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A TOUGH BALANCING ACT: A DISCUSSION OF FREE TRADE AND PROTECTIONISM THROUGH THE LENS OF SOUTH AFRICA AND THE WTO ANTI-DUMPING AGREEMENT

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DECLARATION

I, **KARMEN WINFRED**, hereby declare that:

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Signature of candidate:

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KARMEN WINFRED **Date: 15 December 2017**

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ABSTRACT

There have been many examples and cases where countries have used the provisions of the Anti-Dumping Agreement in an advantageous yet unfair manner. As a result, there is a conflict emerging out of the fact that these states have an obligation to comply with the core principles of the World Trade Organisation (WTO), especially the principle of non-discrimination and free trade in the global community, while employing anti-dumping measures or engaging in protectionism. The WTO encourages as one of its main objectives free trade, which encourages member states to lower trade 'guards' or trade barriers in an attempt to facilitate trade between countries. The advantage of this is to promote competition between member states.

The legal document under scrutiny is the Anti-Dumping Agreement (ADA), which is a WTO agreement that was established to 'focus on how governments can or cannot react to dumping' in their countries. The Agreement permits government(s) to act against such activities where there is genuine and actual injury to the domestic industry.

If not strictly applied within parameters, the ADA procedures can become effective barriers to trade, which would bring it in conflict with the core principle of free trade, which advocates (as briefly mentioned above) that countries should practice trade in a way that is free of barriers. It has been said that an economy 'promoting free trade enhances competition within industries which in turn yields greater efficiency and better products particularly in domestic companies' (Krueger 1990, p 68). Countries that are member states of the WTO have a mandatory obligation to comply with the principles of the WTO, which include promoting free trade and refraining from imposing unnecessary barriers to trade.

One of the main users of barriers to trade in the form of anti-dumping duties and other protectionist tools is South Africa, which has become a prolific user of anti-dumping duties in recent years. This research thus attempts to rekindle WTO obligations within South Africa, while also being cognisant of the fact that protectionist policies can still be used, albeit in a justified manner.

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CHAPTER 1:
BACKGROUND AND INTRODUCTION TO THE RESEARCH

1.1 BACKGROUND TO AND OUTLINE OF THE RESEARCH PROBLEM

To date, disputes with South Africa over the Anti-Dumping Agreement have presented themselves where the prevalent issue mainly concerns the imposition of anti-dumping duties on other importing countries. Anti-dumping by definition refers to 'charging extra import duty on the particular product from the particular exporting country in order to bring its price closer to the 'normal value' or to remove the injury to domestic industry in the importing country'.[1]

One example includes a complaint by Turkey in 2003 in that South Africa was accused of imposing anti-dumping duties without proper notification by the then Board of Tariffs and Trade.[2] The Board found that the establishment of the facts that lead to the anti-dumping duties being employed were improper and the Board's evaluation was not 'unbiased and objective'.[3] In light of this, Turkey then claimed that South Africa had in fact contravened Articles 5.5, 6.1, 6.1.3, 6.2, 6.9, 6.10, 9.2, 9.3 and Article 12.1 of the Anti-Dumping Agreement; and Articles III and X of the GATT 1994.[4] To the knowledge of the WTO, there has since been no dispute panel, no withdrawal and no mutually agreed solution has been agreed on.[5] A further example involving South Africa in this context is a complaint by Brazil in 2012 where it was alleged that the 'preliminary determination and the imposition of provisional anti-dumping duties by South Africa' on frozen chicken imports from Brazil, as well as the conduct and initiation of the investigation by ITAC was inconsistent with the GATT 1994 and the Anti-Dumping Agreement (hereafter referred to as the ADA).[6]

[1] https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (Accessed 11 May 2017).
[2] Now known as the International Trade Administration Commission (ITAC).
[3] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds288_e.htm (Accessed 11 March 2017).
[4] *Ibid.*
[5] *Ibid.*
[6] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds439_e.htm (Accessed 11 Match 2017).

A more recent event involved Pakistan requesting consultations with South Africa regarding the imposition of anti-dumping duties on Portland cement imports.[7] Pakistan claimed that South Africa had contravened the Anti-Dumping Agreement[8] as well as Article VI of the GATT.[9] To date, the dispute has not reached a mutually agreed solution.[10]

Given the aforementioned examples demonstrating the challenge of dumping and antidumping measures, the situation has generated world-wide attention, with countries introducing anti-dumping measures to curb dumping activities within its respective territories. Assuming that these countries are in fact member states of the World Trade Organisation (WTO), there is a conflict emerging out of the fact that these states have an obligation to comply with the core principles of the WTO, especially the principle of non-discrimination and free trade in the global community, while employing these antidumping measures or engaging in protectionism. The WTO encourages as one of its main objectives, free trade, which encourages member states to lower trade 'guards' or trade barriers in an attempt to facilitate trade between countries. The advantage of this is to promote competition between member states. In doing so, discrimination between trading partners are prohibited which leads one to the principle of Most-Favoured Nation (MFN). This principle, as a sort of paternalistic approach, states that if one country allows free trade with another, that country must extend that same benefit to all other WTO members.[11]

In light of this, an exception to the MFN principle is that countries can impose barriers on other importing countries where unfair practices are proved to have occurred.[12] This principle thus allows for discrimination in terms of trade barriers, which then conflicts with the notion of free trade.

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[7] *Ibid*.

[8] Articles 1, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 3.6, 6.1.3, 6.2, 6.4, 6.5, 6.8, 7.1, 12.1.1(i), 12.2., 18 and paragraph 6 of Annex II of the Anti‑Dumping Agreement.

[9] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds500_e.htm (Accessed 11 March 2017).

[10] *Ibid*.

[11] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (Accessed 11 March 2017).

[12] *Ibid*.

The legal documents under scrutiny are the Antidumping agreement (formally known as the 'Agreement of the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994'), which is a WTO agreement that was established to 'focus on how governments can or cannot react to dumping'[13] in their countries. The Agreement permits government(s) to act against such activities where there is genuine and actual injury to the domestic industry. With the GATT being the predecessor of the WTO, Article VI has been incorporated into the Agreement establishing the WTO (hereafter the WTO agreement) as part of the 'single package' and as such it 'allows countries to impose an anti-dumping duty on the exporting country to neutralise the lower price in an attempt to bring the price closest to what it actually is'.[14] To impose this duty, however, a country would have to prove that dumping has indeed taken place. The ADA thus provides 'detailed procedures on how dumping cases are initiated, how the investigations are to be conducted and that all interested parties are given opportunity to present evidence'.[15]

If not strictly applied within parameters, the ADA procedures can become effective barriers to trade, which would bring it in conflict with the core principle of free trade, which advocates (as briefly mentioned above) that countries should practise trade in a way that is free of barriers. It has been said that an economy 'promoting free trade enhances competition within industries which in turn yields greater efficiency and better products particularly in domestic companies'.[16] Countries that are member states of the WTO have a mandatory obligation to comply with the principles of the WTO, which includes promoting free trade and imposing barriers to trade.

The converse side of free trade comes in the form of protectionism. Protectionist measures take the form of tariff or non-tariff barriers, as a reaction to any kind of unwanted trade activity being conducted in a country. Due to the increase in unfair activities such as dumping, countries had to impose their own anti-dumping mechanisms to protect their domestic industry against injury from exporters. These

[13] https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (Accessed 28 February 2017).
[14] *Ibid*.
[15] *Ibid*.
[16] Krueger A *Free Trade is the Best Policy* In Robert Lawrence and Charles Schultz *An American Trade Strategy: Options for the 1990s,* Washington DC: Brookings Institution (1990) p 68.

come in the form of, for example, anti-dumping penalties and higher tariffs. According to Sibanda:

> '[a]nti-dumping duties (and countervailing duties) constitute one of the exceptions to trade liberalisation and predictability goals in that members are allowed to impose duties to offset the anticompetitive effects of open trading in order to protect national industries'.[17]

A study conducted weighing free trade against protectionist legislation in the United States led the author Hurabiell to state that 'in order to be a part of freer global trade, the United States must also practice less protectionism'.[18]

The same can be said for South Africa (which has implemented the required processes by means of the International Trade Administration Commission).[19] However, cognisance should be given to the fact that South Africa is a BRICS country, with its status furthermore being a developing country. By virtue of such a status as well as being subservient to the special and differential treatment provisions of the WTO, South Africa has been seen to be using the Anti-dumping agreement 'to prevent competition from international economic rivals by hindering their access to the South African market'.[20]

Thus, this research will attempt to uncover the balancing act of applying protectionist measures, those that generate millions in revenue for South Africa as well as protecting its domestic industry, and furthermore identifying that although 'dumped' products are sold at low prices, this is unfortunately what is the most affordable for

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[17] Sibanda O 'Are anti-dumping measures in multilateral trade justifiable or not? A call for an academic debate in Africa' *Codicillus* , Vol 44 , Issue 2 (2003) at p 87.

[18] Hurabiell, ML 'Protectionism versus Free Trade: Implementing the GATT Antidumping Agreement in the United States' *University of Pennsylvania Journal of International Law,* Vol 16, Issue 3 (1995) p 582.

[19] The International Trade Administration Act 71 of 2002 established the International Trade Administration Commission (ITAC) which is responsible for anti-dumping investigations, defines dumping, or provides for the normal and export price and provides for the treatment of confidential information.

[20] Beltran Gomez, LH 'Is South Africa using Trade Remedies as a Protectionist Measure – Reflections on a Court Case' *Con-Texto: Revista de Derecho y Economia*, Vol 34 (2011) at p 70.

those who generate a low income in South Africa. However, in practising free trade, the benefits are far reaching for the economy.

This research therefore seeks to uncover the balancing act between free trade and protectionist measures, through the lens of South Africa, and its adherence to the Anti-dumping agreement.

1.2 LITERATURE REVIEW

The rationale for the research is that the particular topic chosen is in fact a global debate, not just for South Africa, but for the international community. Free trade has been an ideal projected on all member states of the WTO but continues to be a struggle for developing and least developed countries as 'there are only a relatively small number of these countries who have the economic capacity to take full advantage of the benefits of trade liberalisation'.[21] Leland B Yeager and David G Tuerk argue that free trade is 'a Utopian-like promise that has been eroded by the realities of the market place'[22] and that free trade is 'unreal' or 'a myth'.[23]

Bergstein believes that free trade has a positive outcome in the global economy as 'success requires countries to compete effectively in international markets rather than simply at home'.[24] The authors also[25] argues that countries should strive for 'liberalization reciprocity where countries could turn to their geographical regions or to the world trading system as a whole'.[26] Bergstein furthermore states that the global trading system is 'superior because it maximizes the number of foreign markets involved and it avoids the economic distortions and political risks of discrimination among trading partners'.[27]

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[21] http://www.huffingtonpost.com/ian-fletcher/free-trade-isnt-helping-w_b_837893.html (Accessed 6 April 2017).

[22] Yeager & Tuerk 'Realism and Free Trade Policy' *Cato Journal*, Vol 3, Issue 3 (1983–1984) p 645.

[23] *Ibid.*

[24] Bergstein C.F 'Globalizing Free Trade' *Foreign Affairs,* Vol 75, Issue 3, (1996) pp 105–112.

[25] *Ibid.*

[26] *Ibid* at p 106.

[27] *Ibid.*

Sibanda, quoting from the Doha Ministerial Declaration,[28] states that 'it is through the attainment of a freer or liberalized trade that world economies can obtain economic growth and development, which may not be fully realized under protectionism'. Root further provides that the benefit of free trade ensures equality between states in terms of its 'marginal rate of transformation in production and its marginal rate of substitution in consumption and the international terms of trade'.[29] The advantages of free trade have, in many cases, shown themselves both in theory and practicality, evidencing themselves in a way that where free trade is practised, 'income rises and is more evenly distributed when countries pursue free trade'.[30]

Other writers such as Hurabiell disagree with the concept of free trade and argue that protectionist measures are necessary. Hurabiell argues (in a study conducted in the United States) that these measures were put in place to protect 'US industrial interests'.[31] Meanwhile, the US Congress (which was one of the subjects of the study) argued that by protecting the industrial interests of its citizens, they were in turn guarding the jobs of US citizens.[32] It would seem that the underlying rationale for a protectionist measure is to protect a country's domestic industry, as noted by some authors.[33] Root also provides insight into the need for protectionist policies, providing arguments such as national security, infant industry, and diversification.[34]

Upon the reading of the above authors, it is submiited that trade liberalisation is a tool that could lead to the acceleration of economic growth in developing countries. Since economic growth is the ultimate goal of such countries, the negotiation of free trade agreements and economic partnership agreements can strengthen the trade relations

[28] Sibanda at p 87.

[29] Root F.R *International Trade and Investment,* 7th edition, The Wharton School University of Pennsylvania, South-Western Publishing Co (2000).

[30] Yuduo L, Ma J 'Free Trade or Protection: A Literature Review on Trade Barriers' *Research in World Economy,* Volume 2, (2011) p 72.

[31] Hurrabiel at p 582.

[32] *Ibid.*

[33] Schick JR 'Agreement on Safeguards: Realistic Tools for Protecting Domestic Industry or Protectionist Measures' *Suffolk Transnational Law Review,* Volume 27, Issue 1 (2003–2004) p 157. *See also* the Agreement on Safeguards.

[34] Yuduo at p 72.

with developing countries and developed countries. This echoes the views of Bergstein and Sibanda quoted above.

However, developing countries do inhibit the need for revenue, and one of the main sources of revenue is generated by tariffs or by other means of protectionist policies. Similarly, developing countries cannot resort to protectionist policies as the main source of revenue as the engagement of trade is an equally important component in the growth of the economy. Moreover, imposing trade barriers against developed countries, for example, could lead to the breakdown of relations between the two, and furthermore, developing countries may need assistance from the latter in terms of special and differential treatment provisions in respect of certain WTO agreements which may not be reciprocated by developed countries, as these provisions are not mandatory. That is not to say that protectionist policies should be abolished entirely. It is submitted that they should be utilised when circumstances call for it, such as when dumping is proved to have taken place, but excessive use of such policies may isolate developing countries with regard to trade.

Henry George, author of 'Protection or Free Trade: An Examination of the Tariff Question, with Especial Regard to the Interests of Labor' provided his views on the topic as far back as 1949 and afforded mention to American protectionists who contended that:

> '…protection is everywhere beneficial to a nation, and free trade everywhere is injurious; that the prosperous nations have built up their prosperity by protection, and that all nations that would be prosperous must adopt that policy. And the arguments must be universal to have any plausibility, for it would be absurd to assert that a theory of national growth and prosperity applies to some countries but not to others'.[35]

[35] George H *Protection or Free Trade: An Examination of the Tariff Question, with Especial Regard to the Interests of Labor,* Robert Schalkenbach Foundation (1949) p 29.

At present, Fouda[36] also provides an argument that plays into the hands of those who are anti-free trade. Fouda further submits that that protection against foreign companies establishes a guard over infant industries in that these newly formed companies, especially those in developing countries, would struggle against international competition. Protectionist policies would thus allow these companies to progress and improve in this way.[37]

Another argument is that companies are often faced with situations where their industry declines and inefficiency runs rampant; thus protectionist policies are used as a tool to 'buy time' in order for these industries to reinvent themselves.[38] Protectionist measures are also often used as instruments for government revenue.[39] Revenue for developing countries is used as a source of funding[40] as opposed to developed countries having its primary source of revenue from taxes other than tariffs imposed on products of trade.[41] One example is that of Japan in which it generated about one trillion Yen in tariff revenue, but this forms less than 2% of its total tax revenue (1996).[42]

However, Article VI of the GATT condemns dumping only where 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'.[43] Although the GATT uses the broader 'injury to industry' language instead of condemning only dumping that injures competition, the standards that must be met before a dumping duty may be imposed suggest that the Agreement adopts a competitive rather than a protectionist stance.[44]

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[36] Fouda R.A.N 'Free Trade and Protectionism: A Country's Glory or Doom?' *International Journal of Trade, Economics and Finance* Vol 3, (2012).

[37] *Ibid* at p 351.

[38] *Ibid.*

[39] *Ibid* at p 353.

[40] http://www.meti.go.jp/english/report/data/gCT9904e.html (Accessed 6 April 2017).

[41] *Ibid.*

[42] *Ibid.*

[43] Article VI of the General Agreement on Tariffs and Trade.

[44] Ehrenhaft, P.D 'What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for U.S. Trade Policy', *11 LAW & POL'Y INT'L Bus.* pp 1361–1362 (1979).

According to Hurabiell,[45] the US regularly imposes anti-dumping measures however these measures are 'incompatible with free trade policies'. Herein lies the issue that this research intends in contributing to. Academics argue[46] 'that anti-dumping measures are in conflict with 'the key benefits of global trade rules that are stable and predictable access to foreign markets'.[47] Others propose that 'anti-dumping measures are a significant threat to the prospect of international freer trade'.[48] As a matter of fact, authors argue that no such justification for anti-dumping measures exists.[49] Deardoff proposes, quite arguably, that anti-dumping mechanisms may solve the issue of dumping on the face of it, but fails to wholly correct the activity on a global scale. He states that 'in precisely this situation antidumping policies would have hardly any effect. The fluctuation here is on the world market and a policy to restrict the price of a particular foreign exporter may exclude him from the market, but it will not appreciably raise the price'[50] set by the companies accused of such activities in the export country.

In fact, it has been said that the use of anti-dumping duties has been increasingly used as a veil against protectionist policies that is counter to free trade principles contained in the GATT.[51] The overall foundation for antidumping activity is to protect the domestic industry from any injury caused by the foreign market as a result of dumping within the territory. In short, antidumping activity can be justified in order to 'prevent international predation'.[52]

Gay notes that if antidumping activity were limited only to situations where international predatory pricing has occurred, it would indeed have a major impact on antidumping

[45] Hurrabiel at p 582.

[46] Sibanda at p 87.

[47] Evenett S.J 'The World Trading System: The Road Ahead' *Finance and Development* 36(4): 22 (1999).

[48] Corr CF 'Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures' *Nw J Int'l & Bus* (1997) 49, 53. *See also* McGee `The case to repeal anti-dumping laws' *Nw J Int'l & Bus* (1993) 431.

[49] Deardoff AV 'Economic Perspectives on Antidumping Laws' *Research Seminar on International Economics,* University of Michigan, (1989) pp 4–7.

[50] *Ibid.*

[51] Gay P 'Unveiling Protectionism: Anti-Dumping, the GATT and Suggestions for Reform' *Dalhousie Journal of Legal Studies* (1997) p 51.

[52] *Ibid*.

activity. He adds that proving the occurrence of international predation in the early 1900s was a challenge as a result of insufficiency of information and resources, but proving such predatory pricing presently will be equally as difficult, not because of the lack of tools and information, but because 'theoretical possibilities are sufficiently limited as to make such predation in cases of international dumping a practical non-entity'.[53] In light of this statement, Gay states that economists and businesspersons have thus condemned the antidumping provisions of the GATT for the implicit wording that price differentiation and below-cost pricing are not 'within the ordinary course of trade'.[54]

In respect of the theory of below-cost pricing, international practice has suggested that price is a component of fixed and variable costs. Fixed costs remain constant throughout, and thus where prices have escalated, the rational choice would be to decrease the market price, even where production costs 'are not fully realised'.[55] However, in doing so, this conflicts the exporter in being subject to anti-dumping duties.[56]

Regarding price differentiation, Hagelstam notes that this is a legitimate strategy that is commonly used by suppliers who use such a tactic in response to price elasticity. Elasticity is dependent on many factors such as substitution possibilities, consumer tastes, and purchasing powers,[57] and thus is not the same in every country. Therefore, Hagelstam notes that to base the usage of anti-dumping measures on price elasticity, in light of the differences between countries, would be 'both unfair and not economically merited'.[58]

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[53] *Ibid* at p 56–57.

[54] Article VI of the GATT 1994.

[55] Gay P 'Unveiling Protectionism: Anti-Dumping, the GATT and Suggestions for Reform' *Dalhousie Journal of Legal Studies* (1997) p 57.

[56] Hagelstam J 'Some Shortcomings of Anti-Dumping Provisions' *Journal of World Trade* Volume 25 (1991) p 99.

[57] Gay P 'Unveiling Protectionism: Anti-Dumping, the GATT and Suggestions for Reform' *Dalhousie Journal of Legal Studies* (1997) p 58.

[58] Hagelstam at p 100.

1.3 PRINCIPAL THEORIES

International trade law is littered with legal, economic and political policies and theories. Having said that, it is not the purpose of this thesis to provide an expansive discussion on each of these theories, as such a limited overview of particular theories such as the free trade theory (which originated from the traditional theories such as the 'absolute advantage theory' and the 'comparative advantage theory'[59] will be provided. As was noted somewhat earlier in the chapter, the free trade theory of absolute advantage refers to a country's method of producing goods or services where a lower input is utilised.[60] This theory also 'compares productivity of different producers or economies'.[61] The absolute advantage theory was established by the 'father of free trade', Adam Smith. According to Smith, different countries can have an absolute advantage in respect of the same product, but in different domestic markets, taking into consideration transport costs, which are indeed production costs.[62] Where two countries which specialise in the production of a particular product start trading with each other, where each has its own turn at obtaining a comparative advantage, more products can be produced more efficiently in that materials used in production are used efficiently. Therefore, consumption of that particular product would be at a higher level between these two nations.[63]

Also, as discussed earlier, another principle which will also be focused on throughout the thesis is the protectionist theory, which refers to 'government actions that restrict or restrain international trade, often done with the intent of protecting local businesses and jobs from foreign competition'.[64]

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[59] Due to the expansive nature of the CAT and AAT- this thesis will not engage in an expansive discussion.

[60] https://www.boundless.com/economics/textbooks/boundless-economics-textbook/international-trade-31/introduction-to-international-trade-124/absolute-advantage-versus-comparative-advantage-493-12589/ (Accessed 16 March 2017).

[61] *Ibid*.

[62] Schumacher R 'Adam Smith's theory of absolute advantage and the use of Doxography in the History of Economics' *Erasmus Journal for Philosophy and Economics,* Vol 5, (2012) p 54–80.

[63] *Ibid* at p 65.

[64] http://www.investopedia.com/terms/p/protectionism.asp (Accessed 6 April 2017).

The MFN principle will also be briefly discussed later in the context of states adopting anti-dumping measures as trade barriers to one country as opposed to the imposition of such barriers to others.[65]

1.4 PURPOSE STATEMENT

In consideration of the aforementioned, the purpose of this dissertation therefore, is to analyse the balance and differing views of free trade and protectionist stances with a focus on the Antidumping agreement and the position adopted by South Africa. In doing so, the following research questions (set out below) will be answered.

1.5 RESEARCH QUESTIONS

The key questions to be determined in this research will essentially take the form of the following:

- What role do free trade and protectionist principles play in the current global trading system? To what extent has the formation of the WTO affected the formation of current anti-dumping procedures and practices?
- What are the focal points in the Antidumping agreement, and how have these affected current antidumping practices?
- To what extent has SA implemented relevant legislation to govern antidumping? How did South Africa arrive at the legislation governing antidumping, and what landmark cases were heard involving antidumping in South Africa? How does free trade impact on the dumping situation in South Africa, and what protectionist measures does South Africa have against antidumping?

1.6 RESEARCH METHODOLOGY

The nature of the research will be based on theoretical and academic writings based on the researcher's topic. Antidumping causes heated debates and as such this research will also use the current literature to discuss the issues on the subject matter. There are a number of contributions by a host of international and national authors (academic and practitioners) on the subject. Thus, the research will mainly be desktop.

[65] See above, paragraph 3.

As such, the sources of information to be used for this topic would typically be from journal articles and textbooks from experts on international trade as well as case law with reference to the relevant international agreements. It has been established that these types of source would be best suited for this type of research as this topic is not one that involves any type of survey or collecting data from individuals.

1.7 CHAPTER OUTLINE

Chapter 1: Essentially the research proposal, which includes but is not limited to background, research questions, research methodology and chapter outline.

Chapter 2: In this chapter, the research will firstly discuss the history of GATT and the formation of the WTO with particular focus on how the establishment of the WTO affected the formation of the Antidumping agreement. Secondly, it will briefly continue to discuss the WTO principles that underpin multilateral trading system.

Chapter 3: This chapter will analyse the provisions of the ADA and relevant cases, to determine how the particular Agreement has affected past and current antidumping practices.

Chapter 4: This chapter deals with an overview of relevant SA legislation to determine the extent to which SA has implemented the relevant legislation to govern antidumping. It includes a discussion on how South Africa arrived at the legislation governing antidumping and what landmark cases were heard involving antidumping in South Africa. Lastly, the chapter will discuss whether free trade has impacted the dumping situation in South Africa and what protectionist measures South Africa has against antidumping.

Chapter 5: Recommendations and conclusion on the topic.

1.8 CONCLUSION

The aforementioned information contained in this chapter displays an outline of what this thesis will contain with regard to the debate concerning the subject matter. The following chapters will thus attempt to add insight to this worldwide controversy in the

hope that the submissions put forth will shed light on the matter. The following chapter will discuss the origins of the international institutions that govern trade, both past and present, and will furthermore provide submissions on how the establishment of said institutions have affected dumping practices currently.

CHAPTER 2:
GATT, WTO, AND THE FORMATION OF THE ANTI-DUMPING AGREEMENT

2.1 INTRODUCTION

The General Agreement on Trade and Tariffs was for many years at the forefront of trade relations to such an extent that any current discussion needs to provide a background on it. More so, as the backbone of the World Trade Organisation (WTO) and its array of multilateral agreements, a discussion of the extent to which the GATT and the current trade frameworks have shaped in particularly the Antidumping agreement is required. As such the chapter seeks to determine in particular how the formation of the WTO with particular focus on how the establishment of the WTO affected the formation of the Antidumping agreement, which is the crux of the research. As such the chapter will first discuss the historical overview of previous multilateral trade organisations such as the International Trade Organization, and thereafter progress in the chapter dealing with the various multilateral trade negotiations that inevitably led to the inception of the World Trade Organisation. Secondly, it will briefly continue to discuss the WTO principles that underpin multilateral trading system.

2.2 HISTORICAL OVERVIEW OF PAST TRADE INSTITUTIONS

2.2.1 The International Trade Organization (ITO)

The beginning that marked the end of the Second World War had the allies pushing not only for world peace, but also for a system that would never again bring the international economy to a screeching crash.[66] The Allies thus fully made use of this opportunity to redesign the new world,[67] which encompassed the birth of the post-war establishment of the International Monetary Fund (IMF) and the World Bank as a central bank, the General Assembly of the United Nations, and the International Court

[66] Drache D 'The Short but Significant Life of the International Trade Organisation: Lessons to be Learned' *CSGR Working Paper No. 62/00* (2000) p 8.

[67] VanGrasstek C 'The History and Future of the World Trade Organization' *WTO Publications* (2013) p 12.

of Justice (ICJ), as well as other organisations representing agriculture,[68] education and culture,[69] health,[70] labour,[71] and others.

Similarly, the International Trade Organization (ITO) was proposed to be established as an institution that would emulate the functions of a 'global trade ministry',[72] with the original intention of creating a third institution to handle the trade sector of international economic cooperation, joining the other 'Bretton Woods'[73] institutions previously mentioned.[74] The vision that was hoped for was to have these institutions mirror that of a world government, but naturally this was plagued by a series of tribulations, one that included that countries all reserved the right to their own sovereignty.[75] The concerns over sovereignty subsequently forced drafters of the ITO to 'pursue rather modest goals'.[76] A draft ITO Charter evidenced an over-extension of trade disciplines, one that included rules on employment, commodity agreements, restrictive business practices, international investment, and services.[77] The aim of this was to create inevitably an ITO at a United Nations Conference on Trade and Employment in Havana, Cuba in 1947. In the meantime, the General Agreement on Tariffs and Trade (globally known as the GATT), which was also established in 1947, served as a provisional measure until ratification of the Havana Charter.[78]

[68] Food and Agriculture Organization (an extension of the United Nations that leads international co-operation to defeat hunger around the world http://www.fao.org/home/en/ (Accessed 17 June 2017).

[69] United Nations Educational, Scientific and Cultural Organization (also known as 'UNESCO', this organisation is renowned for its efforts to bring international efforts in fight for education, science, culture and communication) http://en.unesco.org/about-us/introducing-unesco (Accessed 17 June 2017).

[70] World Health Organization (an agency of the United Nations that concerns itself with international public health http://www.who.int/en/ (Accessed 17 June 2017).

[71] International Labour Organization (an international organization setting labour standards, develop policies and create programmes promoting work standards for men and women) http://www.ilo.org/global/about-the-ilo/lang--en/index.htm (Accessed 17 June 2017).

[72] Van Grasstek at p 11.

[73] International Monetary Fund and the World Bank.

[74] https://crossick.blogactiv.eu/2009/06/04/international-trade-the-rise-fall-of-the-havana-charter/ (Accessed 23 April 2017).

[75] VanGrasstek at p 11.

[76] *Ibid.*

[77] See note 74.

[78] *Ibid*.

The Conference held at Havana thus began on 21 November 1947, subsequent to the signing of the GATT.[79] The event coordinating the Charter proved to be a success, as it 'served as a prototypical model agreement for its time, complementing the IMF and the World Bank, as envisaged by the Bretton Woods Agreement of 1944'.[80] A number of proposals to safeguard industries and allow trade restrictions were tabled, which proved much to the advantage of a significant number of developing nations who were present at the negotiations.[81] As such, a Charter was thus founded, one that encompassed the authority to establish the ITO.

Less than a year later, once the ITO Charter was agreed upon in Havana in March 1948, the proposed ITO would remain immortalised as nothing but an ideology, as the Charter was met with significant resistance, one that included the US Congress opposing ratification of the Charter, ironically, where it had been one of the strongest proponents for the ideal.[82] The GATT remained thereafter as the only multilateral trade instrument that governed international trade from 1948, up until the year in which the World Trade Organisation was established.[83] Drache[84] submits that 'in the end, the ITO fell victim to cold war politics, shifting US priorities, a protectionist Congress and elites that preferred not to have a strong world trade organisation with non-liberal principles and goals'. As such, Diebold[85] argued that 'neither the ITO nor the GATT said a word about free trade'.

[79] *Ibid*.

[80] Drache at p 16.

[81] Crossick S 'International Trade: The Rise and Fall of the Havana Charter' https://crossick.blogactiv.eu/2009/06/04/international-trade-the-rise-fall-of-the-havana-charter/ (Accessed 23 April 2017).

[82] *Ibid*.

[83] *Ibid*.

[84] Drache at p 28.

[85] Diebold W Jr. (1994), 'Reflections on the International Trade Organization', *Northern Illinois University Law Review* 14(2) p 336.

2.2.2 The GATT and Multilateral Trade Negotiations (MTN)

Since the failure of the ITO, 'world commerce'[86] had been governed by the GATT[87] up until 1994, where the global economy saw the establishment of the WTO. During the period of the GATT, the rules provided in the Agreement formed the foundation of international trade and contributed to 'some of the highest growth rates in international commerce'.[88] Despite the considerable achievements of the GATT, it was nonetheless a provisional agreement.[89] As a result, signatory states to the GATT were referred to as 'contracting parties'. The GATT which was signed in 1947 as a supplemental agreement to the ITO originally had 23 contracting parties, those which 'were also the part of the larger group negotiating the ITO Charter'.[90]

The basic principles[91] contained in the original GATT remained much as they had been since 1948.[92] The Rounds (known as 'trade rounds' or 'multilateral negotiations') that followed[93] focused primarily on the efforts to reduce trade barriers, with additions of a section on development that was introduced in the 1960s as well as the introduction of plurilateral agreements in the 1970s.[94] Ironically, during these early years, even where the GATT initially served as a safety net subsequent to the fall of the ITO, it was remarked that the 'biggest leaps forward in international trade liberalisation have come through these rounds which were held under the GATT's auspices'.[95]

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[86] Blumberg L 'GATT gives Way to WTO' *Juta's Business Law,* Vol 3, Issue 1 (1995) p 31.

[87] Prior to the GATT coming into force, the Protocol of Provisional Application (PPA) had allowed for the provisional application of the GATT for almost 50 years up until one year after the signing of the Marrakesh Agreement that established the WTO. Information taken from https://www.wto.org/english/tratop_e/gatt_e/task_of_signing_e.htm (Accessed 27 November 2017).

[88] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (Accessed 28 April 2017).

[89] *Ibid*.

[90] *Ibid*.

[91] Because of the expansive nature of this chapter in dealing with the historical progression of the events that led up to the WTO, this research will refrain from discussing the principles of the GATT, as the principles of the WTO are discussed in detail later in this chapter.

[92] See note 87.

[93] Geneva in 1947, Annecy in 1949, Torquay in 1951, Geneva in 1956 and again at Geneva (known as the 'Dillon Round') https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (Accessed 28 April 2017).

[94] See note 87.

[95] *Ibid*.

The multilateral negotiations that followed in the mid-1960s came in the form of the Kennedy Round held at Geneva. A significant round it was, where Norwood submits that 'it was hailed upon its completion in Geneva, not only because of the trade liberalisation achieved, but because of the methods used in achieving that liberalisation'.[96]

2.2.3 The Kennedy Round of Negotiations

Discrimination of the United States from foreign markets gave the international giant a reason to prompt a further round of negotiations – The Kennedy Round.[97] A momentous development arose during the Kennedy Round of negotiations, among the discussions of tariff and non-tariff barriers.[98] This was known as the 'international antidumping code'.[99] Formally known as 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade', (hereafter referred to as 'Article VI') the Code 'outlines the principles under which anti-dumping may be assessed and furthermore acts as an elaboration to Article VI.[100]

Symons submits that the reason for the international anti-dumping code was 'obvious'.[101] It is trite in international law as per the broad principles provided for in the GATT that it is the responsibility of the authorities within a state to determine whether dumping has taken place. Symons provides that it is against this background that disputes arise as well as confusion as to the administrative process arriving at such a decision, and thus prove the necessity of the role of the Code.[102] It is furthermore argued that the need for the Code was necessary because of the difficulty of amending

[96] Norwood B 'The Kennedy Round: A Try at Linear Trade Negotiations' *Journal of Law and Economics*, Vol 12, Issue 2 (1969) p 297.

[97] Irwin DA 'The Truths About Trade: What Critics Get Wrong About The Global Economy' *Foreign Affairs* Vol 95, Issue 4 (2016) p 95.

[98] Lamp N 'The Club Approach to Multilateral Trade Lawmaking' *Vanderbilt Journal of Transnational Law* Vol 49, Issue 1 (2016) p 137.

[99] *Ibid* at p 140.

[100] General Agreement on Tariffs and Trade 1947.

[101] Symons EL Jr. 'The Kennedy Round, GATT, Anti-Dumping Code' *University of Pittsburgh Law Review*, Vol 29, Issue 3 (1968) p 489.

[102] *Ibid.*

the GATT[103] owing to the large number of contracting parties that were bound to its provisions.

It was thus hoped that the outcome of the Kennedy Round would provide national authorities with a procedure that would provide assistance in the determination of any dumping activity, one that is 'predictable and fairer to all interested parties'.[104]

Although Article VI on the face of it embodies a protectionist stance, the Preamble affirms the principle of freer trade by the Contracting Parties while also covering tariff and non-tariff barriers.[105] The Preamble furthermore states that in order to give effect to its provisions, the purposes of Article VI:

> 'are to provide for equitable and open procedures as the basis for a full examination of dumping cases', 'to interpret the provisions of Article VI of the General Agreement [on Tariffs and Trade][106] and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation' and to acknowledge that 'the imposition of anti-dumping duty is a measure to be taken only under circumstances provided for in Article VI of the General Agreement'.

The years following the Kennedy Round saw the international community alleging that the GATT rules had become 'obsolete, ignored or in need of strengthening in several key areas'.[107] Graham suggests that these problems included rules pertaining to government subsidies, to temporary import restrictions under the 'escape clause', government restrictions on importing, and settlement of international trade disputes.[108] Graham further submits that additional challenges had become apparent in that the

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[103] Curzon G, Curzon V *The Multi-Tier GATT System* The New Economic Nationalism p 137–147 (1980).
[104] Symons at p 490.
[105] *Ibid.*
[106] additional information added.
[107] Graham TR 'Results of the Tokyo Round' *Georgia Journal of International and Comparative Law* Vol 9, Issue 2 (1979) p 156.
[108] *Ibid* at p 157.

European Economic Community (EEC)[109] was emerging as an international trading giant that had begun its gradual ascent to take on fellow international trading giant, the United States of America, and least-developed countries had begun to use the newly emergent forum, the United Nations Conference on Trade and Development (UNCTAD),[110] to put forth their interests in relation to trade that were adverse to the basic principles of the GATT; that being the Most Favored Nation (MFN) principle.[111]

2.2.4 The Tokyo Round of Negotiations

The global trading community thus used these challenges as the catalyst to begin negotiations in a further round known as the Tokyo Round. The Tokyo Declaration, which provided the Round with its namesake, provided that 'consideration shall be given to improvements in the international framework for the conduct of world trade' and further recognised 'the importance of the application of differential measures to developing countries in ways which will provide special and more favourable treatment for them in areas of the negotiation where this is feasible and appropriate',[112] a first in the negotiating Rounds under the GATT.[113]

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[109] The European Economic Community comprises of three separate communities, that being 'the European Coal and Steel Community, established by the Treaty of Paris in 1951 to regulate production and liberalise Europe's trade in coal and steel products; the European Atomic Energy Community, formed by the Treaty of Rome in 1957; and the European Economic Community, also created by the Treaty of Rome'. The EEC originally consisted of 'six Western European nations—Belgium, Luxembourg, France, Italy, the Netherlands, and West Germany. Britain, Ireland, and Denmark were admitted in 1973. Three southern European countries were allowed to join once they installed democratic governments—Greece in 1981, Spain and Portugal in 1986'. Information taken from http://www.econlib.org/library/Enc1/EuropeanEconomicCommunity.html (Accessed 27 November 2017).

[110] The role of UNCTAD is to 'support developing countries to access the benefits of a globalized economy more fairly and effectively [and] to help equip them to deal with the potential drawbacks of greater economic integration. To do this, [UNCTAD] provides analysis, consensus-building, and technical assistance. This helps [developing countries] to use trade, investment, finance, and technology as vehicles for inclusive and sustainable development.' Taken from http://unctad.org/en/Pages/aboutus.aspx (Accessed 27 November 2017).

[111] *Ibid* at p 156.

[112] Declaration of Ministers Approved at Tokyo on 14 September 1973, para. 1, reprinted in *GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS* (20th Supp.) pp 19–20.

[113] Graham at p 156.

The Tokyo Round began in 1973 and concluded in 1979 and served as a negotiating forum for 102 countries.[114] In its initial negotiations, the Tokyo Round aimed to perpetuate the GATT's efforts to reduce tariffs at a progressive rate.[115]

In addition to the negotiations regarding tariff reductions, the Tokyo Round also centred around non-tariff barriers. In terms of the Agreement on Subsidies and Countervailing Measures, negotiators sought to gain more clarity in respect of certain elements about which the GATT was unclear.[116] The birth of the Agreement on Subsidies and Countervailing Measures (hereafter referred to as the 'SCM Agreement') thus provided much-needed clarity on these issues by providing adequate control over the use of subsidies and ensuring that an 'injury standard' is adhered to by all signatories.[117]

The Tokyo Round furthermore resulted in a revision of the Anti-Dumping Code that was established in the Kennedy Round. Changes made to the Anti-Dumping Code included 'determination of injury, price undertakings between importing and exporting countries and imposition and collection of anti-dumping duties' and attempting to align these elements with the provisions of the SCM Agreement.[118] Further notable outcomes of the Tokyo Round included Government procurement, the establishment of the Agreement on Technical Barriers to Trade (which primarily regulated the use of Member states using standards as unnecessary obstacles to trade), customs valuation, import licensing, and dispute settlement, as well as further 'sectoral'[119] Agreements on Agriculture and Dairy,[120] an Arrangement Regarding Bovine Meat,[121]

[114] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (Accessed 20 May 2017).

[115] *Ibid.*

[116] Graham at p 162. The GATT provided no reasonable definition of 'export subsidy' or what constitutes a 'domestic subsidy' which created confusion among the international community, seeing as these types of subsidies were prohibited under the GATT. Furthermore, the US' domestic law on countervailing duties provided no indication that there needed to be 'material injury to the domestic industry', as the rules of the GATT required.

[117] *Ibid.*

[118] Graham at p 165.

[119] *Ibid* at p 172.

[120] The New International Dairy Agreement GATT Doc. MTN/DP/8.

[121] GATT Doc. MTN/ME/8.

the Agreement on Trade in Civil Aircraft,[122] and Steel.[123] However, these Agreements and Codes were voluntary, and not all of the Contracting Parties to the GATT assented to them.[124]

Further, during this round, developing countries interests became one of the focal points during this round and their interests as well, due to the reason being that many countries had just begun to see the advantages of negotiations and moreover, began to break free of ties with colonial powers.[125]

2.2.5 The Uruguay Round of Negotiations

Approximately three years subsequent to the conclusion of the Tokyo Round, the United States (US) sought to use that momentum to their advantage by proposing a new round of multilateral negotiations,[126] in order to 'continue where the Tokyo Round left off'.[127]

In 1986, the US was successful in achieving its goal of beginning a new round of negotiations and urged the Contracting States to start negotiations to extend the scope of GATT in covering trade in services, the protection of intellectual property, trade-related investment measures, and finally, to improve the GATT rules where such needed attention.[128] The final round of negotiations thus began in Punta del Este, Uruguay, in 1986. This last round of MTN proved to be anything but expeditious in that this Round saw eight years before negotiations came to an end.[129]

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[122] GATT Doc. MTN/W/38.

[123] Although an Agreement on Steel was not formally part of the Tokyo Round, it was closely related to the negotiations, in which a steel committee was established to 'encourage the continuation and extension of free trade in steel, and to provide a means of disseminating information and coordinating policies among governments with respect to trade in steel.' *See* Graham at pp 165–173.

See also https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (Accessed 21 May 2017).

[124] Bello JH, Footer ME 'Symposium: Uruguay Round-GATT/WTO' *The International Lawyer* Volume 29, Issue 2 (1995) p 336.

[125] Page S 'Developing Countries in GATT/WTO Negotiations' *Working Paper* p 14 http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.195.3749&rep=rep1&type=pdf (Accessed 27 November 2017).

[126] *Ibid.*

[127] *Ibid.*

[128] US Department of State Dispatch 'Fact Sheet: Benefits of the Uruguay Round' Vol 5 (1994) p 16.

[129] Leebron DW 'Overview of the Uruguay Round Results' *Columbia Journal of Transnational Law* Vol 34, Issue 1 (1996) p 11.

A change over in the US administration made closure of the negotiations imminent,[130] as the US and the EU had finally reached a mutually agreed solution to their differences on agriculture.[131]Thereafter, the signing of the Final agreement in Marrakesh on 15 April 1994[132] (known as the Marrakesh Agreement) marked the end of one era but the birth of another – The World Trade Organisation.

The Uruguay Round resulted in the expansion of the authority of the GATT to uncharted areas such as agreements in respect of trade in textiles, agriculture, and services, as well as intellectual property.[133] The GATT was subsequently replaced by the WTO as the international organisation governing the multilateral trading system while still remaining as the agreement governing trade in goods.[134] Further to that, the establishment of the WTO had led to what Kleen[135] refers to as 'collectively associat[ing] all countries to all new (and previous) agreements', which is universally known as the 'single undertaking'. This translates into 'every negotiation is part of a whole and indivisible package and cannot be negotiated separately'.[136] Thus, once a Member has signed the Final Agreement establishing the WTO, that Member was bound to every other agreement in the WTO.[137]

[130] Bello at p 338. *See also* https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (Accessed 21 May 2017).

[131] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm accessed 21 May 2017). This deal was loosely termed the 'Blair House Accord'.

[132] Agreement Establishing the WTO ('Marrakesh Agreement') http://pmg-assets.s3-website-eu-west-1.amazonaws.com/151021multilateral.pdf (Accessed 17 June 2017). *See also* Bello at p 338.

[133] Crowley MA 'An Introduction to the WTO and GATT' *Economic Perspectives* (2003) p 44.

[134] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (Accessed 21 May 2017).

[135] Kleen P 'So Alike Yet So Different: A Comparison of the Uruguay Round and the Doha Round' *Jan Tumlir Policy Essays* (2008) p 7.

[136] Ibid, p 7 at note 13. *See also* https://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm (Accessed 22 May 2017).

[137] Article II:2 of the Agreement Establishing the WTO ('Marrakesh Agreement').

2.3 THE PRINCIPLES UNDERPINNING THE WORLD TRADE ORGANISATION (WTO)

The Agreements contained in the single undertaking are 'lengthy and complex'[138] as there are a variety of agreements dealing with different sectors.[139] Thus, it was necessary to create a series of principles that can essentially reflect the WTO and the agreements it encompasses, preventing the administrative burden of compiling principles that are unique to each and every agreement.[140] These principles are examined below:[141]

a) *Trade without discrimination:* Non-discrimination is fundamental to the WTO and is further divided into two subcomponents: the Most Favoured Nation Treatment Principle and the National Treatment Principle.[142] The former is a core notion that underlies all WTO Agreements, that member states may not discriminate between each other, in that where is a benefit is granted to one country, that concession must be extended to all member states of the WTO.[143] The latter principle is a further essential principle that is central to all WTO Agreements in that foreign goods or services must not be discriminated against domestic products or services of a member state.[144]

b) *Freer trade:* The most common and integral way of encouraging trade across the globe is through the lowering of trade barriers[145] that provides a growing access to

[138] 'Understanding the WTO' (written and published by the WTO) p 10.

[139] agriculture, textiles and clothing, banking, telecommunications, government purchases, industrial standards and product safety, food sanitation regulations, intellectual property, and much more. *See* note 138.

[140] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (Accessed 21 May 2017).

[141] *Ibid. See also* https://ecampus.wto.org/admin/files/Course_378/Module_1370/ModuleDocuments/M2_E.pdf (Accessed 22 May 2017).

[142] https://ecampus.wto.org/admin/files/Course_378/Module_1370/ModuleDocuments/M2_E.pdf (Accessed 22 May 2017).

[143] *Ibid. See also* 'Introduction to the WTO, Principles and Agreements' http://www.unitar.org/ny/sites/unitar.org.ny/files/1)%20Intro,%20Principles%20and%20Agreements%20May2010.pdf (Accessed 23 May 2017).

[144] *Ibid. See also* ''Matshusita M 'Basic Principles of the WTO and the Role of Competition Policy' *Washington University Global Studies World Review* Volume 3, Issue 2 (2004) pp 366–367.

[145] *Ibid. See also* 'Introduction to the WTO, Principles and Agreements' http://www.unitar.org/ny/sites/unitar.org.ny/files/1)%20Intro,%20Principles%20and%20Agreements%20May2010.pdf (Accessed 23 May 2017).

markets.[146] These trade barriers take many forms, one that includes tariffs, quotas, and non-tariff barriers.

c) *Predictability of trade through binding and tariffs:* The multilateral trading system is driven by predictability in that governments can expect that trade barriers will not be raised during the course of trade.[147] The WTO notes that he acknowledgment of member states to adhere to the principles of non-discrimination and predictability is a significant catalyst to achieving the aims of the WTO.[148]

d) *Transparency:* Transparency as a core principle of the WTO ensures that regulations and policies are at the disposal of governments of member states as well as parties to trade so that awareness is made about the various trade rules around the world.[149] This principle also allows for the monitoring of trade measures imposed by member states that effect the multilateral trading system.[150]

e) *Encouragement of development:* Member states have acknowledged the challenges that developing and least developed countries are faced with and have recognised that these countries obtain the necessary assistance in order to compete effectively in the multilateral trading system.[151] Thus, this notion is effected by the introduction of 'special and differential treatment provisions' in every WTO agreement,[152] which allows developing and least developed countries preferential treatment in respect of certain aspects where such countries face difficulty.[153] Page and Kleen[154] note that the 'purpose of special and differential treatment provisions is to give developing countries

[146] http://www.unitar.org/ny/sites/unitar.org.ny/files/1)%20Intro,%20Principles%20and%20 Agreements%20May2010.pdf (Accessed 23 May 2017).

[147] Introduction to the WTO, Principles and Agreements' http://www.unitar.org/ny/sites/unitar.org.ny/files/1)%20Intro,%20Principles%20and%20Agreements%20May2010.pdf (Accessed 23 May 2017).

[148] *Ibid*.

[149] *Ibid*.

[150] *Ibid*. *See also* Matshusita M 'Basic Principles of the WTO and the Role of Competition Policy' *Washington University Global Studies World Review* Volume 3, Issue 2 (2004) p 368,

[151] *Ibid*.

[152] For example, Article 10 of the Agreement on Sanitary and Phytosanitary Measures contains the provisions on special and differential treatment for developing countries.

[153] 'Introduction to the WTO, Principles and Agreements' http://www.unitar.org/ny/sites/unitar.org.ny/files/1)%20Intro,%20Principles%20and%20Agreements%20May2010.pdf (Accessed 23 May 2017). *See also* Kleen P, Page S 'Special and Differential Treatment Provisions of Developing Countries in the World Trade Organisation' *Global Development Studies No.2* (2005) p vii.

[154] *Ibid.*

a greater priority [of member states] to grow and develop without impeding the progress of others' to give attention to their own needs and less to that of others.

f) *Fair competition:* Competition in the WTO is encouraged to 'promote a free an open trading system'.[155] It involves the 'promotion of an open market, provision of fair and equal business opportunities to every participant in the market, transparency and fairness in the regulatory process, the promotion of efficiency and the maximisation of consumer welfare'.[156]

As mentioned above, the principles that underpin the multilateral trading system are a thread that runs through every agreement encompassed under the WTO. As such, these principles are, by implication, integral to the Antidumping agreement by virtue of being a WTO Agreement. It is thus submitted that these principles are of relevance to the ADA because the provisions must comply with or face being in contravention of the WTO principles. This research submits further that it is imperative that the provisions of the ADA are not construed as being a protectionist measure and should always reflect the ideals inherent to the WTO.

2.4 HOW HAS THE ESTABLISHMENT OF THE WTO AFFECTED THE FORMATION OF THE ANTI-DUMPING AGREEMENT?

As mentioned above, the first type of regulation regarding anti-dumping was established during the Kennedy Round, known as the Anti-Dumping Code. It was further revised during the Tokyo Round and was subsequently incorporated as one of the agreements constituting the 'single package' in the form of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade during the establishment of the WTO.[157] Since then, all member states of the WTO are bound to this agreement by virtue of signing the Agreement establishing the WTO. From a reading on the establishment of anti-dumping practices, the Code was initially introduced to regulate how governments react to such cases, to eliminate the use of protectionism that were disguised as anti-dumping duties. This has led to mixed

[155] Matshusita M 'Basic Principles of the WTO and the Role of Competition Policy' *Washington University Global Studies World Review* Volume 3, Issue 2 (2004) p 363.
[156] *Ibid.*
[157] 'A Summary of the Final Act of the Uruguay Round' https://www.wto.org/english/docs_e/legal_e/ursum_e.htm. (Accessed 15 June 2017).

feelings regarding the text of the Antidumping agreement. Lekfuangfu[158] submits that the Code 'was insufficient to deal with anti-dumping issues and was used instead as a tool for trade protectionism'.[159]

It is thus submitted that, in recent years, developing countries have become more frequent users of the antidumping policy, as opposed to developed countries being the forerunners of the policy.[160] This research submits that this 'mimicking' by developing countries of the actions of developed countries has been tailored to suit the needs of developing countries by protecting its domestic industries. It is true that the purpose of antidumping is primarily to safeguard the interests of domestic industries, but it should be paramount that such actions are not be used as a means of defeating international competition. It is submitted that the use of antidumping mechanisms should not act as a façade behind the promotion of trade liberalisation, of which international competition is a vital factor. It is also important to take cognisance of the 'limitation clause' contained in the ADA, that is, to abandon any investigation where the dumping margin is below 2%, that serves to prevent arbitrary use of antidumping measures in order to preserve the principles inherent to the WTO.

The founding of the WTO during the Uruguay Round finally saw a compromise[161] to this ambiguity in the formation of the Anti-Dumping Agreement together with Article VI of the General Agreement on Tariffs and Trade. Lekfuangfu proposes that while the Anti-Dumping Agreement concerns itself primarily with the action of dumping which is linked to predatory pricing, this does not translate to mean that dumping is in fact a form of predatory pricing.[162] In fact, the author submits that the action of price discrimination is an advantage to export markets.[163] In an analysis of the text of the

[158] Lekfuangfu N 'Rethinking the WTO Anti-Dumping Agreement from A Fairness Perspective' *Cambridge Student Law Review* (2008).

[159] *Ibid* at pp 304–305.

[160] Moore MO 'Does Antidumping Use Contribute to Trade Liberalization in Developing Countries?' *Institute of International Economic Policy* (2008) pp 1–3.

[161] *Ibid* at p 305.

[162] Lekfuangfu at pp 304–305.

[163] Lekfuangfu submits at p 306 that '[w]hile it is also true that a producer engaging in predatory pricing will normally practise price discrimination (since it must have a profitable market to offset the losses in the market that it seeks to monopolise), it does not hold that price discrimination is an indication that predatory pricing is taking place. In fact, price discrimination is a normal business practice used to maximise profits'.

Agreement, the author furthermore points out that one of the fundamental rationales against dumping is that it distorts the international market, but that the test conducted in order to prove that dumping has occurred is that the goods must have 'caused injury to the domestic industry'.[164] However, injury to the domestic industry does not mean there is a distortion in the international market[165] This lack of fairness, as Lekfuangfu proposes, should be addressed in the Anti-Dumping Agreement itself in that the effect of these actions have a domino effect on developing countries who struggle for access to international markets.[166]

On the other hand, Adamantopoulos and De Notaris submit that because the text of the Agreement regulates the use of anti-dumping measures which is averse to the principles of non-discrimination and predictability, the Agreement should be perceived in a more restrictive manner.[167] The authors further submit that the Agreement is too vague and ambiguous in certain aspects which opens the door for many states to use these measures as a protectionist tool.[168] One of the reasons put forth for this was because the present Anti-Dumping Agreement was one that was created out of haste between negotiators who embodied divergent stances during the Uruguay Round and as a result created 'too many technical deficiencies'.[169]

In light of the above, the Anti-Dumping Agreement is an effective way to curb unwanted trading practices within a country. It is important to note that while it is the actions of private companies that commit acts of dumping, the ADA imposes on governments to initiate action to prevent this by way of investigation and imposition of anti-dumping duties. It is, however, through these government bodies that the

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[164] *Ibid* at p 306.

[165] *Ibid*.

[166] *Ibid* at pp 307–308. Examples of the effect that antidumping can have on developing countries include Argentinian carbon steel exports to the US declining by 94% in 1997 subsequent to the imposition of an antidumping duty by the US. Furthermore, when an antidumping investigation is initiated, the strain on resources of developing countries are exacerbated. For example, the US demanding 3000 pages of financial information be translated into English against the investigation of electronics from Matsushita, led to Matsushita withdrawing the product from the US market rather than complying with the request. (http://www.rrojasdatabank.info/undpgtrade/undpgtch9.pdf (Accessed 15 June 2017).

[167] Adamantopoulos K, De Notaris D 'The Future of the WTO and the Reform of the Anti-Dumping Agreement: A Legal Perspective' Vol 24 (2000–2001) p 33.

[168] *Ibid* at p 34.

[169] *Ibid.*

provisions of the ADA are misconstrued and are thus used as a protectionist tool that shelters such countries against international competition. Furthermore, governments tend to delay the process of investigations, resulting in the domestic industry totally collapsing. If the provisions of the ADA were established to deter such occurrences, a restrictive interpretation by governments should be practiced. This thus leads one to believe that the lacunas contained in the ADA since the formation in the Uruguay Round, be revised in order to suit the needs of certain countries in the current economic climate, as much has changed since then.

The ripple effect of protectionist measures utilised within the framework of the ADA materialises into allowing other countries limited access to foreign markets. It furthermore impacts heavily in developing and least developed countries where the former and latter cannot compete with the barriers lifted against other thriving economies. It thus submitted that the text of the Anti-Dumping Agreement be revised[170] in order to close the gaps that invite unwarranted protectionism, while considering the needs of developing and least developed countries.

2.5 CONCLUSION

This chapter ultimately contained a focus on the history of the multilateral trading system. The projected rise and fall of the ITO that gave way to the GATT set a climate for the WTO that was to come. The Rounds that gave way to the WTO had significant outcomes but were plagued by diversity, but ultimately served as a forum to bring together a variety of interpretations and views in order for the multilateral trading system to be one that facilitated smooth trade, despite the differences between nations. Further, this chapter examined how the establishment of the WTO affected the formation of the ADA, with a critique on how the provisions have adapted since its formation. Since, chapter two has now provided this historical overview, chapter three will put this into context by analysing provisions of the ADA and relevant cases.

[170] Para 28 of the DOHA WTO MINISTERIAL 2001: MINISTERIAL DECLARATION WT/MIN(01)/DEC/1. *See also* Rai S 'Analysis of the Draft Anti-Dumping Agreement, Chairperson's Text 2007 in Light of the Jurisprudential Background' *Manchester Journal of International Economic Law* Vol 5, Issue 2 (2008) p 127.

CHAPTER 3:
OVERVIEW OF SPECIFIC PROVISIONS OF THE WTO ANTI-DUMPING AGREEMENT

3.1 INTRODUCTION

In the previous chapter, this research demonstrated the ambulatory nature of how the international community gained a pivotal organisation to govern its trade between nations. A focal point in this research, was the establishment of the policies governing dumping. After decades of negotiations in respect of dumping, members agreed to the formation of the Antidumping Agreement (ADA) during the Tokyo and Uruguay Rounds and as such, this chapter will seek to discuss specific provisions of the Agreement. In addition to identifying provisions of the ADA, relevant case law will be considered. Albeit not an entirely voluminous Agreement, this chapter will centralise the focus on particular provisions as opposed to discussing the entire agreement, due to the limitations imposed on this research.

As such, this chapter will firstly provide a short overview on the origins of antidumping, as this was dealt with at length in the previous chapter,[171] to provide context to the discussion. Following a brief history, this chapter will then proceed to provide a concise overview of the ADA and thereafter, seek to analyse specific provisions of the agreement itself.

3.2 BRIEF OVERVIEW OF ANTI-DUMPING

As discussed in the previous chapter, antidumping has had a long history, beginning with the first Code established in the Kennedy Round, to the present in the form of the ADA. Of interest, to the research, the chapter now seeks to determine the reasons for the establishment of the ADA.

The practice of dumping is far from novel as it can be traced back as far as the 18th century.[172.] Notice had been taken of foreign producers 'underselling' products and its

[171] Chapter 2, pp 15 – 24.

[172] Grimwade N 'Antidumping Policy: An Overview of the Research' *Centre for International Business Studies*, Research Working Papers (2009) p 3.

harmful effect on the economy, and thus began the snowballing effect of different countries introducing antidumping legislation.[173] In 1947, when the GATT governed the multilateral trading system,[174] the international community saw the introduction of the Article VI of the GATT. An antidumping Code was further negotiated in the Kennedy and Tokyo Rounds due to shortcomings in Article VI[175] and finally, lead the global community to the 'Anti-Dumping Agreement' or the 'Agreement on the Implementation of Article VI of GATT 1994' during the Uruguay Round.[176] The ADA now serves as an extension of Article VI that governs the 'investigation, determination and application of antidumping duties'.[177]

3.3 THE AGREEMENT ON THE IMPLEMENTATION OF ARTICLE VI OF GATT 1994

Noting the diverse handling of dumping in the territory of member states, the ADA sought to instill a more uniformed approach. Thus, Article VI and the ADA work concurrently, as stated in Article 1 of the ADA. 'Dumping' is seen to have occurred when:

> '…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'.[178]

[173] Examples included Canada in 1904, New Zealand in 1905, Australia in 1906 and finally by the United States in 1916. *See* Grimwade p 3.

[174] Crossick S 'International Trade: The Rise and Fall of the Havana Charter' https://crossick.blogactiv.eu/2009/06/04/international-trade-the-rise-fall-of-the-havana-charter/ (Accessed 22 June 2017).

[175] https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (Accessed 23 June 2017). These included requiring a determination of material injury, but failing to provide criteria as to how to do so, in a general manner.

[176] https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (Accessed 23 June 2017).

[177] *Ibid*.

[178] Article VI of GATT.

In addition to the definition, Article VI furthermore provides criteria as to what constitutes a product 'at less than normal value'.[179] As a result of the foreseeable damage that dumping potentially has on a domestic industry, the GATT and later, the ADA provided for the use of antidumping duties in order to offset any injury caused by the dumped products.[180] Vermulst[181] argues that an enquiry as to 'whether dumping has caused material injury to the domestic injury of the like product in the importing country is comprised of four sub-investigations:

(1) the definition of the like product;
(2) the definition of the affected domestic industry;
(3) the materiality of the injury; and
(4) the causal link between the dumped imports and the injury'.

Again, in response, to the varied responses to dumping, the ADA, further provides a substantial guideline on the use, implementation and determination of such antidumping levies that are encompassed in various articles in the Agreement. Due to the nature of this research, the study is limited to particular provisions, and thus, will be discussed throughout this chapter.

3.3.1 Article 2 of the ADA – Determination of Dumping

As stated above, Article 2.2 of the ADA provides a guideline in which the use of antidumping duties is permitted as well as determining whether 'sales below cost' are

[179] '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.' *See also* Article 2.1 of ADA.

[180] Article VI of GATT and Article 1 of the ADA.

[181] Vermulst E 'Injury Determinations in Antidumping Investigations in the United States and the European Community' *New York Law School Journal of International and Comparative Law* Vol 7 (1986) p 305.

in the 'ordinary course of trade'.[182] Such calculation is known as the 'dumping margin' in which the duty is calculated by the difference of the price of the 'dumped product' and the 'normal price' of the product.[183]

It should be noted that the 'normal value' is interpreted to be the price of the product in the domestic market and the ADA encompasses this definition in the determination of the act of dumping. Thus, the export price is evaluated at the aforementioned value, and does not take into the account the costs of production.[184] It is submitted, therefore, that the increase in antidumping investigations with this rationale as a foundation may at times, find governments using this as a competitive advantage in order to impose an antidumping duty. The standard, as this research submits, is minimal and could account for the rising toll in developing countries implementing antidumping measures.[185] This chapter submits that this is a clear protectionist shield against foreign competitors. Grimwade argues that it is not always a clear case that the costs of production are negated as governments make use of a price in a developing country or even a constructed value.[186]

Article 2.2 furthermore states that should there be 'incomparable sales' in a domestic market because sales are 'few, non-existent, or at below cost prices', then the use of the normal value from a third country should be used, or a 'constructive value'[187] should be used in place of the normal value.[188] The result of such calculation and its relation to the imposition of anti-dumping duties will be discussed later in the chapter with reference to article 5 of the ADA.

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[182] https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_01_e.htm (Accessed 30 July 2017).

[183] Bhala R 'Rethinking Antidumping Law' *George Washington International Journal of Law and Economics,* Vol 29 (1995–1996) p 64. Bhala notes an interpretation of a 'normal price' to be 'the foreign home market price of a 'foreign like product' sold in the ordinary course of trade (i.e., not to a related party or below cost) for consumption in the exporter's country'.

[184] Grimwade at p 8.

[185] *Ibid*.

[186] *Ibid*.

[187] This refers 'to the total cost of production including the actual costs of materials, labour and overheads incurred for the production of the goods sold in the comparison market, plus selling, general and administrative expenses' – taken from article 2.2.1 of ADA. *See also* Fillis JB *Assessing the Determination of Constructed Normal Value in the 2000 USA Antidumping Poultry Case in South Africa* (Published LLM Thesis, University of Pretoria, 2016) p 18.

[188] Bhala at p 64.

Moreover, throughout the Agreement, there are several mentions of the term 'like product' beginning in Article 2. For purposes of clarity, article 2.6 has defined the term to mean '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'. In other words, the 'like product must be identical in all respects in order for antidumping regulations to be applied'.[189] Notwithstanding this definition, and reference being made to it throughout key articles and determinations throughout the ADA, it has opened the door for disputes regarding the elements of what constitutes a like product.[190]

An example of a conflict of this nature was the imposition of an antidumping duty on an exported product and such product has been modified by the exporter in order to be removed from the 'original product category'.[191] Where the modification is of such an extensive nature so that it is no longer a 'like product' of the original product, the antidumping duty on the exported product falls away.[192] The Footwear from China and Indonesia case[193] saw the Commission establishing a 'two-way interchangeability test',[194] in ascertaining what constituted a 'like product' (discussed further on).

In this case, the Commission was notified of an imposition of antidumping duties on certain footwear originating from the People's Republic of China and Indonesia, justified by the material injury of European Confederation of the Footwear Industry (CEC), which accounts for a significant proportion of the footwear industry in the

[189] Mattar A 'Legal Analysis of Anti-Dumping Cases Raised against Saudi Arabia's Petrochemical Products' *Global Journal of Human-Social Science* Vol 15 (2014) p 23–24.

[190] http://www.meti.go.jp/english/report/data/gCT9905e.html. (Accessed 1 August 2017).

[191] Matsushita M 'Some International and Domestic Antidumping Issues' *Asian Journal of WTO and International Health Law and Policy*, Vol 5 (2010) p 252. *See also* Choi, 'Like Products' in International Trade Law – Towards a Consistent GATT/WTO Jurisprudence, Oxford University Press (2003).

[192] Mattar at pp 23–24.

[193] The COMMISSION REGULATION (EC) No 165/97 of 28 January 1997 imposing a provisional anti-dumping duty on imports of certain footwear with textile uppers originating in the People's Republic of China and Indonesia.

[194] Adamantopoulos K, De Notaris D 'The Future of the WTO and the Reform of the Anti-Dumping Agreement: A Legal Perspective' Vol 24 (2000–2001) p 37.

European Community.[195] The Commission introduced the two-part test in determining a 'like product' as 'the general technical or physical characteristics, the use or functions and finally, the consumer's perception of products, and not the method used for their production'.[196] However, favour was not granted to the EU as the test was satisfied in only one part,[197] and not in the other.[198]

3.3.2 Article 3 of the ADA – Determination of Injury

As mentioned above, in order for an antidumping duty to be imposed on an imported product, the preliminary test that must be satisfied is firstly, the act of 'dumping' must have occurred and secondly, the act of 'dumping' must have caused injury to the domestic industry.[199] One of the issues with Article VI of the GATT was that there were insufficiencies regarding the definition of what constituted material injury to a domestic industry.[200]

However, at the establishment of the ADA, only the term 'injury' was defined.[201] Soprano[202] shed light on this by referring to the French and Spanish versions of the ADA in interpreting the term 'material'. The author furthermore makes use of what the Appellate Body has defined the term to be in a Safeguard case:[203]

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[195] Paragraph 1 and 2 of the COMMISSION REGULATION (EC) No 165/97 of 28 January 1997 imposing a provisional anti-dumping duty on imports of certain footwear with textile uppers originating in the People's Republic of China and Indonesia http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A31997R0165. (Accessed on 28 June 2017).

[196] Paragraph 18 of the COMMISSION REGULATION (EC) No 165/97 of 28 January 1997 imposing a provisional anti-dumping duty on imports of certain footwear with textile uppers originating in the People's Republic of China and Indonesia.

[197] The Commission determined that slippers could be substituted by outdoor shoes for indoor shoes'. *See* Adamantopoulos et al, at p 37.

[198] 'The Commission could not determine that outdoor shoes could be replaced by slippers for outdoor use, due to slippers' 'usual flimsiness''. *See* Adamantopoulos et al at p 37.

[199] Article 1 of ADA.

[200] Graham at p 162.

[201] Article 3, footnote 9 of ADA states that injury 'shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article'.

[202] See Soprano R 'The Threat of Material Injury in Antidumping Investigations: A Threat to Free Trade' Vol 11 (2010) p 68.

[203] Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (US- Lamb),* WT/DS177/AB/R, WT/DS178/AB/R, 1 May 2001, para. 124 and footnote 77. *See* Soprano R 'The Threat of Material Injury in Antidumping Investigations: A Threat to Free Trade' Vol 11 (2010) p 68. 'This means, for example, that short-term

'material' is to be interpreted as 'less strict' than 'serious'.

Interestingly, the ADA has provided states with a broad scope of how to react to cases of dumping, as Article 3 prescribes that a member state of the WTO can impose an antidumping duty on an imported product, even when the injury has not yet materialised.[204]

Thus, in terms of article 3.1 of the ADA, determination of injury must be based on the following:

> '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'.

In interpreting this article, in almost its entirety, the Appellate Body has provided an explanation for precise adherence by member states. In the case of ***United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US-Hot Rolled Steel)***,[205] an antidumping investigation was initiated by the United States Department of Commerce (USDOC) on imports of hot-rolled steel from, *inter alia*, Japan.[206] Because of the vast number of Japanese producers and exporters, the USDOC had elected to conduct its investigation on a 'sample of Japanese producers'.[207] The USDOC established a 'single rate' of antidumping duty on the producers individually investigated, while calculating an 'all others rate' on other producers not individually investigated.[208] Upon the conclusion of the investigation, the United States International Trade Commission, found in the affirmative that

injury shall be excluded as well as in the cases where the injury suffered by the domestic industry is limited and does not lead to any significant economic problem or shown by only a few factors.'

[204] Soprano at p 70.

[205] WT/DS 184/AB/R, 24 July 2001.

[206] *Ibid* at para 2.

[207] *Ibid*.

[208] *Ibid.*

dumping had indeed occurred by the Japanese on imports of hot-rolled steel, and consequently imposed an antidumping duty on the aforementioned.[209]

This chapter disagrees with the position used by the United States International Trade Commission as the approach that was used is not in line with international standards. Furthermore, this standard embodies a discriminatory stance and is averse to the principle of harmonisation.

In respect of article 3.1, the Appellate Body held that that the provision 'sets forth a Member's fundamental, substantive obligation with respect to the injury determination'.[210] The Body furthermore declared that 'positive evidence' mentioned in the article refers 'to the quality of the evidence that authorities may rely upon in making a determination'.[211] The Appellate Body moreover confirmed that the term 'positive' in the context of this provision, is interpreted to the Body as evidence being of an 'affirmative, objective and verifiable character, and that it must be credible'.[212] It seems that this allows investigating authorities to 'base its determination on all relevant reasoning and facts before it'.[213]

The second enquiry of article 3.1 of the ADA which mentions that evidence should also be of an 'objective examination' was further given acknowledgment by the Appellate Body in ***US Hot-Rolled Steel***. It was held that this stage of the enquiry is 'concerned with the investigative process itself'.[214] The Body affirmed that 'the word 'objective', which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness'.[215] Within the context of dumping, this provision obliges

[209] *Ibid.*
[210] *Ibid* at note 36, para 106.
[211] *Ibid* at para 192.
[212] *Ibid.*
[213] Appellate Body Report, *Thailand- Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (Thailand- H-Beams),* WT/DS 122/AB/R, 12 March 2001, para. 111. *See* Soprano at p 69.
[214] WT/DS 184/AB/R, 24 July 2001, para 193.
[215] *Ibid*.

member states to commit to investigations into dumping being done in a manner that is unbiased and does not favour any party concerned.[216]

In addition, Article 3.4 was afforded mention in the ***Hot-Rolled Steel*** case. The Body held that this article imposes an obligation for investigating authorities to evaluate certain factors that are relevant to investigations.[217] However, the listed factors do not equate to being confined to such and rather 'extends to all economic factors'.[218]

Moreover, Article 3.5 of the ADA includes in this provision, the element of causation which is essential for consideration in the determination of an antidumping duty. This provision imposes an obligation on investigating authorities to demonstrate a causal link 'between the volume of dumped imports and the injury to the domestic industry' thereof. Bhala[219] adds with reference to the ***Hot-Rolled Steel*** case[220] that causation involves a five-part enquiry. Thus:

> 'An investigating authority must:
> (1) identify factors that could be causing injury to the petitioning industry,
> (2) check to see these factors are operating simultaneously,[221]
> (3) examine all of these known factors to see if they indeed are having an injurious effect,
> (4) distinguish between two categories of known factors, namely, the injurious effects of dumped imports versus the injurious effects of all other known factors, and
> (5) ensure that the damage done by other factors is not attributed to the dumped imports.'

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[216] *Ibid*.

[217] *Ibid* at para 194.

[218] *Ibid*. Examples of such factors are 'the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry', among others. Taken from https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_02_e.htm (Accessed 31 July 2017).

[219] Bhala at p 997.

[220] WT/DS 184/AB/R, 24 July 2001, para 222.

[221] Factors 1 and 2 are taken from the *Hot-Rolled Steel* case at para 222.

This chapter has discussed before that an antidumping duty can be imposed even where the injury has not yet materialised.[222] Article 3.7 of the ADA elaborates on this point and provides a criterion which must be considered in totality, and not treated as consideration of one or another.[223] This provision states that 'a determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility', which Soprano qualifies as a limitation in order to 'limit risks of arbitrariness'.[224] The provision furthermore eliminates the possibility of futile investigations by stating that the threat must clearly be 'foreseen and imminent'. At footnote 10 of article 3.7, the ADA provides a non-exclusive example of what constitutes a threat of injury that is foreseeable and imminent, which is:

> '.. there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices'.

The open-endedness of the term 'threat of material injury' was significantly curbed in the case of ***Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States Recourse to Article 21.5 of the DSU by the United States[225] (Mexico – Corn Syrup case)***, in which the Appellate Body provided clarity. In this case, the antidumping investigating authority of Mexico imposed an antidumping duty on imports of HFCS (which is a sweetener used in soft drinks as well as in other products) from the United States and alleged that the imports were being

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[222] Article 3, footnote 9 of ADA.

[223] In making a determination regarding the existence of a threat of material injury, the authorities should consider, inter alia, such factors as:

1. (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
2. (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
3. (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
4. (iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.'

[224] Soprano at p 70.

[225] WT/DS132/AB/RW, 22 October 2001.

dumped in the Mexican domestic industry and further, threatened to cause material injury to the sugar industry.[226] The US challenged this reasoning on the basis of the 'threat of injury analysis being flawed in several respects'.[227]

The Body provided that in order to determine a threat of material injury, the relevant investigating authorities would have to result in assumptions in relation to the 'occurrence of future events since future events can never be definitively proven by facts'.[228] The Body furthermore argued that despite the uncertainty of postulating future events, the investigating authorities must provide a 'proper establishment of facts' when determining a threat of material injury must, unequivocally, 'be based on events that, although they have not yet occurred, must be clearly foreseen and imminent'.[229]

Due to the reasonable doubt following a threat of material injury to a domestic industry, article 3.8 concludes article 3 by stating such case 'must be considered and decided with absolute care'. It is thus submitted that the expansive nature of the provisions involving injury is in fact necessary, so as to prevent futile investigations from occurring. As dumping is a means of distorting international market competition, the allegations against this act, when it does occur, must be treated in all its seriousness as the use of antidumping tariffs impacts on the principles of the WTO such as the MFN principle and the encouragement of international competition. This research furthermore submits that this requirement is in fact, paramount, as the damage caused by dumping to domestic industries has the potential of collapsing entire industries resulting in substantial job loss and decrease in economic growth.[230]

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[226] https://ustr.gov/archive/Document_Library/Press_Releases/2001/October/US_Wins_WTO_Antidumping_Case_on_High_Fructose_Corn_Syrup.html (Accessed 3 July 2017).

[227] *Ibid*.

[228] Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HRFS) from the United States Recourse to Article 21.5 of the DSU by the United States WT/DS132/AB/RW, 22 October 2001, para 85, taken from Appellate Body Report, United States – Lamb Safeguard, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para 136.

[229] Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HRFS) from the United States Recourse to Article 21.5 of the DSU by the United States WT/DS132/AB/RW, 22 October 2001, para 85 in reference to *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US-Hot Rolled Steel)* WT/DS 184/AB/R, 24 July 2001 at para 56*. See also* Article 3.7 of the ADA.

[230] http://ewn.co.za/2017/03/23/sapa-dumping-behind-sa-poultry-crisis (Accessed 11 July 2017). The act of poultry dumping in South Africa by the EU has resulted in the SA Poultry Industry losing up to 200 000 employees. A further example of the effects of dumping was the steel industry that was on

3.3.3 Article 4 of the ADA – Definition of a Domestic Industry

A further element in the antidumping equation is found in article 4, which defines a domestic industry. The provision follows that:

> 'In determining injury or threat thereof, a 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products'.[231]

Lee has argued that the text of this provision has been constructed in a rather 'restrictive' manner by only limiting the injury to domestic industries.[232] The result of this restriction is that other role players in the domestic market are ignored.[233] In an international context, the author further argues that this provision permits governments

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the verge of collapse due to dumping of steel products (as well as the oversupply of steel by China that led to the Chinese market crash) by China in South Africa and other global markets, and commodity prices began to slump across the world. *See* http://aidc.org.za/crises-steel-mining-mean-south-african-economy/ (Accessed 10 September 2017). Because of the oversupply by China, steel companies such as Evraz Highveld Steel and Vanadium closed down in February 2016, and retrenched over 2 000 employees. *See* https://mg.co.za/article/2016-04-07-sas-steel-industry-on-brink-of-collapse (Accessed 10 September 2017).

[231] Article 4.1 of the ADA 'For the purposes of this Agreement, the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

1. (i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term 'domestic industry' may be interpreted as referring to the rest of the producers;
2. (ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if:
   - (a) the producers within such market sell all or almost all of their production of the product in question in that market, and
   - (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory.

In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.'

[232] Lee JS *A Critical Analysis of the Antidumping Policy at the Multilateral and Regional Levels: The Potential Influence of Europe's Trade Power for Possible Reform* (Published LLM Thesis, University of Hamburg, 2012) p 12. See article 4.1(i) of ADA at footnote 53.

[233] Other role players include domestic importers, retailers and consumers. See Lee JS *A Critical Analysis of the Antidumping Policy at the Multilateral and Regional Levels: The Potential Influence of*.

to neglect any other type of injury to 'domestic welfare and competition caused by the imposition of an [antidumping] measure'.[234] On quite the adverse view, the Panel in **the *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (EC-Fasteners)*** case has held that 'the use of the term 'may'' in article 4.1 makes it clear that the investigating authorities are not required to exclude related producers or importing producers'. The Panel moreover stated that 'there is nothing in article 3.1 or article 4.1 [of the ADA] that limits the discretion of investigating authorities to exclude, or not, related or importing producers'.[235]

The Panel **in *Mexico-Corn Syrup*** confirmed that article 4.1 and footnote 9 of article 3:

> 'inescapably require the conclusion that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1'.[236]

The domestic industry requirement in the ADA carries in itself, a significance. It forms an integral part in the imposition of antidumping duties, and without definition of what constitutes such, there would be far too many questions unanswered in respect of dumping. It can be argued, in this opinion of this chapter, that without a definition of a domestic industry, there would be no harm committed and inevitably, there would be no agreement governing the use of antidumping duties. This chapter is in agreement with the EC Fasteners case in that the term domestic industry is none but an umbrella term, which encompasses the many role players who are affected when dumping is found to have occurred.

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[234] Lee, at p 12.

[235] Panel Report of European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China WT/DS397/R 3 December 2010 para 7.244 (own emphasis added). *See also* https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_02_e.htm#fnt-451 (Accessed 6 July 2017.2017).

[236] Panel Report Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HRFS) from the United States Recourse to Article 21.5 of the DSU by the United States WT/DS132/AB/RW, 22 October 2001 para 7.147. *See also* https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_02_e.htm#fnt-451 (Accessed 6 July 2017.2017).

3.3.4 Article 5 of the ADA – Initiation and Subsequent Investigation into Alleged Acts of Dumping

The importance of defining the relevant domestic industry is followed through in article 5.1 of the ADA which states that:

> '[e]xcept as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry'.

The text in article 5 sets out strict procedures in which an investigation into dumping which must be adhered to,[237] as the investigation process is paramount before any anti-dumping duty is imposed.[238] As such, Article 5.1 is to be read concurrently with paragraph 4 of article 5 as the provision places an obligation on the relevant authorities to ascertain whether the petition made (to conduct an investigation into alleged dumping practices) has garnered adequate support from the domestic industry and directs that the 'petition be supported by domestic producers that account for:

(a) at least 25% of domestic production; and
(b) more than 50% of production by producers who either support or oppose the application'.[239]

Appleton and Plummer found that the purpose for the test at (b) was to prevent petitions being made where more opposition than support was established, 'even if the 25% minimum was met' and further acknowledged that some domestic producers prefer to remain neutral in certain circumstances.[240] In ***United States – Continued Dumping and Subsidy Offset Act of 2000 (US Byrd Amendment case)***,[241] Australia, Brazil, Chile and the European Communities, and subsequently, Canada

[237] International Trade Law Centre, Appleton E, Plummer MG *The World Trade Organization: Legal, Economic and Political Analysis* Springer Science and Business Media (2007) p 510.

[238] Article 1 of the ADA.

[239] Appleton, Plummer at p 510.

[240] *Ibid.*

[241] Appellate Body Report United States – Continued Dumping and Subsidy Offset Act of 2000 (US Byrd Amendment case) WT/DS217/AB/R WT/DS234/AB/R 16 January 2003.

and Mexico, requested the establishment of a Panel to assess the 'WTO-consistency of the United States Dumping and Subsidy Offset Act of 2000'.[242] In respect of article 5.4 of the ADA, the Appellate Body overturned the Panel's reasoning with regard to the aforementioned provision and held that there is no 'requirement for investigating authorities to examine the motives producers that elect to support (or to oppose the application)'.[243] The Body furthermore termed this to be 'difficult, if not impossible, as a practical matter, to engage in that exercise'.[244]

In addition to article 5.1, article 5.2 of the ADA, inevitably, provides criteria in order to support such investigations as 'evidence required for initiation'.[245] The provision states that:

> '[a]n application under paragraph 1 shall include evidence of:
> (a) dumping,
> (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and
> (c) a causal link between the dumped imports and the alleged injury.
>
> Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph'.

Paragraph 2 of article 5 furthermore mandates investigating authorities to supplement the proposed investigation with further particulars[246] in order to 'prevent a proliferation

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[242] *Ibid* at paras 2–3.

[243] *Ibid* at paras 288–291.

[244] *Ibid* para 291.

[245] Appleton; Plummer at p 510.

[246] 'The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

of vexatious and baseless investigations and obviate the potential and actual abuse of process' which is given authority by article 5.3 as it obliges 'investigating authorities to examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation'.[247] WTO panels have made mention of this provision allowing a wide discretion in this assessment.[248] In the ***Guatemala – Cement II case***, the Panel held that the investigating authorities are not confined to the limits of this provision, and may thus gather information from other sources.[249] More so, the Panel in *Mexico-Corn Syrup* stated that the 'quantity and quality of evidence required at this stage is less than that required at the preliminary or final determination of dumping or injury' and furthermore held that the investigating authority need not solve all underlying issues of fact. [250]

Article 5.5 of the ADA prohibits investigating authorities from publicising any application for the initiation of an investigation unless a decision has been taken to initiate an investigation. It does however, prescribe authorities to notify the government of the exporting member after receipt of a documented application and before commencement of an investigation. Appleton and Plummer qualify the reason for this

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.'

[247] Article 5.3. See also Ndlovu L 'An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa's dumping and anti-dumping Law' *Journal of International Law and Technology* Vol 5, Issue 1 (2010) p 32.

[248] Appleton, Plummer at p 511.

[249] Panel Report Guatemala – Definitive Antidumping Measures on Grey Portland Cement from Mexico WT/DS156/R 2000 para 8.62.

[250] Panel Report Mexico- Anti-Dumping Investigation of High Fructose Corn Syrup (HRCS) from the United States Recourse to Article 21.5 of the DSU by the United States WT/DS132/AB/RW, 22 October 2001 para 7.94, para 7.110. see also Ibid, Appleton; Plummer.

requirement as preventing 'industry uncertainty and disruption that would be likely to occur' once an investigation had begun.[251]

As an exception to article 5.1, article 5.6 of the ADA provides that the investigating authorities are permitted to conduct an investigation into alleged dumping without written application by or on behalf of a domestic industry, provided that such authorities have sufficient evidence of dumping, injury and a causal link. Article 5.7 of the ADA specifies a time frame in respect of the evidence previously mentioned, and prescribes that the evidence of dumping and injury must be considered simultaneously in the pending decision of whether or not an investigation will be conducted and throughout the investigation at a date no later than the earliest of which provisional antidumping measures may be applied.

Instructions on the conclusion or termination of investigations are found in article 5.8 in the ADA. This article mandates that there will be immediate termination in cases where authorities 'determine that the margin of dumping is *de minimis* or that the volume of dumped imports, actual or potential is negligible'. The text furthermore clarifies that *de minimi*s accounts for a margin of less than 2% and the volume of dumped imports are qualified as negligible of the volume of dumped imports from a country has accounted for less than 3% of imports of the like product from the importing member. Should individual countries account for less than 3% of imports of the like product in the importing member, but collectively account for more than 7% of imports of the like product in the importing country, the *de minimis* margin still applies.

In this respect, the Appellate Body in the case of ***Mexico – definitive anti-dumping measures on beef and rice (Mexico – Anti-Dumping Duties on Rice)***,[252] found in agreement with the Panel in that it noted that 'the second sentence of Article 5.8 requires the immediate termination of the investigation in respect of exporters for which an individual margin of dumping of zero or *de minimis* is determined'.[253] The Body held that 'for the purposes of Article 5.8, there is one investigation and not as

[251] Appleton, Plummer at p 512.
[252] Appellate Body Report WT/DS295/AB/R 29 November 2005.
[253] *Ibid* at para 217.

many investigations as there are exporters or foreign producers'.[254] It further gave more clarity to this and stated that 'that there is a single investigation, and that Article 5.8 requires the 'immediate termination' of this investigation in respect of the individual exporter or producer for which a zero or *de minimis* margin is established'.[255] The Body furthermore confirmed that the 'margin of dumping' shall refer to the 'individual margin of dumping of an exporter or producer rather than a country – wide margin of dumping', one that is consistent with the definition contained in article 2.4.2.[256]

The Panel noted in ***US – Drams***[257] that where the *de minimis* test is concerned, it is concerned solely with the provisions of article 5.8 and must be distinguished from any other test.[258] Lastly, Article 5.10 concludes this section by stating that, save for exceptional cases, investigations must be concluded within one year and must not continue for more than 18 months.

3.3.5 Article 11 of the ADA – Duration and Review of Anti-Dumping Duties and Price Undertakings

A limitation that is imposed on the imposition of anti-dumping duties can be found in article 11 of the ADA which details inter alia, the duration of anti-dumping duties.[259]

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[254] *Ibid* at para 218.

[255] *Ibid.*

[256] *Ibid* at para 216.

[257] United States Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea WT/DS99/R 29 January.

[258] *Ibid* at para 6.89 – 6.90.

[259] '11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

'11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

'11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of a time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.

This provision imposes an obligation on national authorities to 'establish mandatory reviews of anti-dumping duties after five years from the initial imposition'.[260] This is universally known as the 'sunset review'.[261] The rationale for such a review stated by Pattison,[262] and is further confirmed by article 11.1 of the ADA, is that 'anti-dumping duties should remain in force only so long as they [are] generally necessary to counteract dumping which [is] causing or threatening material injury to a domestic industry'.[263] In the absence of evidence showing that the removal of the duties will lead to the continuation of injury on the domestic industry, the anti-dumping duties will thus be terminated.[264] The introduction of the sunset review proceedings, which were incorporated during the Uruguay Round of multilateral negotiations, have been in force since the signing of the Final Act in 1994.[265]

A unique provision that is article 11, along with a few others, it further provides detailed proceedings that require strict adherence by the respective investigating authorities in which other provisions in the ADA do not.[266] It is thus submitted, that the inclusion of sunset review proceedings seems to eliminate the possibility of excluding international markets entirely, thereby removing the protectionist connotations that are implicitly attached to anti-dumping duties.

'11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

'11.5 The provisions of this Article shall apply mutatis mutandis to price undertakings accepted under Article 8.'

[260] Sohn C 'Current Developments of WTO Dispute Settlement Body Findings on the US Antidumping Sunset Review Regime' Richmond Journal of Global Law and Business (2006) p 179.

[261] Hurrabiell at p 596, footnote 191. ''Sunset indicates the termination of a dumping duty assessment against a producer, if no other action is taken, after five years have passed. These provisions specify an end-point for the levying of an antidumping duty which activates automatically rather than requiring respondent to petition for termination.'

[262] Pattison JE Antidumping Duties and Countervailing Laws (2005) p 6.

[263] Sohn at page 179.

[264] article 11.3 of ADA.

[265] Pattison at p 30 – 31.

[266] Sohn at p 180. Examples include 'Article 11.4 states that provisions of Article 6 regarding evidence and procedure shall be applied to sunset reviews. Article 18.3.2 provides transitory measures for the antidumping duty orders imposed before the date of entry into force of the WTO Agreement. In this respect, sunset reviews differ from original investigations that is governed by extensive legal and procedural framework provided in Articles 3 and 5 of the AD.'

3.4 CONCLUSION

This chapter analysed analysing the focal elements involved in antidumping determinations contained in the ADA. The analysis of the above provisions presents the argument that the investigation process in respect of article 5 of the ADA is flawed due to the lack of impartiality, which is the foundation of most adjudication proceedings.[267] Further, the provisions found in the ADA were primarily enacted to control the reactions of governments to acts of dumping within the borders of a country, and it is in the opinion of this research, that the ADA is a tool made to come to the aid of the affected country. Notwithstanding this statement, it is further submitted that parties to the investigation be afforded proper representation, which is granted by the ADA.[268]

However, this should be done in a manner that does not put a strain on the responding member due to strict time constraints. Furthermore, this research argues that it is in the interests of fairness, that the country alleging dumping not construe the provisions into a protectionist shield as it places administrative and economic burdens on countries that may otherwise not have the means to respond adequately to allegations made. The case law mentioned have further provided insight and clarity as to the interpretation of these elements, in an attempt to prevent any harm caused by dumping through the lens of the ADA. The following chapter will proceed to discuss dumping laws and regulations in South Africa and its establishment thereof and will further this country's stance in relation to free trade and whether dumping in the country has affected its adherence to this principle, as part of the general theme of the research.

[267] Cho S 'Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition' North Carolina Law Review Vol 87 (2009) p 386 – 387.
[268] Article 17.

CHAPTER 4:
SOUTH AFRICA AND ITS ROLE IN THE MULTILATERAL TRADING SYSTEM IN RESPECT OF DUMPING

4.1 INTRODUCTION

It is common cause that developed countries dominate the playing field in the world of international trade due to their wide access to many opportunities, skills and resources that many developing countries may not possess. If one has to narrow the kaleidoscopic connotations to this statement, it is easy to point out that in the field of dumping and anti-dumping activities, developed countries have thus in the past, taken the lead in this too. For example, Grimwade states that 'the main users of anti-dumping were the developed countries', particularly the United States ('US'), the European Communities ('EC'), Canada and Australia.[269]

Among these giants of international trade, developing countries began to push through the current in order to make their mark on the international playing field.[270] Research suggest that countries such as South Africa becoming one of the biggest users of anti-dumping policies during the midst of the 1980s, in addition to countries such as Argentina, India and Mexico.[271] In light of this, it is submitted that South Africa's actions elicits varying questions as to whether its use of anti-dumping is indeed a justifiable act or whether its use is that of a protectionist measure in response to the heavy handedness of developed countries.

In response to the above, this chapter will thus seek to provide an overview of relevant SA legislation that govern antidumping. It will thereafter provide a discussion on how South Africa arrived at the legislation dealing with antidumping with reference to landmark cases that were heard in respect of antidumping in South African courts. Lastly, the chapter will discuss whether free trade has impacted the dumping situation

[269] Grimwade at p 7.

[270] https://www.brookings.edu/opinions/protectionism-is-on-the-rise-antidumping-import-investigations/ (Accessed 12 August 2017). 'Comparing 2008 to 2007, the number of new anti-dumping investigations opened in 2008 was up 31%, while the number of anti-dumping measures actually applied increased by 19%. Developing countries dominated this trend on both sides; they initiated 73% of all new investigations and were the target of 78% of them.'

[271] Grimwade at p 7.

in South Africa and identify the protectionist measures which South Africa employs against antidumping.

4.2 BACKGROUND TO SOUTH AFRICA'S POSITION ON DUMPING

South Africa's use of antidumping regimes began during the time it was subject to colonial reign in 1914.[272] The Customs Tariff Act of 1914[273] imposed a 'discretionary power' on the Governor-General at the time to levy a duty on goods imported into South Africa (when it was classified as the Union of South Africa) that were less than the normal price of the goods sold in the exporting country.[274] In effect, it prevented the Governor-General from abusing the process by obliging the former to provide a six-week notice prior to imposing the duty.[275] The Board of Trade and Industry was the sole authority that was responsible for anti-dumping investigations. However, in practice, Customs 'conducted the dumping part of investigations, while the Board of Trade and Industry was responsible for investigating injury and causality as well as making the necessary recommendations regarding the impositions of any duties'.[276] The Board was then an independent body that derived its powers from statute[277] to maintain and develop South African industries 'including the responsibility of tariff increases and decreases, as well as for trade remedies'.[278]

By 1921, South Africa had imposed its first anti-dumping duty and 'was a prolific user of the instrument right from the start'.[279] The country had earned the title of the 'single biggest user during the first ten years of the GATT and again a major user during the first fifteen years of the WTO'.[280] Brink argues that 'during the 1970s and the 1980s, South Africa was a closed economy with high tariffs to protect local industries'.[281] As

[272] Peterson CCD 'African Dumping Grounds: South Africa's Struggle Against Unfair Trade' Boston University International Law Journal Vol 14 (1996) p 390.

[273] Brink G 'One Hundred Years of Anti-dumping in South Africa' Journal of World Trade (2015) p 1.

[274] Peterson at p 390.

[275] Viner J *Dumping: A Problem in International Trade,* University of Chicago Press (1923) p 209.

[276] http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf (Accessed 16 August 2017).

[277] Board of Trade and Industries Act 33 of 1924.

[278] Board Report No. 1 (1921). *See also* s 2(1)(g) of the Board of Trade of Industries Act 1924 and s 9(2)(g) of the Board of Trade and Industries Act 1944.

[279] Brink (2015) at p 8.

[280] Brink G 'Anti-dumping in South Africa' *Tralac Working Paper No. D12WP07/2012* (2012) p 1.

[281] Brink (2015) at p 8.

a result, the domestic industries were unable to compete with foreign imports due to their 'relatively small capacities'.[282]

During the 1990s, South Africa began to make its way back into the international community, after it was faced with sanctions as a result of apartheid.[283] The country had encouraged the economy to become more competitive and supported the idea of integrating its economy with the international community.[284] Thereafter, South Africa became involved in the multilateral trade negotiations[285] discussed at length in chapter 2.[286]

Since the establishment of the WTO in 1995, and South Africa's subsequent membership of the WTO, the country stance has changed rapidly, in that it has changed from inviting competition into its borders to actually attempting to shun the practice entirely.[287] This is evident in the fact that South Africa has become one of the most prolific users of antidumping since 1995.[288] Between 1995 and 2014, South Africa has initiated a total of 229 anti-dumping investigations and 137 anti-dumping duties.[289] This has led to South Africa being 'the fifth-largest users of anti-dumping actions after the US, EU, Argentina and India'.[290] See Annexure 'I' for South Africa's statistics of the imposition of anti-dumping duties since 1995.

4.2.1 Case Law Reflecting South Africa's Position

According to Ndlovu, there are pertinent cases at the WTO level in which South Africa has been a respondent, but has surprisingly never made it past the 'request for

[282] *Ibid.*
[283] https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm (Accessed 19 October 2017).
[284] *Ibid.*
[285] *Ibid.*
[286] See chapter 2, pp 17–22.
[287] Beltran Gomez at pp 65–66.
[288] Brink (2015) at p 8.
[289] *Ibid.*
[290] https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm#fntext21 (Accessed 19 October 2017).

consultation' levels of the dispute settlement system due to South Africa avoiding adverse consequences as a result of 'diplomatic overtures'.[291]

In ***South Africa Anti-Dumping Duties on Certain Pharmaceutical Products from India*****,**[292] India requested consultations with South Africa in respect of the imposition of anti-dumping duties recommended by the Board of Tariffs and Trade on certain pharmaceuticals from India.[293] The Board contended that the pharmaceuticals were being dumped into the SACU and subsequently imposed preliminary and definitive anti-dumping duties respectively.[294] India contended that the anti-dumping duties were in violation of articles 2, 3, 6, 12 and 15 of the ADA.[295]

Furthermore, in ***South Africa Definitive Anti-Dumping Measures on Blanketing from Turkey*****,**[296] Turkey requested consultations with South Africa in respect of the imposition of definitive anti-dumping duties recommended by the Board of Tariffs and Trade on imports of blankets in roll form.[297] The measures were 'imposed further into an investigation by the Board in respect of the alleged circumvention of anti-dumping duties on blankets originating in or imported from Turkey'.[298] Turkey claimed that:

1. The Board had failed to ensure the proper notifications;
2. The establishment of the facts was improper;

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[291] Ndlovu at p 1–2.

[292] WT/DS 168/1 (13 April 1999).

[293] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds168_e.htm (Accessed 19 August 2017).

[294] *Ibid*.

[295] *Ibid*. 'India contended that:

1. the definition and calculation by the BTT of normal value is inconsistent with South Africa's WTO obligations, because erroneous methodology was used for determining the normal value and the resulting margin of dumping;
2. the determination of injury was not based on positive evidence and did not include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, which led to an erroneous determination of material injury suffered by the petitioner;
3. the South African authorities' establishment of the facts was not proper and that their evaluation was not unbiased or objective; and
4. the South African authorities have not taken into account India's special situation as a developing country.'

[296] WT/DS288/1 (15 April 2003).

[297] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds288_e.htm (Accessed 19 August 2017).

[298] *Ibid*.

3. The Board's evaluation of these facts 'was not unbiased and objective, in particular, the initiation and conduct of the investigation and the imposition of the anti-dumping duty'.[299]

Lastly, Ndlovu[295] notes the case **of *South Africa Anti-Dumping Measures on Uncoated Woodfree Paper*,**[300] in which Indonesia requested consultations with South Africa on its 'continued imposition of anti-dumping measures on imports of uncoated wood-free white A4 paper from Indonesia'.[301] Albeit the termination of the anti-dumping measures was brought about, and South Africa noted that the termination would not lead to further dumping activities, South Africa continued to impose the duties on the Indonesian industry.[302] Indonesia claimed that South Africa was in violation of articles 11.3, 11.4 and 16.4 of the ADA.[303] However, in November 2008, the Indonesian authorities were informed that South Africa had effected an amendment to the Customs and Excise Act, withdrawing the duties with retrospective effect from November 2003, which subsequently led to Indonesia withdrawing its request for consultations.[304]

This chapter submits that the approach used by South Africa to avoid disputes from reaching the Dispute Settlement Body ('DSB') at the WTO is, perhaps, a deferral tactic in which the country can evade its free trade obligations in order to sustain its protectionist stance.[305] It is moreover submitted that South Africa's evasiveness towards the DSB is a further indication that the country uses the ADA in a manner that shields its domestic industries from foreign suppliers. However, a discussion on the country's relevant legislation could determine the extent of its actions.

[299] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds288_e.htm (Accessed 19 August 2017).
[295] Ndlovu at p 1–2 .
[300] WT/DS374/1 (16 May 2008).
[301] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds374_e.htm (Accessed 19 August 2017).
[302] *Ibid*.
[303] *Ibid*.
[304] *Ibid*.
[305] This is discussed more substantially later on in this chapter.

4.3 LEGISLATIVE FRAMEWORK AND THE PERTINENT BODIES REGULATING ANTI-DUMPING IN SOUTH AFRICA

Interestingly, in the years between 1924 and 1986, the South African anti-dumping legislative framework saw a myriad of changes and amendments in order to bring its laws in line with the obligations of the GATT as well as Article VI of GATT.[306] In 1992, South Africa sought to amend its antidumping legislation, which then became the Board on Tariffs and Trade Act 107 of 1986 ('the Act').[307] The aim of the amendment was towards advancing 'clearer definitions of dumping and a more refined procedural application'.[308] A further change that came with the Act was the extension of the 'jurisdictional and protective reach of the statute by expanding its application to include goods imported to the Republic or the South African Customs Union'.[309]

The Board of Trade and Industry subsequently became the Board on Tariffs and Trade ('the Board') and was then given full authority to conduct investigations into dumping in accordance with the Act.[310] The Act was ultimately revised in 1995 in order to bring the provisions of the Act in line with the Anti-Dumping Agreement of 1994,[311] 'including the definition of normal value'.[312]

Further, in 2003, the Board on Tariffs and Trade was replaced by the International Trade and Administration Commission ('ITAC'), which presently stands as the main authority for anti-dumping investigations in South Africa.[313] The establishment of this body was founded to 'rationalize, streamline and modernize an organization with a

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[306] Brink (2015) at p 1- 7.See also UNCTAD/WTO International Trade Centre, *Business Guide to Trade Remedies in South Africa and the Southern African Customs Union,* International Trade Centre, Switzerland (2003).

[307] Peterson at p 390.

[308] GATT Secretariat, *GATT Trade Policy Review Mechanism: South Africa,*

WORLD TRADE MATERIALS, July 1993, at 5,10.

[309] Peterson at p 390.

[310] http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf (Accessed 16 August 2017).

[311] *Ibid*. *See also* Brink (2015) p 8.

[312] Brink (2015) at p 8. Other changes included the definition of dumping, export price and fair comparison. Taken from Brink G (2012) at p 2.

[313] http://www.itac.org.za/pages/about-itac/an-overview-of (Accessed 19 August 2017). *See also* Brink (2015) at p 7. *See also* Brink (2012) at p 2.

history that dates back to the 1920s'.[314] ITAC forms part of a Schedule 3A Public Entity that was founded in terms of the International Trade Administration Act 71 of 2002 ('ITAA') that employs 'strategic international trade instruments in its alignment to prevailing trade and industrial policy imperatives' in its attempt to successfully execute its given mandate.[315]

Complimenting ITAC, was the promulgation of the Anti-Dumping Regulations ('ADR') that were created under section 59 of the ITAA as an indication 'to give effect to the provisions of the treaties binding on the Republic in international law'.[316] The present legislative framework now stands with ITAA and its subordinate, the Anti-Dumping Regulations, and the Customs and Excise Act,[317] as well as various South African statutes such as the Promotion of Access to Information Act,[318] which ensures access to non-confidential information , and also the Promotion of Administrative Justice Act,[319] which guarantees a fair administrative process as well as transparency of proceedings.[320]

Most importantly, it is trite that the aforementioned statutes, as well as any law in the land, are subject to the rights and obligations set forth by the Constitution of South Africa.[321] Brink[322] submits that the rights associated with anti-dumping investigations can be found in the Constitution in sections 32, 33, 33(2) and 195.[323] These sections

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[314] http://www.itac.org.za/pages/about-itac/an-overview-of (Accessed 19 August 2017).

[315] *Ibid*.

[316] Brink (2012) p 5. *See also ITAC v SCAW* (Unreported case 48829/2008 T) para 2.

[317] Act 91 of 1964. According to Vinti, South Africa is presently in the process of reviewing its Customs and Excise Act in order to bring the provisions in line with international standards, but it is, however, still in the process of being promulgated as the primary statute governing dumping in South Africa (SARS 2015 http://www.sars.gov.za.). Until this occurs, reference will be made to the Customs and Excise Act 91 of 1964. Taken from Vinti C 'A Spring Without Water: The Conundrum of Anti-Dumping Duties in South African Law' Potchefstroom Electronic Law Journal (2016) p 2.

[318] Act 2 of 2000.

[319] Act 3 of 2000.

[320] Brink (2012) at pp 3–4. *See also* Brink (2015) at p 7.

[321] Constitution of the Republic of South Africa, 1996.

[322] Brink G (2012) at p 3.

[323] Section 32 of the Constitution reads as follows:

'(1) Everyone has the right of access to—

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

affirm the rights of access to 'any information held by the state'; the right to 'reasonable and procedurally fair' administrative action; the right to require written reasons to be given in cases where a person's rights are adversely affected by an administrative action; and the right to require the public administration to provide services 'impartially, fairly, equitably and without bias, and impose the obligation on courts to interpret

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(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.'

Section 33 of the Constitution reads as follows:

'(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration. '

Section 195 of the Constitution reads as follows:

'(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

'(2) The above principles apply to—

(a) administration in every sphere of government;

(b) organs of state; and

(c) public enterprises.

'(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).

'(4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

'(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.

'(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.'

decisions in line with international law.[324] Notwithstanding South Africa's membership to the GATT and its successor, the WTO since its inception in 1995, it has yet to promulgate the ADA into its municipal law.[325] This chapter submits that this approach is somewhat problematic as, although South Africa is bound to the ADA by virtue of being a member of the WTO, it leaves room for South Africa to digress from some of the provisions, as the country has promulgated the ADR, which has been found to show non-compliance in some of its provisions.[326]

Whatever the position may be, the South African Constitution nevertheless prescribes that 'the courts, when interpreting any legislation, must prefer the interpretation that is consistent with international law to the interpretation that is inconsistent'.[327] A landmark unreported case that exists with relevance to this is the case of ***Chairman, Board on Tariffs and Trade v Brenco Inc and Others***,[328] which surrounded the 'importance of the Constitution in interpreting international trade laws'.[329] The SCA in this matter was faced with 'questions of procedural fairness in the unique context of the investigation of dumping and the imposition of anti-dumping duties pursuant to the relevant provisions of the Board of Tariffs and Trade Act as well as the Customs and

[324] Brink (2012) pp 3–4.

[325] Khanderia S 'The Compatibility of South African Anti-Dumping Laws with WTO Disciplines' African Journal of International and Comparative Law (2017) p 351.

Also, section 231 reads as follows:

'(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.'

[326] Discussed further in chapter 5.

[327] Section 233 of the Constitution of South Africa.

[328] 2001 (4) SA 511 (SCA).

[329] Ndlovu at p 33.

Excise Act'.[330] The court naturally leaned into interpreting the national anti-dumping law and the corresponding practice in South Africa.[331]

In arriving at its decision, the court found that the 'obligations set forth by the [ADA] offer some assistance in adjudging the fairness of the investigating authorities in the manner of anti-dumping investigations'.[332] The SCA further held that the Board on Tariffs and Trade 'had been guided by the Anti-Dumping Agreement in drafting the dumping legislation'.[333] The court further gave effect to section 233 of the Constitution of South Africa stating that '[i]n any event, we are required by the Constitution to interpret domestic legislation governing the duration of anti-dumping duties consistently with these international obligations'.[334]

A second case that afforded clarity in this contentious matter was the case **of *RSA v SARS*,**[335] which alluded to the relationship of South Africa to the ADA. The SCA held that 'an international agreement would only become 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 that the intention of the South African Parliament is to give effect to the provision of the [ADA],[336] provided that the latter is in conformity with section 233 of the South Africa Constitution'.[337]

This chapter appreciates the court's comments stating that the ADR was guided by the ADA, but notes the fact that although it acted as a framework, the door is left open for South Africa to interpret the ADR primarily, with the view that they are a generic

[330] Osode PC 'An Assessment of the WTO-Consistency of the Procedural Aspects of South African Anti-Dumping Law and Practice' *Pennsylvania State International Law Review* Vol 22 (2003–2004) p 22.

[331] *Ibid.*

[332] *Chairman, Board on Tariffs and Trade v Brenco Inc and Others* 2001 (4) SA 511 (SCA). *See* Khanderia at p 352.

[333] *Chairman, Board on Tariffs and Trade v Brenco Inc and Others* 2001 (4) SA 511 (SCA) para 33. *See also* Vinti at p 20.

[334] (2007) SCA 118 (RSA) para 43.

[335] (2007) SCA 118 (RSA).

[336] Own emphasis added (brackets).

[337] (2007) SCA 118 (RSA) para 6. *See also* Khanderia at p 352.

form of the principles embodied in the ADA, while it has been argued that the ADR shows WTO inconsistencies.[338]

4.4 FREE TRADE OR PROTECTIONISM: WHAT IS SOUTH AFRICA'S STANCE?

Previously mentioned in this chapter was the fact that South Africa was one of the first users of the anti-dumping instrument and subsequently became a 'prolific user' in ensuing years during the GATT era and, at present, the WTO era. This chapter puts forth a submission that it remains to be asked, however, whether South Africa has continued this abundant usage as a response to combat international competition against its domestic producers. While it remains known that free trade is an integral principle of the WTO,[339] it is submitted that South Africa seems to tailor the ADA in a manner that suits its own needs, that is, to prevent international competition.[340] Beltran-Gomez submits that South Africa finds itself in a 'permanent dilemma' of opening its economy to free trade when domestic producers have inherent barriers that are averse to this worldwide principle.[341] The case of ***International Trade Administration Commission v SCAW South Africa***[342] demonstrated South Africa's position with regard to its usage of anti-dumping duties, in which such position stands to be up for debate.

During 2002, an anti-dumping duty was imposed by South Africa on imports of stranded wire, rope and cables of iron steel that originated in or were imported by various countries, which included the United Kingdom.[343]

It was alleged by SCAW (which is the largest South African manufacturer of steel products)[344] that Bridon International Ltd (a British manufacturer of the same products

[338] Ndlovu at p 40.

[339] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (Accessed 22 August 2017). Discussed in chapter 2 p 23.

[340] Beltran Gomez at pp 65–66.

[341] Beltran Gomez at pp 64–65.

[342] (2010) ZACC 6.

[343] *Ibid* at paras 8–9 http://www.saflii.org/za/cases/ZACC/2010/6.html (Accessed 22 August 2017).

[344] *Ibid*. The steel products were 'of a wide variety, including rolled steel and alloy iron castings, cast alloy iron, for steel grinding media, chain, steel wire rope, and strand wire products'.

which was, in fact, a direct competitor of SCAW (referred to hereafter as 'Bridon UK') was dumping the aforementioned goods in South Africa.[345] The matter of contention was that the anti-dumping duty was imposed on a number of goods, notwithstanding the fact that fishing rope was the only product that was found to be dumped in the country.[346] Of interest, the anti-dumping duty amounted to 42.1% on the products in question, which considerably shielded SCAW as well as other domestic manufacturers within the Southern African Customs Union ('SACU') from any international competiton.[347] Approximately five years later, SCAW initiated a sunset review before the existing anti-dumping duty expired, with the intention of persuading ITAC 'to extend the life of the existing anti-dumping duties'.[348] ITAC accepted the proposal put forth by SCAW and conducted a sunset review, investigating whether the removal of the anti-dumping duties would lead to a continuation of 'injurious dumping'.[349] The subsequent report of the investigation by ITAC concluded that dumping would indeed occur once the duties were lifted, but dumping of the products in question would not be a product of Bridon UK.[350]

ITAC subsequently recommended a lifting of the duties against Bridon UK, in which SCAW responded with an administrative action against ITAC, in which the former sought to interdict the latter from removing the anti-dumping duties.[351] The matter had reached the Constitutional Court, in which the court finally set aside the interdict of the High Court after revising the entire case, but, however, 'failed to properly address the competition matter that emerges evidently from the facts'.[352]

It is clear from the aforementioned case that South Africa primarily imposed the anti-dumping duty in order to eradicate its direct competition. The idea of creating a monopoly remained the foremost goal of SCAW in a manner that undoubtedly sees

[345] Beltran Gomez at p 66.
[346] *Ibid.*
[347] (2010) ZACC 6 at para 17 http://www.saflii.org/za/cases/ZACC/2010/6.html (Accessed 23 August 2017).
[348] *Ibid.* at para 19.
[349] *Ibid.*at para 20.
[350] *Ibid.*
[351] (2010) ZACC 6 at paras 22–24 http://www.saflii.org/za/cases/ZACC/2010/6.html (Accessed 23 August 2017).
[352] Beltran Gomez at p 66.

the manufacturer using the ADA in order to further its own needs. Beltran Gomez provides that South Africa is an enthusiastic enforcer of competition laws that not only are administered locally, but includes international producers, and furthermore agrees to the 'international commitments of free trade' [353] thus, creating a monopoly as in the ***SCAW case***, is contrary to its own laws.

To the contrary, Bi puts forth a submission that an exploration into the justification of dumping is necessary as there has been a proliferation of the use of anti-dumping duties by developing countries, including South Africa.[354] The author states that the general international community are subject to the propagated idea that 'dumping is harmful', but decline to delve deeper into why it actually occurs.[355] Denton further provides that antidumping law should not 'attempt to cleanse the international system of distortions' but should merely aim to reduce 'the protectionist pressure by reducing the unfairness of foreign commercial structures'.[356] The law should purely act as a 'buffer' that enhances the 'effects of structural differences'.[357] Thus, this chapter submits that the proliferation of protectionism by developing countries such as South Africa would resort to trade restrictive barriers only where it is necessary and not as a deliberate tactic against larger nations.

4.4.1 Anti-Dumping of Poultry: South Africa vs United States

Linked to the above discussion, the trade in chicken between South Africa and the United States endured a 15-year debacle, but ultimately reached an agreement in June 2015.[358] It began in November 1999, when the Board on Tariffs and Trade initiated an antidumping investigation into the alleged dumping of poultry products

[353] Beltran Gomez at p 69–70. The author furthermore states that in wiping out international competition where such products are also imported into the SACU, will only deprive the countries of the SACU as well as South African consumers of a choice in products, and possibly, at better prices.

[354] Bi Y 'Is Dumping Still Harmful – New Thinking on Anti-Dumping in the Global Free Trade' *Journal of East Asia and International Law* Vol 6, Issue 1 (2013) p 31.

[355] *Ibid.*

[356] Denton R '(Why) Should Nations Utilize Antidumping Measures' Michigan Journal of International Law Vol 11, Issue 1 (1989) p 250.

[357] *Ibid.*

[358] Watson KW 'Antidumping Fowls Out: US – South Africa Chicken Dispute Highlights the Need for Global Reform' Free Trade Bulletin No. 62 https://www.cato.org/publications/free-trade-bulletin/antidumping-fowls-out-us-south-africa-chicken-dispute-highlights (Accessed 28 August 2017).

imported into South Africa by the United States.[359] The petition was brought by Rainbow Farms (Pty) Ltd ('Rainbow Farms') 'on behalf of the Southern African Customs Union (SACU)'[360] and was, in addition, given the support of the South African Poultry Association.[361] It was alleged by Rainbow Farms that the imports of poultry from the US were dumped at prices less than the normal value in the SACU.[362] Once the anti-dumping investigation was initiated, relevant questionnaires were sent for completion to producers and exporters of poultry products in the US.[363]

In a preliminary investigation, the Board had found material injury to have occurred by the dumping of the poultry products into the SACU,[364] and later confirmed this finding in a final determination, subsequent to receiving comments and submissions from all the relevant and interested parties concerned.[365] The conclusions reached in the final determination included the fact that dumping had ensued on the part of US exporters and producers, which inevitably caused material injury to the Southern African domestic industries concerned.[366] As a result, the Board had recommended the imposition of anti-dumping duties on the relevant poultry imports, in order to neutralise the loss suffered by the affected domestic industries.[367]

Relevant to the discussion is that consumers in the South African market tend to lend a preference towards dark meat (thighs and legs), whereas American consumers

[359] Notice No. 2445 of Government Gazette No. 20599 5 November 1999.

[360] Fillis JB *Assessing the Determination of Constructed Normal Value in the 2000 USA Antidumping Poultry Case in South Africa* (Published LLM Thesis, University of Pretoria, 2016) p 25.

[361] Board on Tariffs and Trade Report No. 4088(2000) 'Investigation into the alleged dumping of meat of fowls of the species *Gallus domesticus*, originating in or imported from the United States of America: Final Determination' at p 1.

[362] *Ibid* at p 3.

[363] *Ibid* at p 1.

[364] Board on Tariffs and Trade Report No 4065 (2000) 'Investigation into the alleged dumping of meat of fowls of the species *Gallus domesticus*, originating in or imported from the United States of America: Preliminary Determination.

[365] Board on Tariffs and Trade Report No. 4088(2000) 'Investigation into the alleged dumping of meat of fowls of the species *Gallus domesticus*, originating in or imported from the United States of America: Final Determination' at p 2.

[366] Fillis at p 26.

[367] Board on Tariffs and Trade Report No. 4088(2000) 'Investigation into the alleged dumping of meat of fowls of the species *Gallus domesticus*, originating in or imported from the United States of America: Final Determination' at p 2.

seem to favour white meat (breasts and wings).[368] As a result of this fact, the US market were able to sell portions of dark meat in the South African market for a higher price than the amount for which it was sold for in its home market.[369] Watson states that this *per se* does not constitute dumping, for the reason that the export price was higher than the home market price.[370] A study of the case found that notwithstanding the detail that 'the average value of US chicken producers' exports to South Africa minus transportation costs exceeded the US market price consistently throughout the period of investigation' used by the Board,[371] anti-dumping duties were nonetheless imposed on US poultry ranging from 209 to 375%.[372]

This exorbitant range of the percentage of anti-dumping duties, was a bold yet incredibly protectionist move on the part of South Africa, which effectively locked the US out of the South African market completely.[373] The rationale of the prohibitive duties was based on the premise that South Africa centred its investigation on 'constructive value'[374] and disregarded the home market value of the US.[375]

This chapter submits that the general premise of article 2.2 of the ADA is that constructive value may be used in anti-dumping investigations only where 'there are no sales of the like product in the ordinary course of trade within the domestic market

[368] Report No. 195 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 at para 4.1.1. See also R Henry & G Rothwell 'The World Poultry Industry' (1995) *International Finance Corporation* p 12.

[369] Watson KW 'Antidumping Fowls Out: US – South Africa Chicken Dispute Highlights the Need for Global Reform' Free Trade Bulletin No. 62 https://www.cato.org/publications/free-trade-bulletin/antidumping-fowls-out-us-south-africa-chicken-dispute-highlights (Accessed 29 August 2017).

[370] Watson KW 'Antidumping Fowls Out: US – South Africa Chicken Dispute Highlights the Need for Global Reform' Free Trade Bulletin No. 62 https://www.cato.org/publications/free-trade-bulletin/antidumping-fowls-out-us-south-africa-chicken-dispute-highlights (Accessed 29 August 2017).

[371] Coleman JR, Fry J, and Payne WS, 'Use of Antidumping Measures by Developing Countries: The Impact on U.S. Exports of Agricultural Products' (paper presented at 'Agricultural Policy Reform and the WTO: Where Are We Heading?' Capri, Italy, June 23–26, 2003).

[372] Board on Tariffs and Trade Report No. 4088(2000) 'Investigation into the alleged dumping of meat of fowls of the species *Gallus domesticus*, originating in or imported from the United States of America: Final Determination' at p. 96.

[373] Watson KW 'Antidumping Fowls Out: US – South Africa Chicken Dispute Highlights the Need for Global Reform' Free Trade Bulletin No. 62 https://www.cato.org/publications/free-trade-bulletin/antidumping-fowls-out-us-south-africa-chicken-dispute-highlights (Accessed 29 August 2017).

[374] Article 2.2 of ADA. See also Chapter 2 for a discussion on this provision.

[375] Watson KW 'Antidumping Fowls Out: US – South Africa Chicken Dispute Highlights the Need for Global Reform' Free Trade Bulletin No. 62 https://www.cato.org/publications/free-trade-bulletin/antidumping-fowls-out-us-south-africa-chicken-dispute-highlights (Accessed 29 August 2017).

of the exporting country' or 'because a particular market situation exists or the volume of imports [is] so low, the price of the products [is] unable to be compared to a like a product when exported to a third country'.

As such, to comply with the ordinary course of trade requirement, Rainbow Farms alleged that 'sales prices in the USA show an anomaly that cannot be applied universally',[376] and disregarded the USA's allocation of costs 'as it did not reasonably reflect the costs associated with the production and sale of brown chicken meat'.[377] A further compliance measure taken by South Africa in order to use the constructive value method was the allegation that the Board made in respect of a particular market situation being present.[378] It came to this conclusion by relying on the preference of the respective countries to dark and white poultry meat.[379] The Board alleged that the strong preference for white meat by the US caused the prices of brown meat to be significantly low, which is 'prevalent in a number of countries such as Canada and the European Union'.[380]

The calculation methods and subsequent imposition of anti-dumping duties prompted the US poultry industry to pursue bilateral negotiations with South Africa on the basis that the methods and duties violated the rules of the WTO.[381] The debate centred around the renewal of the African Growth and Opportunity Act ('AGOA') in 2015 by the US Congress.[382] The proposal put forth by the USA was to exclude South Africa from the 'AGOA trade preferences unless greater market access was granted'.[383]

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[376] Board on Tariffs and Trade Report No. 4088(2000) 'Investigation into the alleged dumping of meat of fowls of the species *Gallus domesticus*, originating in or imported from the United States of America: Final Determination' at p. 18.

[377] *Ibid* at p. 23.

[378] Fillis at p 30.

[379] Board on Tariffs and Trade Report No. 4088(2000) 'Investigation into the alleged dumping of meat of fowls of the species *Gallus domesticus*, originating in or imported from the United States of America: Final Determination' at p. 18.

[380] *Ibid* at p. 19.

[381] Cochrane N, Hansen J and Seeley R 'Poultry Production and Trade in the Republic of South Africa: A Look at Alternative Trade Policy Scenarios' (A Report from the Economic Research Service) United States Department of Agriculture p 1 taken from https://www.ers.usda.gov/webdocs/publications/81067/aes-96.pdf?v=42690 (Accessed 29 August 2017).

[382] *Ibid,* taken from https://www.ers.usda.gov/webdocs/publications/81067/aes-96.pdf?v=42690 (Accessed 29 August 2017).

[383] *Ibid*.

South Africa's robust interest in AGOA and its benefits resulted in the agreement of a quota 'to allow 65 000 tons of 'bone-in' chicken into the South African market'.[384]

It is the view of the research that South Africa, in light of the above, appears to embody an approach that is incredibly threatened in respect of international competition. That being said, South Africa has reason to personalise such a stance due to the potential and actual threat that dumping has on the domestic industries, with the effect of eradicating major industries.[385] However, in the poultry debacle between South Africa and the USA, the US authorities claimed that South Africa's actions amounted to 'poorly disguised protectionism'.[386]

In the interests of fairness, South Africa as well as other developing countries which face possible injury to domestic industries by countries such as the US should strive to conduct their investigations on an objective basis, while simultaneously taking into account all relevant circumstances of the case in order to arrive at a conclusion that is just and fair to the affected party. Allowing market access to international giants creates reciprocal and advantageous trade preferences (such as AGOA and the SADC-EPA with the EU[387]), as opposed to shutting foreign exporters out completely. Developing countries such as South Africa should, however, continue to condemn dumping and other unfair trading practices, while ensuring fair compliance to the ADA and other WTO obligations.

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[384] 'South Africa and AGOA: What is at Stake?' taken from http://www.saiia.org.za/opinion-analysis/south-africa-and-agoa-what-is-at-stake (Accessed 29 August 2017).

[385] http://www.destinyconnect.com/2017/01/11/rainbow-chicken-close-farms/ (Accessed 29 August 2017).

[386] http://www.saiia.org.za/opinion-analysis/what-came-first-the-chicken-or-the-leg (Accessed 29 August 2017).

[387] https://www.tralac.org/news/article/10734-south-africa-s-transition-from-tdca-to-epa.html (Accessed 29 August 2017). 'The European Union and the Republic of South Africa concluded a Trade, Development and Cooperation Agreement (TDCA) which came into effect on 1 January 2000. The TDCA 'Trade Chapter' will be replaced by the Southern African Development Community (SADC)-EU Economic Partnership Agreement (EPA) when the latter enters into force. The SADC-EU EPA was signed by both parties on 10 June 2016 and began provisional application on 10th October 2016.'

4.4.2 Poultry Industry in Crisis: South Africa vs the European Union

South Africa found itself in yet another debacle involving dumped poultry products from the EU.[388] As a result of the alleged dumping by the EU, an outpour of job losses has occurred, in addition to one of South Africa's biggest poultry producers, RCL Foods,[389] closing 15 of its 25 poultry farms.[390] SAPA has openly condemned the EU for dumping poultry into the Republic, with workers of the Food and Allied Workers Union ('FAWU') embarking on a march to the EU headquarters situated in Pretoria in February 2017 over the immense number of job losses as a result of alleged dumping.[391]

In response, the EU has labelled South Africa's allegations against the Union as a 'handy scapegoat' and claimed that 'a lack of competition, a severe drought pushing up feed prices, rising electricity costs and injecting brine (salt water) were causing South African industry's problems rather than EU imports'.[392] South Africa has, however, criticised the EU for its 'rampant dumping' and disregarded the claim of lack of 'competitiveness'.[393]

Given the fact that South Africa has in place the SADC-EPA with the EU (which is a free trade agreement), the agreement allows for the imposition of safeguard measures for domestic industries 'if imports create significant disruptions and instabilities, job losses included'.[394] South Africa subsequently introduced a 13.9% safeguard duty in order to combat the effect of dumping by the EU in the Republic,[395] which the South

[388] https://www.dailymaverick.co.za/article/2017-02-01-s.africa-and-eu-spar-over-chicken-meat-dumping#.WaVEQTOB3ow (Accessed 29 August 2017).

[389] Rainbow Chicken Limited – http://www.elementim.co.za/newsletters/read/320/ (Accessed 19 October 2017).

[390] http://www.destinyconnect.com/2017/01/11/rainbow-chicken-close-farms/ (Accessed 29 August 2017).

[391] https://www.dailymaverick.co.za/article/2017-02-01-s.africa-and-eu-spar-over-chicken-meat-dumping#.WaVEQTOB3ow (Accessed 29 August 2017).

[392] *Ibid*

[393] http://ewn.co.za/2017/03/23/sapa-dumping-behind-sa-poultry-crisis (Accessed 29 August 2017

[394] https://www.rnews.co.za/article/14710/protection-of-the-poultry-industry-is-key-to-short-term-survival-but-not-the-long-term-answer (Accessed 29 August 2017).

[395] http://epamonitoring.net/will-south-africas-introduction-of-poultry-safeguard-duties-by-challenged-by-the-ec/ (Accessed 29 August 2017).

African Poultry Association (SAPA) has denounced as being 'grossly inadequate'.[396] This provisional measure expired in July 2017;[397] however, as of March 2017, ITAC was conducting an investigation into whether this measure should be increased.[398] In addition to the 'rampant dumping by the EU', South Africa was furthermore forced to place a ban on European exporters of poultry, following the outbreak of avian influenza in Europe.[399]

It is interesting to note that South Africa has been rather prolonged in its response to the act of dumping by the EU. It is submitted that the effects of dumping by the EU have been more far reaching than those of dumping by the US, yet a more robust approach was taken during the latter case. It is the view of this research that South Africa should tackle dumping cases factually, and where the effects seem to be far reaching, such as the present one, strong and forceful measures should be taken in order to safeguard its domestic industries. This chapter submits that South Africa employed the necessary, albeit not correct, approaches to the wrong cases (such as dumping from the US), and should have focused its forceful method on the present EU poultry devastation.

4.4.3 How has Dumping Affected South Africa in respect of Free Trade?

South Africa employs various types of trade restrictive barriers in respect of dumping, namely that being tariffs, import quotas and non-tariff barriers.[400] Sihlobo notes that in 2016 'the tariff on wheat imported in South Africa increased by 30% to an all-time high of R1 591.40 per ton of wheat'.[401]

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[396] *Ibid.*

[397] *Ibid.*

[398] Ensor L 'Clucking in a Chicken Coop' The Times Newspaper 24 March 2017, p 8.

[399] http://epamonitoring.net/will-south-africas-introduction-of-poultry-safeguard-duties-by-challenged-by-the-ec/ (Accessed 29 August 2017).

[400] https://cnx.org/contents/3-W1h5fg@1/Protectionism-An-Indirect-Subs (Accessed 19 October 2017).

[401] Sihlobo, W 'South Africa's wheat import tariff at a record high'. Agriorbit, Agrinews, Local, 23 August 2016. Available: http://agriorbit.com/south-africas-wheat-import-tariff-record-high/ (Accessed 19 October 2017).

In terms of import quotas, Biacuana states that China's share in 'South Africa's total imports of clothing and textiles rocketed from 16.1% in 1996 to 60.7% in 2008'.[402] Estimates recorded that from the period of 2002 to 2008, 69 000 jobs were lost in South Africa's clothing and textile industry.[403] Referring to non-tariff barriers, Radlickli states that in the example of trade between the EU and South Africa, African products need to comply with the so called 'Hurdles-To-Pass' ('HTPs').[404]

This chapter submits that South Africa seems to have been wounded by the overly injurious effect that the practice of dumping has left on its domestic industries. Thus, its increased usage has become what Nakagawa has termed, a 'tit-for-tat' measure.[405] It is submitted that South Africa shows its intimidated nature when foreign imports are concerned, and therefore loses sight of its free trade obligations. In light of the poultry debacle with the EU, the discretion that the government holds in employing trade restrictive barriers against injurious dumping means that the 'cards are stacked in favour of foreign producers who dump their products in SA and this even applies to predatory dumpers'.[406] Thus, the South African government should become proactive in such cases as it leads to disastrous circumstances, such as industry collapse.[407]

[402] Biacuana, G SA's Clothing and Textile Sector post 'Chinese Quotas.' South African Institute of International Affairs, 21 August 2009. Available: http://www.saiia.org.za/opinion-analysis/sas-clothing-and-textile-sector-post-chinese-quotas (Accessed 19 October 2017).

[403] *Ibid.* Available: http://www.saiia.org.za/opinion-analysis/sas-clothing-and-textile-sector-post-chinese-quotas (Accessed 19 October 2017).

[404] Radlicki, M. Shame of tariffs and quotas – how Africa's business partners are hurting the continent. Mail and Guardian Africa, Business, 8 August 2015. see http://mgafrica.com/article/2015-08-03-tariffs-and-quotas (Accessed 19 October 2017).

Radlicki states that HTP's are 'checks for: mycotoxins, microbiological contaminants, heavy metals, unauthorised food additives, product composition, pesticides residues, genetically modified organisms/novel food, foreign bodies, radiation, parasitic infestation and a suspiciously and conveniently broad category requirement labelled 'other''.

Herbs, spices, nuts and seeds need to pass 5 HTPs, fish and fishery products 10 HTPs, and fruit and vegetables 11 HTPs.

[405] Nakagawa J *Anti-Dumping Laws and Practices of the New Users* (2007) p 12.

[406] Goldstone R 'Predatory Dumping is not Unlawful, but SA Should Implement Rule of Law' Business Day, 2 August 2017). See https://www.businesslive.co.za/bd/opinion/2017-08-02-predatory-dumping-is-not-unlawful-but-sa-should-implement-rule-of-law/ (Accessed 19 October 2017).

[407] http://ewn.co.za/2017/03/23/sapa-dumping-behind-sa-poultry-crisis (Accessed 19 October 2017).

4.5 CONCLUSION

In light of the analysis of legislation and case law in particular discussed in this chapter, it has been found that South Africa's approach to international trade is no doubt protectionist, but sometimes necessary. It is difficult for countries to welcome international competition, especially developing and least developed countries, that are faced with instances of dumping that causes extreme material injury to its domestic industries, such as the EU poultry case mentioned above. Although free trade remains the primary goal, various ways exist in which extreme protectionist measures need not be resorted to. In the following and final chapter of this research, recommendations and conclusions will be offered to contribute to the worldwide debate around free trade and protectionism.

CHAPTER 5:
FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

5.1 INTRODUCTION

As the title of this thesis observes, there exists a conflict between two ideals, namely that of free trade, encouraged widely by the WTO on the one hand, and protectionism, not entirely outlawed by the WTO, but sometimes necessary. As such, in particular, the ADA has seen itself as being one of the catalysts used in the proliferation of protectionism globally, as states from all parts of the world tailor this Agreement in a manner that locks out international competition, a further ideal projected by the WTO.[408] It is submitted that the role of free trade and the advantages that are brought with it have become somewhat lost as states such as South Africa have become selective with regard to where to practise free trade and where to abandon it entirely.[409]

While this thesis engaged in the debate concerning this conflict, the focus centred much more on the position that free trade and protectionism occupy in the global trading sphere. In doing so, the research paid attention to the effect that the formation of the GATT and, at present, the establishment of the WTO, has on these conflicting ideals. This research furthermore analysed specific provisions of the ADA and the effect it has on current dumping practices in countries relevant to the study. In particular, as the title suggests, this research aimed at discussing South Africa's role in the international trading field in respect of dumping practices. In doing so, the objective was to discuss the domestic antidumping legislation that exists in South Africa as well as discuss/critique the manner in which South Africa arrived at said legislation.

Finally, the thesis explored the implications of the encouragement of free trade against the backdrop of South African dumping practices, in addition to uncovering specific protectionist tools used by South Africa.

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[408] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (Accessed 4 October 2017).

[409] See the *SCAW* case, discussed in chapter 4. See also the SADC-EPA discussed briefly in Chapter 4 at p 61.

5.2 FINDINGS IN RESPECT OF THE CHAPTERS

A previous discussion contained in Chapter 2 documented the gradual establishment of the institutions that governed international trade, namely that of the GATT as well as the WTO. The chapter sought to determine and note the effects that the establishment of the WTO has had on dumping. Particularly, the research found that the ADA shows a deficiency in fairness[410] and that it should be interpreted in a manner that is more restrictive.[411] In terms of the former argument, the research sought to critique the ADA with regard to its lack of fairness, in that the use of antidumping has not been in line with one of the main reasons for the practice.[412] In particular, it was established that the test for antidumping involves the enquiry as to whether the act of dumping causes injury to the domestic industry. Lekfuangfu, interestingly, submits that injury to the domestic industry is not equivalent to market distortion.[413]

Having identified these impediments and positive elements of the said Agreement, the research correlated the role that free trade and protectionist principles play in the multilateral trading system and found that there is indeed a discord between them in respect of the ADA, in that countries find themselves in conflict involving protecting their own industries and complying with their free trade obligations in terms of their commitment to multilateral trade.

Evidence of such conflict emerged in chapter 3, which documented at length specific provisions contained in the ADA, and further enquired as to how the establishment of the ADA has affected dumping practices since its inception. It was found from the provisions analysed that there had been some ambiguities attached which were then somewhat clarified in the case law discussed.[414] Notably, the effect that the establishment of the ADA on dumping has in the opinion of this research allowed countries to take advantage of these lacunae contained in the ADA, as a protectionist

[410] Lekfuangfu at p 306.

[411] Adamantopoulos et al, at p 33.

[412] *Ibid* at p 33. 'One of the main reasons put forward against the practice of dumping is that it causes distortion to the market and hampers the market's ability to provide protection for fair competition and international competitive process'.

[413] Ibid. Due to the economic rationales behind this theory, this thesis will not engage in a substantive discussion on this matter.

[414] Chapter 3, pp 37 – 43.

tool. Furthermore, the research found that although the ADA is a tool designed to come to the aid of the affected country, it should also not be biased towards the responding Member, as the ADA affords each party an equal opportunity to make representations for their actions.

To illustrate the practical implementation of the ADA, chapter 4 then engaged in the discussion of whether South Africa, as an increasing user of antidumping measures, has indeed distorted the use of the ADA in a protectionist manner. The country's involvement in antidumping practices and policies prompted the chapter to enquire further as to how South Africa had arrived at its antidumping legislation as well as the effects that free trade has had on the country in respect of dumping practices. Lastly, the research explored the protectionist measures that South Africa employs against dumping practices and found that South Africa has become one of the biggest users of the antidumping practice, along with other developing countries such as China and Mexico post-1980, as a response to developed countries using their own trade-restrictive barriers against South Africa and other developing countries mentioned.

The findings also included South Africa's mixed reactions against dumping from different countries in that the country employs a robust approach to poultry dumping from the US, effectively locking the US out from the South African market almost entirely. However, South Africa seems to embody a lax attitude to poultry dumping from the EU that has almost eradicated the South African poultry industry entirely. In addition, from the ***SCAW* case**,[415] it was found that South Africa clearly employs antidumping measures in an attempt to lock out international competition, which is, by its very nature, protectionism.

Interestingly, chapter 4[416] noted that free trade has not in actuality played any part in South Africa in respect of dumping in the country. Although the country is 'scarred' by the injury left by dumping of other countries on its domestic industries, and from its 'tit-for-tat' attitude against developed countries employing their own restrictive barriers, it seems that South Africa has no issue in conducting trade within its regional borders.

[415] *International Trade Administration Commission v SCAW South Africa* (2010) ZACC 6.
[416] chapter 4, p 70.

The fact that the poultry dispute between South Africa and the US over poultry dumping lasted for approximately 15 years shows the 'closed off' and incredibly protectionist attitude of South Africa. As such, the research found that South Africa's main trade restrictive tools include tariffs and non-tariff barriers as well as import quotas, and, in addition, provided examples of South Africa's use of the above protectionist tools.

5.3 RECOMMENDATIONS

The study identified the misuse of antidumping measures and aims to proffer the views and recommendations of particular authors. In this respect, Bi has critiqued the ADA, stating that the 'misuse of antidumping is mainly due to its arbitrary and biased rules and procedures', with many authors debating its very justification.[417] Bi has recommended, arguably, that antidumping laws be reconciled with competition laws in that their harmonisation can contribute to economic development.[418] The author furthermore submits that competition policies are more meticulous and show a lower probability of being used in a protectionist manner, but furthermore recognises that antidumping laws cannot be abolished completely in the near future.[419] As such, Bi suggests that a gradual inception into competition policy be achieved, firstly at bilateral or regional levels, and finally, at the WTO level.[420]

Further, Adamantopoulos and De Notaris submit that because the ADA is contrary to the ideals envisioned by the WTO, the ADA should be interpreted in a manner that is restrictive.[421] The aforementioned authors also suggest that competition policy be taken to 'the heart of the injury analysis' in that antidumping duties should be implemented only where the relevant competition authorities declare that there is no evidence of anti-competitive behaviour, and therefore do not have 'any bearing on the

[417] Bi at pp 30–31.

[418] Bi at p 50. 'Although due to other political factors, the subject of trade and competition was decided to be put aside within the WTO during Doha Round in 2004, the economic crisis in 2009 has once again raised calls for greater coherence between trade and competition policies. Some, especially those from the developing countries, once again require introducing competition into trade, so as to explore on a new development model of 'how the interaction of competition and trade policy can contribute to economic development'.'

[419] Bi at pp 30–31.

[420] *Ibid* at p 51.

[421] Adamantopoulos et al at p 33.

injury analysis'.[422] As such, the authors highlight that this would then solidify the use of antidumping duties for their 'original purpose, namely to protect domestic industries from harmful unfair foreign-based competition'.[423]

Echoing the sentiments of Adamantopoulos et al, this thesis is in agreement that the ADA should be construed in a manner that is restrictive, having regard to the idea that competition and antidumping laws should be harmonised. While it is trite that the ADA restricts the excessive usage of antidumping,[424] Adamantopoulos et al submit that 'such restrictive rules should be designed to enhance competition, or at least not to hinder fair competition, between domestic and imported goods'.[425]

The premise that antidumping laws can be used in a manner that enhances, for example, competition[426] sets a new tone in respect of the international trading sphere. Thus, using the ADA in a way that defeats competition in a form of protectionism is counter to the ideals projected by the WTO. The harmonisation of the competition and anti-dumping laws, it is submitted, could give rise to strengthened trading partnerships between Members of the WTO. In addition, this research submits that the strengthening of trading relationships with developing countries could lower the usage of anti-dumping duties being used by such countries as a 'tit-for-tat measure',[427] and rather utilise the ADA for its fundamental purpose,[428] while furthering the interest of their own economies as a result of partnerships forged with developed countries.

As is evidenced from the research conducted in this thesis, this change is a mammoth task to undertake at WTO level. Furthermore, the merging of these principles (competition and anti-dumping laws) might lead to perpetual negotiations, resulting in

[422] *Ibid* at p 55.

[423] *Ibid.*

[424] *Ibid* at p 34.

[425] *Ibid.*

[426] Competition, it is submitted, can be said to be the lifeblood of trade, in that it stimulates economies and encourages innovation by industries, while providing consumers with the benefit of choosing from an array of products and serviceshttp://www.amd.com/en-us/who-we-are/corporate-information/competition/benefits (Accessed 9 October 2017).

[427] *International Trade Administration Commission v SCAW South Africa* (2010) ZACC 6.

[428] Adamantopoulos et al at p 55. 'This would then solidify the use of antidumping duties for its 'original purpose, namely to protect domestic industries from harmful unfair foreign-based competition'.

dissensus among the many members of the WTO. Thus, this thesis proposes that such a change be implemented at domestic level, at the volition of a country's own authorities and national government, in order to achieve the objectives mentioned above.

Further, as a focal element in any international trade issue, it is submitted that developing and least developed countries each have a role in key negotiations aimed at ensuring smooth trade worldwide. In an effort to involve the aforementioned countries in said negotiations, the Doha Round was established to achieve exactly thta.[429] As noted in this research, since its inception in 2001,[430] developing countries have submitted proposals in order to correct some of the issues faced in implementing various WTO agreements. Kufuor[431] has noted that African countries in particular have been aware of the abuse of the ADA that has been a 'disguised means of protection'.[432] As such, Kufuor puts forth submissions in respect of certain provisions of the ADA. In particular, South Africa proposed submissions[433] in respect of, first, the sunset review provision, and second, the definition of domestic industry provision. Such submissions are discussed below.

Respectively, three main arguments have been identified as relevant by South Africa. Firstly, South Africa has argued that notwithstanding the provision on sunset reviews, WTO members are 'prolonging the life of anti-dumping measures'.[434] Representatives have furthermore argued that article 11.3 of the ADA is vague, requiring more guidance on how to terminate the reviews.[435] Consequently, South Africa's proposal to rectify this lacuna is to limit sunset reviews to a 'single review', and should the expiration of the antidumping duty be likely to cause a recurrence of dumping, such

[429] https://www.wto.org/english/tratop_e/dda_e/dda_e.htm (Accessed 9 October 2017).

[430] *Ibid*.

[431] Kufuor KO 'Recent Developments – Actualities Africa and Anti-Dumping Issues in the Doha Round' *African Journal of International and Comparative Law* (2009).

[432] *Ibid.* at p 166.

[433] South Africa, *Proposals on Issues Relating to the Anti-Dumping Agreement,* TN/RL/GEN/137 (29 May 2006).

[434] Kufuor at p 175.

[435] South Africa, *Proposals on Issues Relating to the Anti-Dumping Agreement,* TN/RL/GEN/137 (29 May 2006) p 4.

duty should remain for a period not exceeding three years.[436] The South African representatives also submit that there should be a restraint on authorities initiating sunset reviews on their own accord, as this should be done by the domestic industries concerned.[437]

This thesis agrees with the above proposal put forth by South Africa, as prolonging the implementation of an anti-dumping duty is the pinnacle of protectionism. Therefore, restricting this practice and curtailing the timeframe of anti-dumping duties could remove their arbitrary usage for any time longer than necessary.

The proposals put forth by South Africa in respect of the definition of a domestic industry followed the country's criticism that article 4.1 'provides investigating agencies [with] a very wide latitude to determine what constitutes 'a major proportion of domestic production'.[438] In line with this, South Africa's recommendation that the article be more detailed and be revised to enhance the 'transparency and predictability of anti-dumping proceedings'[439] is considered viable by this research.

As discussed in previous chapters, South Africa has become one of the most prolific users of anti-dumping measures in recent years.[440] The country has in fact implemented its own Anti-Dumping Regulations ('ADR') that follow the wording of the ADA, as its primary source of anti-dumping legislation, owing to South Africa not yet having implemented the ADA into municipal law.[441] Brink argues that the South African antidumping system is unpredictable in practice, and it is often the case that the ADR are improperly applied, leading to uncertainty in the market, the imposition of duties that in actuality should not be imposed, and vice versa.[442]

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[436] *Ibid.*
[437] *Ibid.*
[438] Kufuor at p 175.
[439] *Ibid.*
[440] *See* Annexure I'.
[441] Brink (2012) at pp 6–7.
[442] Brink (2012) at p 55.

Brink in addition engages in a substantial discussion, proposing that the ADR include a provision dealing with national interest.[443] The author submits that the rights of the domestic industry in question experiencing injury against dumping and the effect that the antidumping duty would cause to the industry which uses the products, as well as the effect that the imposition of the duty would have on consumers, should be balanced, taking cognisance of the fact that national interest as an element in the investigation would 'place a higher premium on job creation or retention in the manufacturing industry'.[444]

Brink[445] notes that despite the aforementioned submission, national interest should not be included in the South African legislation at present due to many factors.[446] However, he advises that should such a provision be included in the legislation, the factors should be included only 'if it is clearly shown that it would be against national interest to impose an antidumping duty'.[447]

This chapter submits that in reading the proposals put forth by Brink, it may be in the best interests of South Africa to include such a provision involving national interest. Furthermore, public interest and national interest can be interpreted as synonymous terms; and the best interests of the country, be they economic, political or military,[448] should be an element in anti-dumping investigations, where the imposition of such duties can have far-reaching effects. If public interest is a factor most widely used by

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[443] Brink G 'National Interest in Anti-Dumping Investigations' *The South African Law Journal* (2009).

[444] *Ibid* at p 358.

[445] *Ibid*.

[446] These include: '1. anti-dumping investigations by their very nature cause significant uncertainty in the market;

2. ITAC struggles to conclude investigations in time, and seldom concludes investigations within the 12 months within which investigations should be completed;

3. the inclusion of national interest provisions will further delay the finalisation of investigations, even if this inquiry forms part of the final investigation phase, as proposed above, rather than a separate inquiry as envisaged by the draft Regulations;

4. ITAC does not at present have the necessary skills to conduct economic analyses in the form of a computable general equilibrium to support national interest inquiries;

5. SACU interest, rather than South African national interest should be taken into consideration; and

6. the inclusion of national interest may open the Minister to significant lobbying from various interest groups, '.

[447] Brink (2009) at p 359.

[448] Brink (2009) at p 319.

South African courts in litigious matters in order to arrive at decisions that are just, fair and equitable, it is submitted that national interest should also be included in antidumping investigations to achieve similar outcomes.

The anxiety felt by developing countries to dumped imports are evident in their increased usage of antidumping duties. Post-1980, developing countries experienced a radical shift of 'being the target to the initiator'.[449] Gupta and Choudhury submit that in order to eradicate the fears felt by developing countries against international competition, 'special and differential treatment for developing countries', such as particular rules available for initiating an investigation, concessions involving import share, and an increased *de minimis* threshold, could be implemented.[450]

This thesis furthermore recommends that in terms of infant industry theory, developing countries should be able to freely engage in protectionist activities where international markets threaten or actually injure infant industries in developing or least developed countries that have the potential to diversify that economy.[451] Such measures should, however, be controlled and should refrain from excessive usage.

5.4 PARTICULAR CONCERNS

5.4.1 'Threat of material injury'

Soprano has argued that the provision involving 'threat of material injury'[452] should ultimately be removed from the ADA, for the reason that the 'possibility of resorting to the threat of injury gives to domestic producers the capacity to be protected before the damage is done'.[453] As a result, this provides domestic producers with the opportunity to implement anti-dumping measures on the basis of future events that possibly may not occur,[454] thus fuelling the protectionism fire. Lowenfeld furthermore submits that

[449] *See* chapter 4 'Annexure I' discussing the increased usage of antidumping duties by South Africa post 1980. *See also* Gupta K, Choudhury V 'Anti-Dumping and Developing Countries' *Korea University Law Review*, Vol 10, Issue 117 (2011) p 133.

[450] *Ibid* at p 134.

[451] https://www.economicshelp.org/blog/glossary/infant-industry-argument/ (Accessed 12 October 2017).

[452] *See* chapter 3.

[453] Soprano at p 77.

[454] *Ibid*.

providing relief for threats of injury 'should not be available as a second resort when the effort to prove actual injury has been unsuccessful', because the threat of injury involves conjecture and not conclusive facts.[455]

It is the view of this thesis that the provisions concerning the 'threat of material injury' provide a wide discretion to authorities to implement trade-restrictive barriers such as anti-dumping measures in necessary circumstances. That being said, authorities need not wait for injury actually to have occurred in order for such measures to be implemented. This chapter agrees with this provision in that, although the ADA acts in a manner that is consistent with WTO aims, it also embodies the option of protection by domestic industries, provided that pertinent evidence is furnished.

5.4.2 Self-Initiated Investigations in South Africa

An anti-dumping investigation may be initiated only upon acceptance of a written application by or on behalf of the domestic industry.[456] However, article 5.1 of the ADA displays the proviso that self-initiated investigations by authorities on behalf of domestic industries may occur only in special circumstances.[457] The South African ADR. as noted by Ndlovu,[458] do not, however, contain any provision involving 'special circumstances'. Ndlovu thus recommends that the ADR reflect the purpose of the ADA, and insert such a provision in order to prevent an abuse of self-initiated investigations by pertinent authorities.[459] The author affirms that retaining this provision would 'ensure that the standard of proof of the existence of dumping remains high' that would deter the authorities from initiating arbitrary and 'WTO-inconsistent self-initiated investigations'.[460] Ndlovu further asserts that retaining the self-initiating provisions 'will come in handy' in the foreseeable future when circumstances demand that such provision be utilised.[461]

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[455] Lowenfeld A, *International Economic Law* (Oxford: Oxford University Press) (2002), p 268.
[456] Article 5.1 of ADA.
[457] article 5.6 of ADA.
[458] Ndlovu at p 36.
[459] *Ibid.*
[460] *Ibid*.
[461] *Ibid.*

This thesis agrees with the recommendations put forth by Ndlovu, as controlling the manner in which self-initiated investigations are implemented can be the start of bringing South Africa more in line with its free trade obligations. It is furthermore submitted that embarking on the course of making the ADR more WTO compliant could set off a gradual chain of events that could deter South Africa from using the ADA as a veiled protectionist tool. It can, in addition, be argued that the lacunae contained in the ADR enable the South African authorities to engage in protectionist actions, without totally being called to action by the WTO, because the ADA has not been promulgated into domestic law by Parliament. Thus, it is moreover recommended that ensuring compliance of the ADR with WTO obligations could bring an end to South Africa's overzealous protectionist actions.

However, in matters where protectionist tools are used in excess, such actions should be disciplined in the appropriate manner. Referring to Chapter 4, the research found that South Africa has been incredibly delayed in controlling the dumped imports of chicken by the EU that have led to the shut-down of the poultry industry, but embodied a robust approach to the US market dumping poultry some years before. This chapter recommends that civil societies need to be proactive in scrutinising their actions and behaviour when it comes to dumping in general, and should not react in different ways to different international markets.

This research has found that South Africa, as well as other developing countries, has embodied a protectionist stance where foreign imports are concerned, as a reaction first, to developed countries employing their own antidumping duties, thereby restricting developing countries market access; and second, to lock out international competition entirely. This thesis ultimately recommends that in certain circumstances, protectionism is warranted. It should be noted that much like dumping, protectionism is condemned and not outlawed. The research thus submits that protectionism can be employed where the situation warrants it. Where domestic industries are under threat of being eradicated or suffer injurious effects as a result of dumping, a country may then embark on trade-restrictive barriers in order to protect the pertinent industries.

5.5 CONCLUSION

In light of the facts presented, the research has unequivocally found that the ADA was primarily enacted to provide relief to those countries who were gravely affected by dumping and its injurious effects on their respective domestic industries. As a further rationale for its enactment, the ADA was also promulgated in order to control the usage of antidumping duties that can be imposed in circumstances that call for it, provided certain criteria are met. While developed countries became the forerunner in implementing antidumping duties in its inception years, it became apparent post 1980 that developing countries had begun to assert their force and started their own antidumping actions, but were then criticised for using the ADA as a protectionist tool, South Africa being one of the main users in this regard.

As such, this thesis ultimately finds that free trade is obligatory in order to bring together a harmonisation of the multilateral trading system, but protectionism is necessary in particular circumstances, thereby achieving a balance between free trade and protectionism. The research submits that the exclusion of one would be too much of a radical approach which could lead to adverse effects and undermine the development capacity of countries such as South Africa. Therefore, this thesis recognises that there is a tough balancing act of these two principles in that South Africa, as Member to the WTO, has to make sure that it complies with such provisions and in terms of the ADA. If South Africa does so, and refrains from taking a robust role in respect of protectionism, this thesis ultimately submits that there is room for both free trade and protectionism in the multilateral trading sphere, and employing such measures where necessary, but adhering to international obligations.

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ANNEXURE 'I'

Table 1: Anti-Dumping Initiations and Measures by Year

Year	Initiations	Duties
1914–1947	137	N/A
1948–1958	211	29[82]
1959–1978	265	N/A
1979–1994	270	N/A
TOTAL PRE-WTO	883	N/A
1995–1999	130	88
2000–2004	45	25
2005–2009	37	15
2010–2014	17	6 (9*)
TOTAL UNDER WTO	229	134 (137)

[Source: These data and the table were taken from Brink G 'One Hundred Years of Anti-dumping in South Africa' *Journal of World Trade* (2015) at page 9.]

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TO WHOM IT MAY CONCERN:

EDITING OF LLM DISSERTATION
PREPARED BY KARMEN WINFRED (DECEMBER 2017)

I, **Adrienne Mavis Pretorius**, a sole proprietor trading as **Gemini Editing Services**, hereby declare that I was asked by **KARMEN WINFRED**, a student of the University of KwaZulu-Natal (student number 213526752), to edit and proofread her LLM dissertation as a third-party editor.

I am a professional editor with 31 years' experience in the field, and have the necessary qualifications and experience to carry out these tasks.

I confirm that in acting as a third-party editor for the dissertation submitted by the abovenamed student, **KARMEN WINFRED**, I have complied with all professional requirements for editorial help for postgraduate research theses/dissertations. My work with regard to this dissertation was confined to the following areas:

* Checking of the various elements of the tables of contents
* Formatting of the document
* Checking of spelling and punctuation
* Ensuring that the thesis/dissertation follows the conventions of grammar, spelling and syntax in written UK/South African English
* Shortening long sentences and editing long paragraphs to ensure easy reading and comprehension of the content
* Elimination of unnecessary repetition
* Checking tables and diagrams for clarity, grammar, spelling and punctuation of any text relating to the tables and diagrams
* Checking correct presentation of references in the applicable referencing convention, as well as full and accurate citation, and
* Ensuring consistency of page numbers, headers and footers.

I have advised the student that this completed declaration **must** accompany her dissertation when she submits it for examination, and that **this declaration will be made available to the examiners**. I have further advised **KARMEN WINFRED** to keep a copy for her records.

Yours faithfully

(Mrs) Adrienne Pretorius

(BA (*cum laude*)) (UNISA)
(Full Member of the Professional Editors' Guild (PEG))

*Signature:*_____ *Date:* 5 December 2017