the level of the duty in force.* In this context, Brink points out that the only way such refunds can be facilitated is by the retroactive amendment of the anti-dumping duties under the provisions of the Customs Act. As a result, exporters would potentially manipulate (by lessening) the margin of dumping (by increasing the export price, and the difference between the normal value and export price reduces) so as to request a refund of the duty. Because the Customs Act exclusively provides for the retroactive reduction or withdrawal of the duties (and not retroactive increase) the exporters can then subsequently decrease the export price, in turn resulting in an elevation of the margin of dumping. See Brink, '10 Major Problems', *supra*, note 49, at p. 151.

making a preliminary or final determination.[131] With respect to the imposition of definitive duties or acceptance of price undertakings, it similarly obligates authorities to provide, *inter alia*, a reasoned decision on the imposition of such a definitive duty or acceptance of price undertaking.[132] The South African anti-dumping laws merely obligate the Commission to state the relevant issues of fact and law in reaching its preliminary decision (as against providing sufficient details), without imposing a similar mandate in terms of final determinations or stating the respective party's submissions in its reports. In other words, it completely ignores the WTO requirements to provide reasoned decisions at the time of concluding or suspending an investigation for the imposition of definitive duties or for the acceptance of price undertakings. In the *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil* dispute, Brazil challenged South Africa's decision to impose preliminary duties insofar as the Commission failed to respect its WTO obligations to provide, *inter alia*, detailed (or sufficient) explanations for its findings on law and fact, before it imposed the preliminary duties on whole birds and boneless portions.[133] Besides, even when the Minister recommended the Commission to terminate the investigation without the imposition of definitive duties, the latter's final report did not reflect the basis for the Minister's decision.[134]

(f) Review

In general, the South African anti-dumping regime recognises five types of reviews: interim reviews, new shipper reviews, sunset reviews, anti-circumvention reviews and judicial reviews.[135] This part in turn analyses the inconsistencies that exist between the South African principles on reviews of anti-dumping duties and the WTO disciplines.

(i) Sunset Reviews

The Anti-Dumping Agreement mandates a review of the continued imposition of definitive anti-dumping duties either by the investigating authorities' own initiative or by a request by any interested party.[136] Consequently, a definitive anti-dumping duty must be terminated on a date not later than five years from its imposition, unless the investigating authorities have initiated a review to determine whether such dumping or injury would continue or recur.[137] Under the provisions of the Anti-Dumping Agreement, sunset reviews should ordinarily be initiated by the investigating authorities' own initiative or subsequent to the receipt

131 Article 9.3.2 of the Anti-Dumping Agreement.

132 *Ibid*., Article 12.2.

133 WTO, *South Africa – Frozen Meat from Fowls*, *supra*, note 94.

134 In other words, the ITAC's report recommends the imposition of anti-dumping duties. The pertinent information was obtained through an interview with Dr Gustav Brink, Associate Director, XA International Trade Advisors. Also see Brink, '10 Major Problems', *supra*, note 49, at pp. 148–9 for other issues pertaining to the lack of transparency in South African anti-dumping procedures; and Brink, 'South Africa', *supra*, note 39, at pp. 555–6.

135 See Part D, ADR 2003.

136 Article 11.2 of the Anti-Dumping Agreement.

137 *Ibid*., Article 11.3.

of a written application by any interested party. The investigating authorities shall therefore carry out sunset reviews in accordance with the anti-dumping disciplines on evidence and procedure set forth in Article 6 of the Agreement.[138]

In this context, South African disciplines on sunset reviews are incompatible with WTO provisions in various respects. First, where the Anti-Dumping Agreement expressly mandates a review of the continued imposition of definitive anti-dumping duties by the investigating authorities' own initiative, the ADR on the contrary exclusively provides for sunset reviews on the basis of a written application by the interested parties, making no provision for self-initiation of such reviews by the Commission.[139] Additionally, where the Anti-Dumping Agreement obligates the investigating authority (in this case the Commission) to carry out sunset reviews in accordance with the provisions on evidence and procedure and thus establish the mere likelihood of the continuance or recurrence,[140] the Commission on the contrary mandates the interested party to substantiate the request with the basic information on which such a such a sunset review is based.[141] As a result, the interested party would now be under the burden to submit information on the normal value, the export price, material injury and also the causal relationship between the dumped imports and the injury to the SACU industry.[142]

Likewise, where the Anti-Dumping Agreement makes clear stipulations against the imposition of definitive anti-dumping duties beyond a period of five years unless a sunset review has been initiated, the South African practice has been in clear violation of the WTO disciplines in this regard. For instance, in the *South Africa – Uncoated Woodfree Paper* dispute, Indonesia challenged the South African anti-dumping measure, before the WTO dispute settlement, for the former's failure to terminate the anti-dumping duty for more than five years on imported white woodfree paper, despite a finding by the Commission (in the sunset review) that there is no likelihood of continuation or recurrence of dumping of the said products by Indonesia.[143]

In addition, the ADR stipulates that the maximum time within which all (investigations and) reviews must be finalised is 18 months,[144] while the Anti-Dumping Agreement mandates that definitive anti-dumping duties must be terminated on a date sunset reviews must normally concluded by investigating

138 *Ibid*., Article 11.4.

139 ADR 40–43, read along with ADR 54.

140 Article 11.2 and 11.3 of the Anti-Dumping Agreement.

141 ADR 41.1(f).

142 Also see Brink, '10 Major Problems', *supra*, note 49, at pp. 150–1, who opines that because the Regulations impose an obligation on the interested party to substantiate the request for review with information on, *inter alia*, the normal value, it increases the likelihood that the Commission would in all probability terminate the anti-dumping duties. This is because exporters would then be able to access information on the impending lapse of the duty and be able to manipulate the normal value, making it difficult for importers to obtain information on the normal value.

143 WTO, *South Africa – Anti-Dumping Measures on Uncoated Woodfree Paper*, WT/DS374/1 (16 May 2008).

144 ADR 20.

authorities, within a period of 12 months from the date of initiation.[145] Consequently, the Commission's failure to complete the review for more than four years after the initiation of the same was incompatible with the obligations created under the Anti-Dumping Agreement.[146]

(ii) Anti-circumvention Reviews

The ADR makes provision for review of the anti-dumping duties on the basis of circumvention[147] on five grounds, namely minor modification of products,[148] assembly operations, absorption of duty, country-hopping and the declaration on a different subheading.[149]

Among the various types of anti-circumvention reviews mentioned above, country-hopping reviews have been the most contentious for failing to be in line with WTO disciplines in several aspects.[150] According to the Regulations, a review may be sought on the basis of country-hopping when the exporter has shifted the supply of the product to a related party in a third country after the initiation of the investigation or the imposition of the preliminary or definitive anti-dumping duty.[151] In such circumstances, the domestic industry need not update its information as long as the application for such a review has been within one year from the date on which the final decision in the original investigation is lodged.[152] For the purpose of such a review, dumping from the related party in such a third country may be established on the basis of the normal value that has been established in the original exporting country (that is before it shifted the supply from the related producer in the third country) and the export price will then be calculated from the new exporting country.[153]

145 Article 11.4 of the Anti-Dumping Agreement.

146 *Ibid*. Although the Commission had already made a finding that there is no likelihood of continuation or recurrence of dumping by Indonesia in the said dispute, the mere fact that it still listed this review as ongoing until 2008 proved that it had failed to conclude the review within a period of 12 months as mandated by the Anti-Dumping Agreement.

147 See ADR 60 for the definition of 'circumvention', which is modelled on Article 13 of the European Basic Regulation 384/96.

148 See Board Report 4132 and 4160 (*Acrylic Fabrics – Turkey*). The finding of circumvention in the form of minor modification of products when Turkey began to export blankets in rolled form (which merely required to be cut across the marked line) was challenged by Turkey, which alleged that the Board's investigation procedure was incompatible with the relevant provisions of the Anti-Dumping Agreement. Turkey thus requested consultations with South Africa for reasons that the procedure adopted by the latter was improper insofar as it, *inter alia*, failed to notify the government of the former regarding the receipt of the documented application, and also did not provide the exporters a copy of the application. See WTO, *South Africa – Anti-Dumping Measures on Blanketing from Turkey*, WT/DS288/1 (9 April 2003). South Africa then withdrew the anti-dumping duties. See *Withdrawal of the Anti-Dumping Duty on Acrylic Fabric Originating in or Imported from the People's Republic of China and Turkey: Final Determination*, Report No. 25 (30 September 2003).

149 See ADR 60.2(b)–(f), 2003.

150 It must be noted that the provision for anti-circumvention review on the basis of country-hopping is peculiar to the South African anti-dumping regime and is not provided for in any other legislation in the world or in the WTO itself.

151 ADR 60.2, 2003.

152 *Ibid*.

153 *Ibid*., 60.3.

The manner, in which the Commission reviews an investigation or the imposition of preliminary or final duties poses several problems and is incompatible with South Africa's obligations under the WTO. First, the Anti-Dumping Agreement mandates the calculation of normal value on the basis of the price at which like products are sold in the exporting Member in the ordinary course of trade.[154] If, however, the calculation of normal value as stipulated above is not possible due to the existence of a *particular market situation or low volume of sales in the domestic market of the exporting country*, the investigating authority is permitted to determine the margin of dumping on the basis of the export price to an appropriate third country or a constructed normal value.[155] Consequently, the South African provisions permitting the calculation of normal value for imports from the original exporting country is in violation of the WTO mandates.

Second, the Anti-Dumping Agreement obligates the investigating authority to begin an investigation only after the application has been substantiated with, *inter alia*, the evidence on dumping, the material injury and a causal relationship between the two factors.[156] Anti-circumvention reviews on the basis of country-hopping violate this fundamental rule of the Anti-Dumping Agreement when they do not obligate the applicant to update the information if it is initiated within one year from the date of the publication of the definitive anti-dumping duty. This Regulation is in turn incompatible with the WTO rules because it fails to investigate on the basis of the evidence provided by the applicant that the imports from the related third party are indeed causing material injury, and that such material injury is a result or the effect of dumped products from such a related third party.

Third, the option not to update the information in the case of country-hopping also fails to adhere to WTO disciplines insofar as the information that would be used in the absence of providing fresh information and evidence on dumping, material injury and a causal relationship between the two would in turn be outdated.[157] Accordingly, it violates the mandate of comparing the normal value with the export price in respect to sales that have been made at as nearly as possible the same time.

The fourth problem arises with the failure to update information when an application has been filed within less than one year from the date of the publication of the final decision in the original investigation.[158] Consequently, while on the one hand the Anti-Dumping Agreement mandates the investigating authorities to examine the accuracy and adequacy of the evidence provided in the application in order to determine whether to initiate the investigation,[159] reviews on the

154 Article 2.1 of the Anti-Dumping Agreement.

155 *Ibid*., Article 2.2.

156 *Ibid*., Article 5.2.

157 This is because information does not require to be updated in case it is lodged within one year from the date of the publication of the final decision in the original investigation. As a result, the normal value is rendered outdated and unreliable by virtue of being more than two years old, on average.

158 See Anti-Dumping Regulation 62.2.

159 Article 5.3 of the Anti-Dumping Agreement.

basis of country-hopping fail to be in line with this obligation by not updating the information that would in turn provide evidence on, *inter alia*, dumping, material injury and a causal relationship. When information is not updated, it cannot in turn be verified in terms of accuracy and adequacy.[160] In the country-hopping investigation against gypsum plasterboard from Indonesia, the latter alleged that there was no evidence of a prima facie case of dumping on the ground that it was not required to submit the normal value (as the normal value of gypsum plasterboard in Thailand, which was the original exporter, was considered).[161] Similarly, in the investigation concerning flat rolled steel products from Malaysia,[162] the Commission, by failing to require updated information on the injury information, violated its WTO obligations to establish a causal relationship between the dumped flat rolled steel products from Malaysia and the consequent injury to the SACU industry. Instead, it continued to rely on the injury information from the original investigation pertaining to the dumping of these products from Australia.[163]

V. CONCLUSION

Admittedly, irrespective of the fact that South Africa has done much in order to bring its anti-dumping laws in line with its international obligations under the WTO, glaring inconsistencies continue to exist with the WTO's Anti-Dumping Agreement, which is the international law on this subject matter. While it is true that the country does attempt to abide by these obligations, it is incompatible in several crucial aspects that form the very crux of anti-dumping investigations such as its method of calculating the constructed normal value and the constructed export price, the determination of material injury, the evaluation of a causal relationship between the dumped imports and the injury caused to the SACU industry, the application of provisional measures, the imposition of definitive dumping duties, and its review procedures. Besides, understanding that these have, in the past, been the prime issues of contention between itself and foreign governments, it remains vital that South Africa strictly adheres to its WTO commitments with respect to anti-dumping in order to foster its relations with the international community. Accordingly, there is an urgent need for South Africa to revise both the law and the legal procedures involved in anti-dumping investigations, in order to become fully WTO-consistent.

160 See generally Brink, *supra*, note 39, at pp. 565–6; Brink, *supra*, note 31, at pp. 45–9; and G. Brink, *Anti-Dumping on TOFA: Hopping a Country Too Far?*, TRALAC Working Paper 10/2009 (October 2009).

161 See *Gypsum Plasterboard (Indonesia)*, ITAC Report 74.

162 See *Color Coated Steel Products (Malaysia)*, ITAC Report 167.

163 In a similar context, in country-hopping investigations for tall oil fatty acids (TOFA) imported from Finland (Notice 998 in Government Gazette 32415 of 24 July 2009) and the US (Notice 625 in Government Gazette 32253 of 29 May 2009), the Commission failed to update its injury information and instead relied on such information in its original investigation for TOFA imported from Sweden.

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