A Critique of Nigerian Anti-Dumping and Countervailing Bill 2010: An Insight from South Africa’s Experience

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Abstract

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Abstract

Part of the World Trade Organisation’s (WTO) objective is trade liberalisation amongst its members and help achieve economic growth. The benefit of trade liberalisation scheme among trading countries is to reduce government initiated protectionist approach/policies in favour of the domestic industries. The WTO Member States are discouraged from using technical regulations to create unnecessary obstacles to international trade. However, the scheme has been abused by countries resulting in dumping of import goods. In an effort to curb dumping, WTO during Uruguay Round of Multilateral Trade Negotiation made regulations on anti-dumping, particularly contained in Agreement on Implementation of Article VI of the General Agreement on Tariffs (WTO AD Agreement) and Trade and General Agreement on Tariffs and Trade 1994 (GATT 1994) binding on Member States. Economic Community of West African States (ECOWAS) alternatively explores WTO’s exception on principle of Most-Favoured-Nation and National Treatment to create regional trade agreements to solve predatory dumping in the region. Nigeria is yet to have up-to-date national legislation and institutional structure on anti-dumping, hence the need for the Anti-Dumping and Countervailing Bill, 2010. However, the Bill is fraught with provisions that are inconsistent with the Member State’s obligation under the WTO Anti-Dumping Agreement.

Conversely, South Africa has been engaging in anti-dumping instrument since 1914, first of its kind in Africa. It has reformed its anti-dumping legal system over the years to conform to the WTO Anti-Dumping Agreement.

The writer uses functional method (focus on the practical effect and purpose of rules) under comparative legal science to discover how South Africa’s reform and current anti-dumping regime can be transplanted to solve the inherent problems present in the Nigerian Anti-Dumping and Countervailing Bill, 2010, thereby consistent with the provisions of the WTO Anti-Dumping Agreement.

Key words
Trade liberalisation, dumping, anti-dumping, Anti-Dumping Agreement, comparative legal science, Bill, Nigeria, South Africa, WTO, ECOWAS
CONTENTS

Abstract ............................................................................................................................................. i

CONTENTS .......................................................................................................................................... ii

REFERENCES ....................................................................................................................................... v

OFFICIAL SOURCES ........................................................................................................................... x

ABBREVIATIONS .................................................................................................................................. xix

FIGURES AND TABLES ........................................................................................................................ xx

1 INTRODUCTION ................................................................................................................................. 1
  1.1 Research Problem .............................................................................................................................. 5
  1.2 Research Questions ............................................................................................................................ 8
  1.3 Research methodology ....................................................................................................................... 9

2 HISTORICAL BACKGROUND TO GATT/WTO .................................................................................. 11
  2.1 The WTO Systemic Framework ......................................................................................................... 12
  2.2 The scope of the WTO Agreements .................................................................................................. 13
  2.3 The WTO Anti-Dumping Agreements ............................................................................................... 15

3 REGIONAL TRADE AGREEMENTS: A SOLUTION TO DUMPING ......................................................... 18
  3.1 RTA and WTO Objectives .................................................................................................................. 18
  3.2 RTAs: An Exception to the WTO Principle of MFN Treatment and National Treatment .................. 18
  3.3 Economic Community of West African State: A Regional Solution to Dumping ......................... 19
    3.3.1 Economic Partnership Agreement (EPA) .................................................................................... 21
    3.3.2 The Main Features of EPA .......................................................................................................... 23
    3.3.3 Trade Defence Instruments under EPA ....................................................................................... 25
    3.3.4 ECOWAS Trade Liberalisation Scheme (ETLS) ........................................................................ 26
    3.3.5 Why a Free Trade Area is needed? ............................................................................................... 27
    3.3.6 The Conditions and Procedure for Accessing the ETLS ............................................................ 27
    3.3.7 The ECOWAS Common External Tariff (CET) ........................................................................ 28
    3.3.8 Structure of the ECOWAS CET ................................................................................................. 29
    3.3.9 Benefits of the CET ..................................................................................................................... 30
    3.3.10 The CET Accompanying Measures .......................................................................................... 31

4 WTO ANTI-DUMPING AGREEMENT: SUBSTANTIVE REQUIREMENT ................................................ 34
  4.1 Determination of Dumping ............................................................................................................... 34
  4.2 Determination of the Export Price ..................................................................................................... 36
    4.2.1 Exceptions to Determination of the Export Price: ..................................................................... 36
  4.3 Determination of the Normal Value .................................................................................................. 37
6.1.2 Dumping
6.1.3 Export Price
6.1.4 Interested Parties
6.1.5 Related Parties
6.1.6 Normal Value

6.2 The Procedural Requirement of the Bill.
6.2.1 Initiation and investigation
6.2.2 Retroactive Imposition of Anti-Dumping Duty
6.2.3 Refund Application
6.2.4 Offence Relating to Information

7 SOUTH AFRICA’S EXPERIENCE ON ANTI-DUMPING MEASURES
7.2. Institutions on Anti-Dumping Law
7.2.1 Board of Trade and Industry
7.2.2 Board on Tariffs and Trade
7.2.3 Customs
7.2.4 International Trade Administration Commission

7.3 Anti-Dumping Legislation
7.3.1 Early Legislation
7.3.2 Current Legislation

7.4 Training and Learning from other Jurisdiction

7.5 National Economic Forum (NEF): Collaborative Effort by Business, Government and Labour

7.6 The Judicial and the Commission Reviews

7.7 Research and Publications

7.8 Engaging WTO Technical Assistance and Capacity Building Initiative

8 CONCLUSION
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*GATS*: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement.


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ABBREVIATIONS

ACP  African, Caribbean, and Pacific Group of States
AD   Anti-Dumping
CET  Common External Tariff
ECOWAS Economic Community of West African States
EPA  Economic Partnership Agreement
ETLS ECOWAS Trade Liberalisation Scheme
EU   European Union
CV   Countervailing
GATS General Agreement on Trade in Services
GATT General Agreement on Tariff and Trade
IMF  International Monetary Fund
ITO  International Trade Organisation
MFN  Most Favoured Nation
RTA  Regional Trade Agreement
TRALAC Trade Law Centre for Southern Africa
UEMOA Union Economique et Monétaire Ouest Africaine
UN   United Nations
UNCTAD United Nations Conference on Trade and Development
WTO  World Trade Organisation
FIGURES AND TABLES

Figure 1.1: Increase in AD and CV investigations (2013-2016)
Figure 1.2: Increase in AD and CV investigations as of 2016
Figure 1.3: Crude Oil Price Movement
Table 1.4: Nigeria-China bilateral trade, 2001-2008 (US dollars)
Figure 1.5: Real GDP on Year to Year Growth
Table 2.1: The Basic Structure of the WTO Agreements
Table 2.2: The WTO Structural Chart
Table 3.1: Structure of ECOWAS
Figure 3.2: European Union Imports from West Africa (Million Euro)
Figure 3.3: European Union Exports to West Africa (Million Euro)
Table 3.4: Rates of the CET Custom Duty
Figure 4.1: The AD Agreement recognises three possible options to determine normal value
Figure 4.2: Basic formula for calculating the margin of dumping
Figure 4.3: Relationship of prices of dumped imports, and costs and prices of domestic like products
Figure 5.1 Stages of investigation
Figure 5.2: The main elements of the pre-initiation stage
Table 7.1. South African Years of AD Initiations and Measures
1 INTRODUCTION

Dumping is evident in an economic atmosphere that promotes a product (similar to those produced locally) to be sold below its nominal market value by an exporting country into another country, albeit, higher selling price is what dictates demand and supply in the said exporting country. Consequently, this trade practice causes injury to domestic industry of the importing country. However, a bargain sale cannot be classified as dumping under a mutual sense of ordinary trade. An importing WTO Member State has the power to restrict dumping. Where an application is made by interested party for an investigation to be initiated, a final determination of dumping that shows a material injury to the domestic industry can make anti-dumping measures implementable. Emphatically, Member States must apply anti-dumping provisions within the framework of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as AD Agreement). Most scholars agree that where predatory dumping remains unchecked, it has devastating effect not only on the economy of the targeted importing countries but also an obstacle to flourish international trade as such practices scheme out competitor from fair trade in a particular market.


3 Chacko Centre for WTO Studies, Indian Institute of Foreign Trade 2011, p. 1; Anti-Dumping Agreement 1994 deals with anti-dumping does not actually prohibit dumping, it merely says that GATT parties recognise that dumping is to be condemned if it causes or threatens material injury to an established industry or retards the establishment of a domestic in the territory of another member. If enquiries are in the importing country show that dumping is taking place and causing material injury to an industry, governments may take anti-dumping measures, see, Pam Nigeria Current Law Review 2007-2010, p. 48.

4 Dumping as a perceived trade problem has been around for a long time, but it only turned into a major trade policy issue after World War 1 and particularly during the Great Depression of the 1930s. See Goode 2004, p. 106-107.

5 A conclusion was reached on GATT between January and February 1947 and became effective in 1948, see GATT 1947; Article 2 Anti-Dumping Agreement 1994, p. 2 (determination of Injury) stipulates that based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

Since GATT 1947, the rules of the international trading system have authorised countries to establish national AD statutes and to implement AD trade restrictions, see Anti-Dumping Agreement 1994. National AD laws predate the GATT, and Article VI was largely written to accommodate these existing pieces of national legislation. Canada is ‘credited’ with the first AD law with an implementation in 1904, see Brown Law & Politics 2008, p. 255; Zanardi European Journal of Political Economy 2006, p. 593;

The anti-dumping measures which seek to remedy injury afflicted on domestic industries through unfair trades have intuitively substitute traditional trade barriers. These barriers have faced gradual elimination from international scene due to regional and multilateral trade liberalisation. Thus, the practice removes the benefits of tariff reduction and blocks avenue for economic integration.

The GATT (General Agreement on Tariffs and Trade) of 1947 focused on reducing government-initiated trade protection and a cohesive international trade based on strengthened rules. In order to keep the various multilateral agreements between governments under GATT in check, there are series of applicable provisions that comprises the General Most-Favoured-Nation Treatment, National Treatment, Anti-dumping and Countervailing Duties etc. The two key aspects of regulation of international trade in relation to tariffs under GATT are: tariff and quantitative restriction which are marked as ‘pure trade instruments’. The aims of GATT were achieved through contracting parties’ obligations. It omitted imposing duties beyond

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7 Cho Berkeley Journal of Int’l Law 2007, p.400
8 Aggarwal World Development 2004, p. 1046; The WTO Agreements Series: Technical Barriers to Trade 2013, p.41
9 Neufeld (UNCTAD/ITCD/TAB/10) 2001, p. 1, for the past few years, various countries have stepped up actions and these have triggered higher number of anti-dumping and countervailing duties. The end game for these AD/CV investigations is to protect domestic industry. From the derivation of GATT, WTO expressly sanctions AD and CV in specific areas that stiff regulations are needed without any violations towards bilateral or multilateral agreements, see Prusa Canadian Journal of Economics, 2001, p. 9, to restrain enterprises that have been point of target from further dumping, stringent costs are imposed. The duties may be in force for a long period to ensure future compliance to international trade standards by the erring countries. From available World Bank record, U.S legal system employs Anti-dumping law as an effective trade remedies means to beat down or reduce high rate of imports in to the country; Ehrenhaft et al 1997, p. 1; Hoakman – Mavroidis Policy Research Working Paper (WPS No. 1735) 1997, p. 1 stress the fact that the industries now reduce competition from imports by using anti-dumping as the instrument of their choice, see Hoakman – Mavroidis Policy Research Working Paper (WPS No. 1735) 1997, p. 9 and Hoekman – Mavroidis Journal of World Trade, 1996, p. 27-52.
11 A conclusion was reached on GATT between January and February 1947 and became effective in 1948; See the preamble to GATT 1947; Ndlovu Journal of Int’l Commercial Law and Technology 2010, p. 30; Brown Law & Politics 2008, p. 263; United Nation Conference on Trade and Development 2003, WTO Dispute Settlement on Anti-Dumping Measures, p. 3.
13 The provisions range from the General Most-Favoured-Nation Treatment Part I Article I of the GATT, note 2 above.
17 Contracting Parties of GATT are the negotiating States; see GATT (1947) preamble.
decided level in the case of ‘pure trade instruments’ and a continuing sequence of multilateral rounds of negotiations that concentrated on tariffs and trade.\(^{18}\)

As said earlier, the significant purpose of trade remedies\(^{19}\) is to protect domestic industries against the negative effect of trade liberalisation\(^{20}\) as various countries enshrine and implement it in their national legislation.\(^{21}\)

Figure 1.1: Increase in AD and CV investigations (2013-2016)

![Graph showing increase in AD and CV investigations (2013-2016)](source: WTO Rules on Anti-dumping and Countervailing Measures Database\(^{22}\))

Figure 1.2: Increase in AD and CV investigations as of 2016

![Graph showing increase in AD and CV investigations as of 2016](source: WTO Rules on Anti-dumping and Countervailing Measures Database\(^{23}\))

From the figure 1.1 and 1.2, it is clear that countries increasingly explore trade remedies under the WTO Anti-dumping Agreements by engaging in investigation of dumping by exporters upon


\(^{19}\) Caribbean Export Development Agency Tradewin 2010.

\(^{20}\) Aggarwal World Development 2004, p. 1047;


\(^{22}\) Analyses from the figure 1.1; red bar represents the level of investigations on anti-dumping from 2013-2016; the green bar represents the level of investigations on countervailing measures from 2004-2015, see World Trade Organisation: Integrated Trade Intelligence Portal 2012.

\(^{23}\) Analyses from the figure 1.2; the red bar represents the level of investigations on anti-dumping as of 30/06/2016; the green bar represents the level of investigations on countervailing measures as of 30/06/2016 see World Trade Organisation: Integrated Trade Intelligence Portal 2012. Several WTO members took the floor at the 27 April meeting of the WTO’s Committee on Anti-Dumping Practices to express concerns about a sharp rise in the number of new anti-dumping investigations, see Anti-Dumping: WTO members exchange views on rise in anti-dumping actions 27 April 2017.
an application by domestic industries (government are prohibited from adopting protectionist approach in the face of WTO trade liberalisation scheme).

No member of WTO is under obligations to adopt and enforce anti-dumping and countervailing measures in their national legislations; however, any member that domesticates WTO Anti-Dumping Agreement must adhere to the provisions set out therein.24 Furthermore, any inconsistencies with the member’s commitment as subscribed may make the national legislation on anti-dumping void to the extent of its inconsistencies.25 Note further that the WTO agreement on anti-dumping and countervailing measures are automatically binding on all members.26

Nigeria strives to promote its economic development by diversifying its economy which largely rests on crude oil export and now to agricultural or non-oil exports.28 Consequent upon unpredictable crash in oil price at the global market (Figure 1.3), Nigeria currently witnesses economic crises due to its large dependence on the crude oil.29 Hence, the country’s economy is prone to high volatility and vulnerable to external shocks. With no options available, the country is poised to incorporate measures that can protect domestic industries and prevent the country’s economy in virtually all sectors from dumped imports in terms of national legislation.30

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25 Vermulst 2005, p. 4; Part I Art 1 Anti-Dumping Agreement 1994, p. 2
28 The negative growth (-2.42%) recorded in the two quarters of 2016 recently released by the National Bureau of Statistics. This is due to crash in crude oil price, see, The Lagos Chambers of Commerce and Industry: Nigeria’s Economic Recession 2016. Predominant economic sectors such as manufacturing, construction, trade, transport, hotels and restaurants, finance and insurance, real estate and government are in recession except agriculture and telecommunications. This shows the reason the government anticipate to diversify the economy and encourage more production in the agricultural products, in a bid to export and generate foreign exchange, a phenomenon that can strengthen foreign reserves, see Nigerian Economy and Recession: Outlook for 2017, 2016, p. 8. The reason for country to diversify its economy is to withstand unprecedented external shock. Usually, a global cycle destabilises a mono-economy country that relies heavily on a likely single product for export. Historically, U.S tackled economic recession in 1930s and 2008, see Adesoji A Perspective on Nigerian Economic Recession 2016, p. 4.
29 Figure 1.3 explicitly shows crash in the crude oil price, a product which serves as the major export source for an oil dependent Nigeria in the mid-2014 and early 2015 resulted in economic crises and recession, thus making the country’s economy vulnerable to external infiltrations, see Husain et al (IMF Staff Discussion Note, SDN/15) 2015, p. 21. Figure 1.3 further points out that despite the small improvement in global crude oil benchmarks and price differentials for most light sweet components, the OPEC Reference Basket (ORB) slipped slightly in September to $42.89/b, but was up marginally for the quarter, ending more than 40% higher than the record-low 1Q16. Year-to-date (y-t-d), the ORB value is about 27% lower at $38.54/b; Organization of the Petroleum Exporting Countries (OPEC): Monthly Oil Report, 2016.
30 Before the General Agreement on Tariff and Trade (GATT) 1947 was signed with objectives of encouraging international trade, and reducing tariff, most countries adopted Protectionism, and economic (need) policy of restraining trade between nations, through methods such as tariffs on imported goods, restrictive quotas, and a variety of other restrictive government regulations is designed to discourage imports, and prevent foreign take-over
Nigeria embraces the global trade liberalisation. The traditional barriers usually employed by the country such as import bans are now inconsistent with the spirit or trading rules of WTO. For this reason, to protect the domestic industries from dumped products and subsidised goods, Nigeria is to provide legal protection, poised to effect national legislation on anti-dumping (trade remedies or mechanisms) and same shall not conflict with its WTO objectives.

1.1 Research Problem

Where a case of dumping is reported upon application by representatives of domestic industry in Nigeria, the country is yet to have a statutorily recognised mechanism to investigate and
determine whether dumped imports cause injury to domestic industry.\textsuperscript{36} The effect of trade remedies in Nigeria is that dumped imports gain better ground, national economic growth weakens and exports decline.\textsuperscript{37} At such stage, the domestic industries stand no chance to gainfully compete with foreign exporters\textsuperscript{38} leading to winding up and loss of employment.

From the table 1.5 below, the trade imbalance between the two countries has favoured China in increasing proportion can be noticed. The China’s imported products are charaterised by inferiority sold at lower price to compete with domestic industry.\textsuperscript{39}

Table 1.4: Nigeria-China bilateral trade, 2001-2008(US dollars)\textsuperscript{40}

<table>
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<tr>
<th>Year</th>
<th>Nigeria’s exports to China</th>
<th>China’s exports to Nigeria</th>
<th>Bilateral trade value</th>
<th>China’s export total %</th>
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<tr>
<td>2001</td>
<td>227.4</td>
<td>917.2</td>
<td>1,144.6</td>
<td>80.1</td>
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<td>2002</td>
<td>121.3</td>
<td>1047.1</td>
<td>1,168.4</td>
<td>89.6</td>
</tr>
<tr>
<td>2003</td>
<td>71.7</td>
<td>1787.5</td>
<td>1,859.2</td>
<td>96.1</td>
</tr>
<tr>
<td>2004</td>
<td>462.6</td>
<td>1719.3</td>
<td>2,181.9</td>
<td>78.8</td>
</tr>
<tr>
<td>2005</td>
<td>527.1</td>
<td>2305.3</td>
<td>2,832.4</td>
<td>81.4</td>
</tr>
<tr>
<td>2006</td>
<td>272.8</td>
<td>2855.7</td>
<td>3,133.5</td>
<td>91.1</td>
</tr>
<tr>
<td>2007</td>
<td>537.5</td>
<td>3800.2</td>
<td>4,337.7</td>
<td>87.6</td>
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<tr>
<td>2008</td>
<td>509.9</td>
<td>6758.1</td>
<td>7,268.0</td>
<td>93.0</td>
</tr>
</tbody>
</table>

Source: South African Institute of International Affairs (SAIIA).

\textsuperscript{36} Sanusha Naidu’s article published by the \textit{Council in Foreign Relations} in 2010 touches upon these divergent viewpoints. Naidu is an academic and research specialist in the Integrated Rural and Regional Development program at the South African Regional Poverty Network and authored or edited three books on the relationship between China and Africa. He writes that, ‘Critics and commentators have labeled this new [economic] thrust by China and India as the 'second scramble for Africa’s resources’ in the 21st century . . . For these critics, the long-term impact would be a race to the bottom between the continent’s former colonial powers and the newly emergent competitors, in particular China, with deleterious consequences, namely Africa’s further underdevelopment and marginalization from the process of globalization; Naidu 2007, p. 41-47.

Apart from Nigeria, other African countries such as Angola faces challenges of dealing with the risk of China’s cheap import leading to deindustrialization increased unemployment and discourage economic diversification; The challenges of handling the possibility that imports from China may be hazardous on account of low quality; Sandrey, Ron the African Economic Research Consortium 2009; Kaplinsky Review of African Political Economy 2008, p. 7-22. Sandrey – Edinger the African Development Bank (AfDB) May 2011.; Falade International Journal of Humanities and Social Science, 2014, p. 235

\textsuperscript{37} Husain et al (IMF Staff Discussion Note, SDN/15) 2015, p. 21.


\textsuperscript{39} Agubamah European Scientific Journal 2014, p.5; Ayoola Research Journal of Finance and Accounting 2013, p.101

\textsuperscript{40} Figure 1.4 shows that the terms of trade on mercantile transaction between the elite and politicians still favoured China, whose exports represented 73% of the bilateral trade total in 1995 and 68% of the total in 2000. In 2008, it was 93%; Agubamah European Scientific Journal 2014, p.5. It may interest Nigeria to be careful of being used by China as a dumping ground for cheap Chinese exports, particularly textiles, as this will increase the existing trade imbalance between the two countries in favour of China and lead to more job losses for Nigeria. Nigeria trade Unions have been reported as blaming Chinese imports for the loss of 350,000 Nigerian manufacturing jobs, chiefly in the textile sector, see Nigerian National Newspapers; Nigeria Tribune Thursday 20th March 2014.
Faced with the need to protect domestic industries, Member States often decide to use Anti-dumping duties instead of (the more ‘costly’) safeguard measures provided for in the GATT 1994.

Figure 1.5: Real GDP on Year to Year Growth

![Graph showing real GDP growth](image)


Figure 1.5 illustrates the drop in the real GDP year on year growth is a reflection of drop in the crude oil price. Consequently, the domestic industries face greater challenges as the economic crunch further affect foreign exchange liquidity making their access to other production components from abroad to produce local products difficult thereby making way for stiffer competition for domestic industries against exporters of like products into Nigeria.

The Nigerian Anti-dumping and Countervailing Bill 2010 reflects the provisions of the AD Agreement in its quest to impose trade remedies where an exporter is found liable of dumped imports. However, there are omissions of concepts and the some terms in the interpretation section of the Bill are not in compliance with the intendments and provisions of AD Agreement. This makes the implementation of anti-dumping duties practically difficult when passed into law. In a bid to protect domestic industries, countries often neglect to separate the interface between anti-dumping and competition law on the face of globalised market, a disposition than

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41 Infant Industry Theory promotes an economic policy that protects young industries in less developed economies until they become established, financially stronger, and capable of withstanding competitive pressures, see *Investing Answer: Infant Industry Theory*, available. A review of the Manufacturers Association of Nigeria (MAN)’s research discovered that only few say 10% of manufacturing companies are operating at a sustainable level while whopping 60% are on the road to distress/liquidation, see Arogundade, Kingley et al International Journal of Academic Research in Business and Social Sciences 2015, p. 4. The significant decline in the performance of manufacturing organization is a result of backward integration and inward orientation strategies of government in the late 1990’s.

42 *Bian* Journal of Economic Integration 1997, p. 62-86.


44 These situations cause more problems such as high rate of unemployment (13.9% in 2016 according to National Bureau of Statistics), and the economy may be prone to external shocks.

generates inconsistencies with their obligations with the requirements of the AD Agreement.\textsuperscript{46} There seems to be trade dispute resulting from countries imposing anti-dumping measures and countervailing duties against exporting countries.\textsuperscript{47}

1.2 Research Questions
The writer intends to answer the following research questions:

i. WTO is a body under which the AD Agreement was formed and Member State subscribed to it. Analytically, what’s the structure of the WTO that facilitated drafting and conclusion of the Anti-Dumping Agreements? What are anti-dumping instruments and how did they come into existence under GATT?

ii. The Member State who intends to adopt the WTO AD Agreement into its national anti-dumping legislation, such a member is required to take necessary step to ensure the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.\textsuperscript{48} In a pursuit to implement anti-dumping measures, any action of an importing country contrary to WTO AD Agreement is akin to violating such an agreement. The question of this research is what are the inconsistent provisions in the Nigerian Anti-Dumping and Countervailing Bill 2010 contrary to Article IV of GATT 1994 (The AD Agreement)?

iii. South Africa has enormous experience in the area of anti-dumping action beyond Nigeria. It happened to be the very first country in Africa to promulgate its own national anti-dumping law. Using South African anti-dumping law as a pivot to straighten irregularities in the Nigerian Anti-dumping and Countervailing Bill. Thus, how can there be thorough analyses of comparative law and effective legal transplant of Anti-dumping legal system of South Africa to Nigeria with a concern to the countries’ legal, political and economic differences?

\textsuperscript{46} Khan Bharati Law Review 2016, p. 125
\textsuperscript{47} Korea (WT/DS504/1) 2017, the case is still consultation stage where Japan accuses Korea of implementation of anti-dumping duties which is inconsistent with Korea’s obligations under, among others, the following provisions of the GATT 1994 and the Anti-Dumping Agreement 1994.
\textsuperscript{48} Article 18.4 of the Anti-Dumping Agreement 1994, p.20; Ehrenhaft et al 1997, p.10; Falade International Journal of Humanities and Social Science, 2014, p. 235
iv. No WTO member is obliged to adopt Anti-dumping Agreements into its national legislation, however, where a country deems it fit to adopt such agreement due to predatory dumping; it must do so in conformity with the AD Agreement.\(^5\) How can anti-dumping law upon enactment be implemented in Nigeria on it facial value without contradictory interpretation to the intent and purpose of AD Agreement?

The focus of this is to consider how Nigeria intends to streamline its anti-dumping regime with its aforementioned obligation. I am of the view that the outcome of this piece will be additional information to be harnessed by the legislators and thereafter enhance implementation of anti-dumping law. Consequently, protect domestic industries from predatory foreign trade practices and further conform to the country’s WTO obligations.\(^5\)

1.3 Research methodology

This work uses doctrinal legal research approach anchored on a hermeneutic discipline. This approach explores interpretation of legal texts and other documents regarding AD Agreement.\(^5\)

It further allows analytical and descriptive study of issues. The writer collects and uses empirical data in form of normative sources such as statutory texts, treaties, general principles of law, case laws, binding precedents and scholarly legal writing (textbooks, articles in journals etc.).\(^5\)

The writer builds theories (the direct binding force of WTO AD Agreement) upon which he tests and from which he derives new hypotheses on the validity, meaning or scope of the Nigerian Anti-Dumping and Countervailing Bill, 2010 where same conflicts with the WTO AD Agreement.\(^5\)

The writer adopts functional method (focus on the practical uses, effects and purpose of rules)\(^5\) under the comparative legal science considering the desirability of introducing forms of legal regulation that have been successfully introduced in other jurisdictions as a response to

\(^{50}\) Note 50 above


\(^{51}\) Hoecke European Academy of Legal Theory Series 2011, p. 4.

\(^{52}\) Hoecke European Academy of Legal Theory Series 2011, p. 11.

\(^{53}\) Hoecke European Academy of Legal Theory Series 2011, p. 11.

\(^{54}\) Samuel European Academy of Legal Theory Monograph Series 2014, p. 66.
analogous issues.\textsuperscript{55} The writer focuses on conceptual framework of South African anti-dumping legal system\textsuperscript{56} on the basis of comparison with the Nigerian Anti-Dumping and Countervailing Bill, 2010. This effort is aimed at introducing the lessons learned from the South Africa’s reform on its anti-dumping regime;\textsuperscript{57} use same to create solutions to the problems in the provisions of the Nigerian Anti-Dumping and Countervailing Bill, 2010 that make it inconsistent with the WTO AD Agreement.

The writer adopts desk research approach in particular, the primary sources used comprise Nigerian Anti-Dumping and Countervailing Bill of 2010; South African International Trade Administration Act (ITA Act) of 2002; Anti-Dumping Regulations 2003 and WTO agreements in particular Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; Article VI of the 1994 General Agreement on Tariffs and Trade; WTO cases and other judicial decisions. Secondary sources used include academic write-ups by scholars contained in books, journals and the use of other internet sources (uploaded reports and statistics on organisations’ website)

\textsuperscript{55} \textit{Walter - Mason} 2007, p. 184.
\textsuperscript{56} \textit{Brink} 2004, p. 14.
\textsuperscript{57} \textit{Brink} 2012, p. 1-7.
2 HISTORICAL BACKGROUND TO GATT/WTO

The collaborative efforts of Britain and USA laid the foundation for the 1946-48 GATT/ITO negotiations during the wartime discussions. The discussions that led to the negotiation started with an exchange of views in Washington in September and October of 1943.  

While the world had been ravaged with overwhelming trade restrictions, for the better and larger part of the discussions, experts completely agree on particular issues of substantive policy. The leading trade problems such as discrimination, subsidies, and quantitative restrictions are canvassed against.  

The most notable with a far-reaching and somewhat comprehensive development in trading world after seven years of negotiations starting in 1986 since 1947 became glaring in 1994 when Uruguay MTN Round was successfully completed.  

The efforts on the procedural rules and the material conditions stipulated to be fulfilled prior protective measures can be effected was reached at the last Uruguay Round (GATT Round). As an integral composition or part of the Marrakesh Agreement (the WTO Agreement), six Understandings and Multi-lateral Trade Agreements were concluded. These formed parts of the

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58 Hoekman. – Mavroidis Journal of World Trade, 1996, p. 8  
59 The International Economics Research Centre: The WTO: An Historical, Legal, and Organizational Overview 1998.  
60 The International Economics Research Centre: The WTO: An Historical, Legal, and Organizational Overview 1998.  
61 Ehrenhaft et al. 1997, p. 366; Adamantopoulos - De Notaris Fordham International Law Journal 2000-2001, p.3; Anti-Dumping Agreement 1994 reflects views beyond the scope of economic concerns of countries such as U.S. EU and Japan, but, it encompasses other developed and developing countries that are signatories members to the agreement and WTO. Emphatically, the Anti-dumping Agreements concluded in the Tokyo, Kennedy and Uruguay Rounds shows similar views against dumping and how countries uphold anti-dumping measures to combat unfair trading practices in this regard from exporting countries. Notably the first round of trade negotiation occurred in 1947 during the ITO negotiations in Geneva (European office of the United Nations), see Mavroidis 2005, p.3. The above resulted to the first round of multilateral trade negotiation, see Mavroidis 2005, p.3; Series of Trade Rounds (Multilateral Trade Negotiations) made the GATT basic rules to be achievable, see World Trade Organisation 1995, Understanding the WTO, p. 10-116.  
62 From 1986 to 1994, a multilateral trade negotiations under the mandate of GATT (the General Agreement on Tariffs and Trade) took place and tagged Uruguay Round, it was the 8th round that involved 123 countries; World Trade Organisation 1995, Understanding the WTO, p. 12; United Nations Conference on Trade and Development 2004, p. 3; Aggarwal World Development 2004, p.1043; For additional reading on the Uruguay Round, see generally international trade law website include the WTO’s website.  
63 The International Economics Research Centre: The WTO: An Historical, Legal, and Organizational Overview 1998.
Final Act that enshrined the Results of the Uruguay Round of Multilateral Trade Negotiations signed in Marrakesh on April 15, 1994 (usually called the Final Act),\textsuperscript{64}

Article VI of the GATT 1947 under the General Agreement on Tariffs and Trade, as well as the World Trade Organisation regimes makes provision for anti-dumping measures.\textsuperscript{65} To reinforce the importance of Article VI, the Agreement on Implementation of Article VI of the GATT 1994 (WTO AD Agreement) further came into existence.\textsuperscript{66} With GATT 1947 and the WTO AD Agreement, traditional act of dumping became unattractive in the international scene as they underscored unfair international trade, a practice that encouraged prices discrimination and a distortive effect on trade.\textsuperscript{67} Ehrenhaft stated that,

[S]ince 1947, when the General Agreement on Tariffs and Trade, now the World Trade Organisation, came into effect, dumping has been seen as an economic practice against which border measures have been accepted by the world’s most important economies, including the United States (U.S.), the European Union (E.U.) and Japan.\textsuperscript{68}

\textbf{2.1 The WTO Systemic Framework}

A landmark conclusion of the Uruguay trade round, launched at Punta del Este under GATT 1947 was the establishment of the World Trade Organisation upon the legal instrument called the WTO Agreement.\textsuperscript{69} The WTO Agreement provides for the common institutional framework for the conduct of trade among its Members.\textsuperscript{70} The institutional structure of the WTO among others,\textsuperscript{71} include a Ministerial conference which consists representatives of all Member States.

\textsuperscript{64} Uruguay Round of Multilateral Trade Negotiations 1994.
\textsuperscript{65} GATT 1947
\textsuperscript{66} Anti-Dumping Agreement 1994.
\textsuperscript{70} Article II.1, WTO Agreements 1994, p. 112
\textsuperscript{71} The essence of GATT and the WTO is to make sure that signatory members to the Agreement carry out their relations in the field of trade and economic sphere in such a way that can raise standards of living, securing a full level of employment and a conspicuous guaranteed state of growing volume of real income and effective demand, enlarging the production and trade in goods and services, while giving room for the maximal use of the world’s resources in compliance with the objective of sustainable development with a view to protecting and preserving
The WTO Agreement expressly states that GATT 1994 and GATT 1947 are 'legally distinct'. Therefore a country that signified its withdrawal from GATT 1947 and partook in the WTO, such a country is not obliged under the GATT 1947 rules towards the contracting parties that declined to join the WTO. With the notable legal distinction between the GATT 1994 and GATT 1947, yet the WTO Agreement maintains continuity with the past Agreements.

To secure a further clarity on some provisions of the Multilateral Trade Agreement, series of decisions were taken at Ministerial Meetings. Thus, the WTO Agreement provides that:

‘The WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.’

2.2 The scope of the WTO Agreements

The most germane aspect of the Uruguay Round agreements is the Agreement Establishing the World Trade Organisation. The institutional frameworks of GATT 1947 are substituted by the WTO. The WTO Agreement focuses on a single institutional framework that comprises of (a) GATT 1994, (b) a series of Understandings that amend GATT 1947, and (c) multilateral trade agreements. The following Annexes are appended to the WTO Agreement and are an integral part of it:

- GATT 1994, as amended (Annex 1A)
- General Agreement on Trade in Services (Annex 1B)
- Agreement on Trade Related Aspects of Intellectual Property Rights (Annex 1C)
- Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2)

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the environment and to uplift the mode of doing so consistently with their prioritised needs and consideration at different stage of economic development, see Article IV.1 WTO Agreement 1994.


73 Article II. 4 GATT1994 as specified in Annex 1A is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified.’

74 Article III WTO Agreement 1994, p. 10.
75 Article XVI: 1, WTO Agreements 1994, p.17.
76 WTO Agreements 1994.
77 Article II, WTO Agreement 1994, p. 9
• Trade Policy Re-view Mechanism (Annex 3)
• Plurilateral Trade Agreements (Annex 4)\(^\text{78}\)

The agreements listed in Annexes 1A-C, 2, and 3 include the Multilateral Trade Agreements (MTAs). The Multilateral Trade Agreements some integral parts of the WTO Agreement. This makes them binding on all WTO Members.\(^\text{79}\) The twelve subject-specific agreements on trade in goods are also listed in Annex 1A.\(^\text{80}\) The GATT 1994, the Agreement on Implementation of Article VI of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures (SCMA) all form part of Annex IA to the WTO Agreement relating to multilateral trade in goods and are binding on all members.\(^\text{81}\) Article VI of the GATT 1994 makes provision for two trade remedies inform of anti-dumping measures and countervailing measures with resultant imposition of countervailing duties CVD against unnecessary dumping and subsidisation.\(^\text{82}\) The AD Agreement entails extensive provisions on both the substantive procedural guidelines as to what establish dumping, injury to domestic industry or the case of causality, determination of same and how provisional and definitive measures can be imposed.\(^\text{83}\) AD Agreement constitute exception to the general breach of WTO obligations by its members, for instance Most Favoured Nation principle and National Treatment do not operate when AD Agreement comes into play.\(^\text{84}\) Furthermore, the Members’ tariff commitments under GATT constitute exceptions under provisions of AD Agreement and Article VI of the GATT 1994, the ADA.\(^\text{85}\)

\(^{78}\) Article II.3 *WTO Agreement* 1994, p. 9.
\(^{79}\) Article II.1-2 *WTO Agreement* 1994, p. 9.
\(^{80}\) These agreement s are Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing, Agreement on Technical Barriers to Trade, Agreement on Trade-Related Investment Measures, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [Anti-dumping Agreement], Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 [Customs Valuation Agreement], Agreement on Preshipment Inspection, Agreement on Rules of Origin, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures, and Agreement on Safeguards, see *WTO Agreements* 1994.
\(^{81}\) Article II.2 *WTO Agreements*1994; *Rudiger et al* 2012, p.199
\(^{82}\) *WTO Agreement* 1994, p.198
\(^{83}\) *WTO Agreement* 1994, p.198; *United Nation Conference on Trade and Development* 2003, WTO Dispute Settlement on Anti-Dumping Measures, p. 4
\(^{84}\) *Pam* Nigeria Current Law Review 2007-2010, p. 44.
\(^{85}\) *Pam* Nigeria Current Law Review 2007-2010, p. 44.
2.3 The WTO Anti-Dumping Agreements

Agreement on Implementation of Article 6 of the GATT 1994 is one of Agreements in the WTO Agreement. It is also called ‘Anti-dumping Agreement 1994’ or ‘WTO Anti-dumping Agreement’. The AD Agreement stipulates both substantive and procedural guidelines on the determination of dumping and events required thereafter. Articles of the Anti-Dumping Agreement provides thus:

‘No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.’

Subsequent to the Uruguay Round of negotiations, a fresh anti-dumping agreement was attained. Article VI of the General Agreement on Tariffs and Trade 1947 was moved onward into General Agreement on Tariffs and Trade 1994. The AD Agreement expanded and gave clarity on Article VI provision concerning dumping. The application of Article VI of the General Agreement on Tariffs and Trade 1994 and the AD Agreement go hand-in-hand. In essence, the revised WTO Anti-dumping Agreement provides clear and comprehensive rules concerning the procedural steps to be taken in initiating and conducting anti-dumping investigations, how to determine that a product is dumped; the criteria to be taken into account in a determination that dumped imports caused injury to a domestic industry, and the implementation and duration of anti-dumping measures.

Furthermore, the Anti-dumping Agreement stipulates the role of

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86 With the creation of WTO in 1994, most parts of the world has witnessed trade liberalisation, in effect, tariff and non-tariff barriers are either eliminated or reduced to a significant level. In developed countries and larger parts of developing countries, both the producers and government of importing countries seeks the Anti-Dumping Agreement1994 knowing the legal weight the agreement lends to trading system, see Stewart Arizona Journal of International and Comparative Law 1999, p. 693. Intervention of anti-dumping measures under the WTO avails producers of any product, (finished goods or raw materials) information on their rights and obligations when making business decisions as it concerns WTO Anti-dumping Agreements.; See also World Trade Organisation: WTO Technical Information on anti-dumping, p. 1

87 Intervention of anti-dumping measures under the WTO avails producers of any product, (finished goods or raw materials) information on their rights and obligations when making business decisions as it concerns WTO Anti-dumping Agreements, see Stewart Arizona Journal of International and Comparative Law 1999, p. 694, see also L. ROSS and S. NING, Modern protectionism: China’s own anti-dumping regulations, The China Business Review (May-June 2000) p.43.

89 Brink 2012, p.105; Pam Nigeria Current Law Review 2007-2010, p.46
90 GATT 1947 applied only to goods which implied that dumping of services was not covered, note 5 above, see United Nation Conference on Trade and Development2003,WTO Dispute Settlement on Anti-Dumping Measures, p. 4
93 Trade Programme Team trade notes Issue 2013, p. 57.
dispute settlement\textsuperscript{94} panels in disputes where domestic authorities have taken actions on anti-dumping.\textsuperscript{95}

The AD Agreement contains 18 Articles on close observation that addresses substantive and procedural rule relating to determination of dumping, and keen on factors in respect of dumping action on behalf of a third country and exploration of dispute settlement.\textsuperscript{96}

Anti-dumping law as enshrined and embedded in the GATT/WTO rules has a wider scope but substantively related to competition law and policy. However, competition law and policy was in the bid for negotiation under International Trade Organisation (ITO), but never came into existence after World War II.\textsuperscript{97} The General Agreement on Tariffs and Trade (GATT) replaced the ITO provisions on restrictive business practices in a ‘best-endeavors’ clause (Art. XXIX GATT).\textsuperscript{98}

Table 2.1: The Basic Structure of the WTO Agreements

<table>
<thead>
<tr>
<th>Basic principles</th>
<th>Goods</th>
<th>Services</th>
<th>Intellectual property</th>
<th>Disputes</th>
<th>Trade policy reviews</th>
</tr>
</thead>
<tbody>
<tr>
<td>GATT</td>
<td></td>
<td>GATS</td>
<td>TRIPS</td>
<td>Dispute settlement</td>
<td>TPRM</td>
</tr>
<tr>
<td>Additional details</td>
<td>Other goods agreements and annexes</td>
<td>Services annexes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Market access commitments</td>
<td>Countries’ schedules of commitments</td>
<td>Countries’ schedules of commitments (and MFN exemptions)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Agreements Establishing WTO\textsuperscript{99}

Table 2.2: The WTO Structural Chart.

\textsuperscript{95} Article 17 Anti-Dumping Agreement 1994, p.18.
\textsuperscript{96} Article 17 Anti-Dumping Agreement 1994, p.18.
\textsuperscript{98} Joel 1981, p. 30
Source: Agreements Establishing WTO\textsuperscript{100}

\textsuperscript{100}The WTO Agreement Series 1998, p. 5.
3 REGIONAL TRADE AGREEMENTS: A SOLUTION TO DUMPING

3.1 RTA and WTO Objectives

The WTO seeks to achieve objectives such as ‘raising standards of living’ and ‘ensuring full employment’ by ‘entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations’. Subject to compliance with stringent conditions, WTO rules permit both RTAs and trade remedies, even though they would otherwise violate core obligations or ‘disciplines’ imposed on WTO Members in order to liberalise trade and thereby improve national and global welfare. Thus, trade remedies are ‘trade protection that you can get away with under the anti-dumping agreement’, the SCM Agreement, and the Safeguards Agreement, and RTAs reflect ‘discriminatory trade policy that you can get away with under Article XXIV’ of the GATT 1994.

3.2 RTAs: An Exception to the WTO Principle of MFN Treatment and National Treatment

From the provisions of RTAs they stand as a key exception to the non-discrimination in the WTO. There seems to be a glaring absence of obligation to provide most-favoured-nation (‘MFN’) treatment to each WTO Member. The MFN rule in the context of trade in goods means that a Member must provide any benefit it grants to the products of one country to the products of all WTO Members. Members’ eagerness to enter into multiple RTAs in recent has effect on the MFN rule and the principle of non-discrimination. Scholars opined that a major reason for the adoption of RTAs has been linked to the uncertainty created by the WTO exception for RTAs, which arises from a scarce and helpful WTO jurisprudence and scholarly

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102 The WTO Agreements Series: Technical Barriers to Trade 2013, p. 42.
105 Regional Trade Agreements (RTAs) are a major and perhaps irreversible feature of today’s multilateral trading system (MTS), see Crawford – Fiorentino 2005, p. 8.
106 World Trade Organisation: Exceptions to WTO Rules: General Exceptions, Security Exceptions, Regional Trade Agreements (RTAs), Balance-of-Payments (BOPs) & Waivers.
107 Pam Nigeria Current Law Review 2007-2010, p. 44
Therefore, the principle of national treatment as stated in Article 3 of the GATT 1994 serves as a core exception to RTAs. WTO rules stress Trade liberalisation and the purpose of Article III is to prevent the effect of protectionism form Member States in the application of internal tax and regulatory measures. More specifically, the purpose of Article III is to ensure that internal measures are ‘to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given’.

However, RTAs quite have some advantages and trade-liberalizing impacts and therefore provide an avenue towards multilateral trade liberalisation. Due to this fact, Article XXIV:5 provides an exception for RTAs.

The WTO law on RTAs seeks to address the prevalence of RTAs and adjust them from a point of disadvantage which could have overbearing effect on countries to a positive force with respect to trade remedies. Emphatically, if RTA partners may trade among themselves with little or no resort to trade remedies, then, such can provide a valuable basis for learning how to reduce trade remedies in the WTO.

For example, African countries after independence in the latter half of the twentieth century embraced the formation of Free Trade Areas (FTAs), provided for under Article XXIV of the General Agreement on Trade and Tariffs (GATT 1947), as an exception to Article I, Most Favored Nation (MFN) clause.

### 3.3 Economic Community of West African State: A Regional Solution to Dumping

Africa’s leading Regional Economic Community, the 15 member Economic Community of West African States (ECOWAS) was established in 1975 to enhance the economic integration and
cooperation among its Member States. Originally, a community of 16 States including Mauritania, the ultimate objective was the creation of an economic and monetary union, epitomised by the free movement of persons, goods, capital and services as well as a common commercial policy and a Common External Tariff (CET) regime.

Expectations of economic integration have always been high and a lot has been accomplished by the regional group since the endorsement of the treaty which gave it the required legal teeth. Today, the organisation is being acknowledged globally as a successful regional body. ECOWAS can be seen now as a toast to a workable integration and regional co-existence.

As currently set up, ECOWAS institutions draws strength from its main body-The Authority of Heads of States and Government. The others are Council of Ministers, the Commission, the Community Parliament, the Community Court of Justice, Specialised Technical Committees as well as the ECOWAS Bank for Investment and Development (EBID).

Table 3.1: Structure of ECOWAS

![ECOWAS Structure Diagram]

Source: ECOWAS official website

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120 Member countries making up ECOWAS are Benin, Burkina Faso, Cape Verde, Cote d’Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal and Togo. See Economic Community of West African States (ECOWAS) 2016 Basic Information, p. 1.

121 ‘The aims of the Community are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent’, see Article 3, Economic Community of West African States (ECOWAS) 2015 Revised Treaty, p. 5.

122 Economic Community of West African States (ECOWAS) 2016 Basic Information, p. 1.

123 Article 6 Economic Community of West African States (ECOWAS) 2015 Revised Treaty, p. 8.

124 Economic Community of West African States (ECOWAS) 2015 The Structure of the Economic Community of West African States.
There are other Specialised Institutions comprising the West African Health Organisation (WAHO), West African Monetary Agency (WAMA) as well as the Inter-governmental Action Group against Money Laundering and Terrorist Financing in West Africa (GIABA).  

3.3.1 Economic Partnership Agreement (EPA)

The WA-EU EPA, which the agreement concerns, consists of a preamble, seven (7) parts and six (6) annexes. In the preamble, both parties base the EPA on the objectives of regional integration for which ECOWAS and UEMOA were created, on strengthening trade cooperation between West Africa and the European Union and on the contributions of such trade cooperation to development in West Africa. The main objective of the West Africa – European Union EPA is the establishment of a free trade area between Europe and West Africa (ECOWAS + Mauritania) in accordance with Article XXIV of GATT, through the gradual removal of trade restrictions between the two trade partners.

The EPA is intended to foster the smooth and gradual integration of ACP States into the world economy, with due regard for their political choices and development priorities, thereby promoting their sustainable development and contribution to poverty eradication.

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125 Economic Community of West African States (ECOWAS) 2015 The Structure of the Economic Community of West African States.
127 UEMOA means Union Economique et Monétaire Ouest Africaine (formerly West African Monetary Union) member countries are Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo. UEMOA member countries are working toward greater regional integration with unified external tariffs. UEMOA has established a common accounting system, periodic reviews of member countries' macroeconomic policies based on convergence criteria, a regional stock exchange, and the legal and regulatory framework for a regional banking system. See Union Economique et Monétaire Ouest Africaine (UEMOA): Basic Information.
128 Note that the negotiations for the regional East African Community (EAC) EPA were successfully concluded on 16 October 2014. The EU will continue to grant 100% duty free quota free access to its market for all imports from the EAC member countries. The modest and gradual liberalisation the EAC has committed itself to will be over a period of 25 years, taking full account of the different level of development between the EAC and the EU, see European Commission, 'Economic Partnership Agreements between the European Union and the East African, see European Union: Economic Partnership Agreements between the European Union and the East African Community 2016.
130 The EPA was negotiated under a West Africa regional configuration which comprised of the fifteen ECOWAS members States plus Mauritania, see ECOWAS Economic Partnership Agreement 2016 Factsheet, p. 1.
132 ACP means African, Caribbean, and Pacific Group of States
134 According to the EC, this EPA is coherent with the development of West Africa. Yet the EC has not commissioned an impact assessment to ensure that the EPA initialled in 2014 will support development objectives.
From figure 3.2 and 3.3 above, the EU imports from West Africa hit all time low in 2015 while the EU exports the same region maintains its average high level in the same year. However, the EU imports and exports ratio are within the same percentage. The illustration shows that the

Some analyses were done more than 10 years ago, based on forecasts, but in a different global context. Even so, critical analyses of the EPAs have been conducted in 2009 by the UN Economic Commission for Africa, see European NGO Confederation for Relief and Development 2015, p. 4 and Economic Partnership Agreement 2013EU-ACP Economic Partnership Agreement, p. 6., European Parliament, 2014 African, Caribbean and Pacific (ACP) countries' position on Economic Partnership Agreements (EPAs), p. 21.

European Union Economic Partnership Agreement tends to balance the equilibrium in its trade suprussage and deficit.

EPA negotiations were officially launched at an all ACP level on 27 September 2002. In the West African region, the negotiations between EU and WA took off on 4 August 2004 following the launch of the Accra Road Map. Parties to the agreement are West Africa (ECOWAS and UEMOA) and EU.

West Africa – European Union negotiations of an Economic Partnership Agreement (EPA) were concluded on 30 June 2014 with the initialing of an agreed text by Chief Negotiators. In July 2014, the Economic Community of West African States (ECOWAS) Heads of State endorsed the EPA and opened it up for signature by Member States. To date, 13 out of 16 West African States have signed the Agreement. Only The Gambia, Nigeria and Mauritania have not yet signed.

3.3.2 The Main Features of EPA

Duty free quota free access into EU for all imports from West Africa

i. Asymmetric and gradual opening of West Africa market to EU goods. West Africa committed to liberalise 75% of imports from the EU over a period of 20 years.

ii. Sanitary and Phyto-Sanitary measures aiming, inter alia, to promote health and safety, as well intra-regional harmonisation of measures with international standards.

iii. Asymmetric Rules of Origin taking into account the different levels of development of the two Parties

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137 ECOWAS Economic Partnership Agreement 2016 Factsheet, p. 4.
138 The integration process in West Africa is being led by two organisations: The Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA). In conduct of the EPA process, the Summit of ECOWAS Heads of State and Government gave the mandate to the President of the ECOWAS Commission, in collaboration with the President of the UEMOA Commission, to conduct the negotiations on behalf of the Member States. The West Africa Parties to the Agreement are: Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea Bissau, Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo, ECOWAS and UEMOA.
139 EU on the other hand, The European Commission negotiated the EPA on behalf of the EU Member States in line with the EU trade policy. The EU Parties to the Agreement are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom, and the European Union, see Economic Partnership Agreement 2013EU-ACP Economic Partnership Agreement, p. 5.
140 Market Access refers to all measures applied at the border to trade in goods. This would, in particular, include all tariff barriers applied to trade between the parties. According to the Cotonou Agreement, the aim of the EPA is to progressively remove obstacles to trade between the parties consistent with the objectives of Cotonou and in conformity with WTO provisions, see ECOWAS Economic Partnership Market Access, 2014, p. 1.
iv. Possibility to change the West Africa’s tariff commitments of based on special needs
of common sectorial policies;

v. Commitment by the EU and its Member States to fund the EPA Development Programme
(EPADP) over period at least equivalent to the liberalisation of trade in Good from West
Africa;¹⁴²

vi. Maintaining the regional integration autonomous funding mechanism of West Africa, until
the establishment of a new mechanism;

vii. Commitment by European Union Party to refrain from the use of export subsidies for
agricultural products exported to West Africa

viii. Establishment of joint bodies for management and monitoring of implementation of the
Agreement promoting the involvement of all stakeholders;

ix. Commitment to strengthening of administrative and customs cooperation to facilitate trade
development;

x. Trade Defence measures protect regional production to threats due to liberalisation;

xi. Support for agricultural policies to strengthen agricultural sectors and ensure food security;

xii. Deepening cooperation in the area of sustainable management of fishery resources;

xiii. Establishment of a Dispute settlement mechanism.

xiv. Provisions relating to the duration of the agreement, its entry into force and revision of the
agreement.

xv. Establishment of a dialogue on tax reform and absorption of the net fiscal impact resulting
from the liberalisation

xvi. Rendezvous clause to continue negotiations on trade in Services and other trade related
issues.¹⁴³

¹⁴¹ The Rules of Origin (RoO) are used to determine the country of origin of a product for purposes of
international trade. RoO therefore ensure that countries benefiting from preferential trade agreements do not
become an intermediate pit stop for other countries. By establishing coherent RoOs, producers from non-EPA
countries are prevented from using the loophole of shipping their goods via an EPA country and thus reaching the
EU market, see ECOWAS Economic Partnership Agreement Rules of Origin 2014, p. 1, see also Article 6

¹⁴² The formulation of EPADP, which is a specific initiative of West Africa, is not intended to present a shopping
list of projects, but rather seeks to provide a coherent reference framework for the implementation of activities
related to EPA development. The EPADP also provides the European Union (EU), its Member States and all
development partners a common platform for the coordination of their assistance to the WA region within the

3.3.3 Trade Defence Instruments under EPA

The objectives of this Chapter are to lay down the conditions in which the two Parties may take trade defence measures while at the same time working on the development of trade in goods between them, by way of derogation from the provisions of Articles 9, 10 and 34 of this Agreement.\textsuperscript{144} The Parties shall ensure that the measures taken under the provisions of this Chapter are no more than is necessary to prevent or rectify the situations described there.\textsuperscript{145}

The provisions in the EPA do not prevent the European Union or the States of the West Africa Party from individually or collectively taking anti-dumping or countervailing measures under the relevant WTO Agreements, in particular the Agreement on Implementation of Article VI of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures which figure in Annex 1A to the Agreement establishing the WTO.\textsuperscript{146} For the purposes of applying this Article, origin shall be determined according to the non-preferential rules of origin of the Parties on the basis of the Agreement on Rules of Origin which figure in Annex 1A to the Agreement establishing the WTO (hereinafter, the ‘WTO Agreement on Rules of Origin’).\textsuperscript{147} The special situation of the States of the West African region as developing countries shall be taken into account when the application of anti-dumping or countervailing measures is considered. Before imposing definitive anti-dumping or countervailing measures, the Parties shall consider the possibility of constructive solutions, such as those provided for in the relevant WTO Agreements. The investigating authorities, may, in particular, carry out appropriate consultations for this purpose.\textsuperscript{148} The anti-dumping duties or countervailing measures shall remain in force only for the time and extent necessary to offset dumping or harmful subsidies.\textsuperscript{149}

No product originating from one Party, when imported into the territory of the other Party, shall be subject both to anti-dumping and countervailing duties to rectify the same situation resulting from dumping or export subsidies. The Parties guarantee that anti-dumping or countervailing measures cannot be applied simultaneously to the same product at both national level, on the one hand, and regional or sub-regional level, on the other.\textsuperscript{150} The Parties agree to each set up a single

\textsuperscript{145} Article19.2 COM (2014) 576 final, p. 15.  
\textsuperscript{146} Article20.1 COM (2014) 576 final, p. 15.  
\textsuperscript{147} Article20.2 COM (2014) 576 final, p. 15.  
\textsuperscript{148} Article20.3 COM (2014) 576 final, p. 15.  
\textsuperscript{149} Article20.4 COM (2014) 576 final, p. 15.  
\textsuperscript{150} Article20.5 COM (2014) 576 final, p. 15.
legal review body, including an appeal level. The judgments of this single body must enter into
effect on the territory of all the States in which the disputed measure is applicable.\textsuperscript{151} The
provisions of this Article shall be applicable to all investigations initiated after this Agreement enters into force.\textsuperscript{152} The provisions of this Article shall not be subject to the dispute settlement provisions of this Agreement\textsuperscript{153}

3.3.4 ECOWAS Trade Liberalisation Scheme (ETLS)\textsuperscript{154}
In line with its objective of promoting cooperation and integration and as one step towards the
creation of a common market, custom union\textsuperscript{155} which, according to the ECOWAS Revised Treaty\textsuperscript{156}, should be established, among others, through ‘the liberalisation of trade by the
abolition, among Member States, of customs duties levied on imports and exports, and the
abolition among Member States, of non-tariff barriers in order to establish a free trade area at the
Community Level’\textsuperscript{157} ECOWAS adopted the ECOWAS Trade Liberalisation Scheme. This was
first implemented in 1979 with only agricultural products, handicrafts and crude products being
allowed to benefit from the scheme.\textsuperscript{158}

Given the evolution of international trade and the adoption by the World Trade Organisation
(which most ECOWAS Member States are members of) of a new agreement on rules of origin, it
was deemed necessary to comply with these rules. As a result, ECOWAS and UEMOA adopted
the same origin criteria.\textsuperscript{159} The ECOWAS protocol A/P1/1/03 of 31st January 2003\textsuperscript{160} defines the

\begin{footnotesize}
\begin{enumerate}
\item Article20.6 COM (2014) 576 final, p. 15.
\item Article20.7 COM (2014) 576 final, p. 15.
\item Article20.8 COM (2014) 576 final, p. 15.
\item The ECOWAS Trade Liberalisation Scheme (ETLS) is a trade instrument designed by the Regional Economic Community and administered by the ECOWAS Commission to encourage Intra-ECOWAS trade. The ETLS is the main ECOWAS operational tool for promoting the West African region as a Free Trade Area and the Commission’s first step towards the realisation of the objective of the community, see Ukaoha – Awa ECOWAS Vanguard 2015, p. 1.
\item A customs union is a form of economic integration whereby member countries charge a common set of tariffs to the rest of the world while eliminating tariffs among themselves, see Ukaoha -Ukpe ECOWAS Vanguard 2013, p. 2.
\item Economic Community of West African States (ECOWAS) 2015Revised Treaty.
\item Ukaoha -Ukpe ECOWAS Vanguard 2013, p. 2.
\item Note that in 1990, however, it opened up to include industrial products, see Economic Community of West African States (ECOWAS) 2014 aid for Africa, p. 1.
\item Economic Community of West African States (ECOWAS) 2014 aid for Africa, p. 1.
\item Article 5, ECOWAS Protocol (2003) A/P1/1/03, p. 4.
\end{enumerate}
\end{footnotesize}
concept of originating products and origin criteria applicable for the free circulation of industrial goods as follows:\textsuperscript{161}

i. Wholly produced goods; goods whose raw materials completely originate from the region.

ii. Goods which are not wholly produced but their production requires the exclusive use of materials which are to be classified under a different tariff sub-heading from that of the product.

iii. Goods which are not wholly produced but their production requires the use of materials which have received a value added of at least 30\% of the ex-factory price of the finished goods.\textsuperscript{162}

3.3.5 Why a Free Trade Area is needed?

i. Encouraging entrepreneurial development in the region.

ii. Increasing intra-regional trade and boosting economic activity.

iii. Increasing West African competitiveness on the global market.

iv. Increasing GDP of Member States, thus better welfare for citizens.\textsuperscript{163}

3.3.6 The Conditions and Procedure for Accessing the ETLS\textsuperscript{164}

It is important to note that the ETLS only exempts the private sector beneficiary from paying import duty, but all other duties such as VAT and levies are\textsuperscript{165} payable. The conditions to be fulfilled\textsuperscript{166} by the importer under the ETLS as follows:\textsuperscript{167}

\textsuperscript{161} Decision of the ECOWAS Authority of Heads of States and Governments, Decision A/DEC.1/5/83 classes Member States into three groups for the implementation of the ETLS: Group 1-Cape Verde Guinea Bissau, The Gambia, Upper Volta, Mali and Niger, Group 2; Benin, Guinea, Liberia, Sierra Leone and Togo, Group 3-Ivory Coast, Ghana, Nigeria and Senegal, see Final Communiqué (1986) ECW/HSG.VI/4/REV-1.

\textsuperscript{162} Under the international trade, one must compare the opportunity costs of producing goods across countries. A country is said to have a comparative advantage in the production of a good (say cloth) if it can produce cloth at a lower opportunity cost than another country, see Article 5, ECOWAS protocol (2003) A/P1/1/03, p. 8.

\textsuperscript{163} RTAs encourage investments aimed at bolstering trade opportunities. This is especially true when the participating countries are of unequal economic status, see Article 7, ECOWAS protocol (2003) A/P1/1/03, p. 9. Ukaoha – Awa ECOWAS Vanguard 2015, p. 1.

\textsuperscript{165} Upon fulfilling certain conditions including proof of origin, ETLS goods are granted total exemption from import duties and exempted from quantitative restriction; Ukaoha – Awa ECOWAS Vanguard 2015, p. 2.

\textsuperscript{166} However, there are challenges facing the implementation of ETLS such as bureaucratic bottlenecks, inter-state differing standards and weighs, the weakness of the compensation mechanism, ECOWAS Solidarity fund, lack of national directives, the tariff barriers, the non-tariff barriers, poor trade infrastructure, corruption among law enforcement agencies etc, see Article 3 Economic Community of West African States (ECOWAS) 2015Revised Treaty, p. 5-6.

\textsuperscript{167} Ukaoha -Ukpe ECOWAS Vanguard 2013, p. 2.
i. Goods must originate from Member States of the Community. This means that such goods must be produced or sourced from any of the fifteen Member Countries of the ECOWAS Region.

ii. The goods must be accompanied by a Certificate of Origin and an ECOWAS Export Declaration Form. These are issued by Custom Officials of each Member States upon certification that the good is an originating one and complies with requirements under the ETLS. However, the Certificate of Origin only applies to industrial goods. 168

iii. Such goods must be subjected to Customs formalities as necessary in the importing country.

iv. Exemption of goods whose value is not above $500 from documentation.

v. Goods must satisfy the sanitary and phytosanitary requirement of the country of origin.

vi. The beneficiary of the scheme must be resident within the ECOWAS sub-region.

vii. All goods shall be covered by the ECOWAS Inter State Road Transit Declaration (ISRT).

viii. The inter-State Road Transit Declaration shall either be typewritten or hand-written but in the latter case, it shall be in ink, eligible and in printed characters.

ix. The Inter-State Transit Declaration shall be signed by the principal oblige or by his authorised representative as well as the approved national guarantor.

x. The goods are to be transported under the cover of the ECOWAS ISRT Log Book and without being transferred to another means of transport between a Member State and the Office of Final Destination.

3.3.7 The ECOWAS Common External Tariff (CET)

A Common External Tariff (CET) 169 is a basic feature of the Customs Union as a form of economic integration. All the countries in a customs union abandon the individual tariff structure 170 with which they trade with other countries and adopt a common external tariff in

170 The legal mandate for the CET derives from the following: Art. 3 of the ECOWAS Revised Treaty which states clearly that one of the main objectives for the creation of the Community is the establishment of a Common Market through trade liberalisation and the adoption of a Common External Tariff (CET) ECOWAS, see Economic Community of West African States (ECOWAS) 2015 Revised Treaty.
trade with third countries\textsuperscript{171}. The same customs duties, import quotas, preferences or other non-tariff barriers to trade apply to all goods entering the area, regardless of which country within the area they are entering.\textsuperscript{172}

In addition to having the same customs duties,\textsuperscript{173} the countries may have other common trade policies, such as having the same quotas, preferences or other non-tariff trade regulations apply to all goods entering the area, regardless of which country within the area they are entering.\textsuperscript{174}

In Africa, three major regional economic groups already have a CET. The UEMOA group made up of 8 francophone West African Countries has a 4 band CET: 0, 5, 10, 20%; the CEMAC group of 6 Central African countries has a 4 band CET of 5, 10, 20, 30%; and the COMESA group of 20 East and Southern African countries has a 4 band CET of 0, 5, 15, 30%. Clearly, the CET structure adopted by the UEMOA countries is the least protective of domestic enterprises as it offers less nominal protection to the intermediate and finished consumer’s goods in West Africa.\textsuperscript{175}

3.3.8 Structure of the ECOWAS CET

Faced with the challenges and pressure of concluding the EPA with the European Union, close to five years after the 2001 summit, the Authority of Heads of State and Government of ECOWAS during their 30th session held in Niamey in January 2006 observed that not much had been done by Member States regarding the re-categorisation and harmonisation. They consequently adopted a fast track process for the CET harmonisation in line with the UEMOA rate. The decision

\footnote{\textsuperscript{171} Third countries include all other countries that are not part or members of the ECOWAS, see, \textit{Economic Community of West African States (ECOWAS) 2016 Basic Information}, p. 1. ECOWAS Decision A/DEC.17/01/06 of the 29th Session of the Authority of Heads of State and Government which adopted the ECOWAS CET for ECOWAS Member States. ECOWAS Regulation C/REG.1/5/09 which provides that ECOWAS CET is supposed to be based on the Harmonised System (2007), see Recommendation REG.1/06/13 Relating to the Establishment of the Integration Community Levy.}

\footnote{\textsuperscript{172} A Common External Tariff is imposed by a group of countries belonging to a Customs Union. By implication, the same customs duties import quotas, preferences or other non-tariff barriers to trade apply to all goods entering the area regardless of which destination country within the area it is going, see, \textit{Ukaoha - Awa} ECOWAS Vanguard 2012, p. 2.}

\footnote{\textsuperscript{173} It is designed to end re-exportation, but it may also inhibit imports from countries outside the customs union and thereby reduce consumer choice and support protectionism of industries based within the customs union \textit{Ukaoha - Awa} ECOWAS Vanguard 2012, p. 2.}

\footnote{\textsuperscript{174} \textit{Ukaoha - Awa} ECOWAS Vanguard 2012, p. 2.}

\footnote{\textsuperscript{175} \textit{Ukaoha - Awa} ECOWAS Vanguard 2012, p. 2.}
established the ECOWAS-CET which draws on the basic UEMOA CET composed of four tariff bands, or rates of customs duty.176

Table 3.4: Rates of the CET Custom Duty177

<table>
<thead>
<tr>
<th>Category</th>
<th>Type of Goods</th>
<th>Duty Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>Basic Social Goods</td>
<td>0%</td>
</tr>
<tr>
<td>1</td>
<td>Basic Goods, Raw Goods, Capital Goods</td>
<td>5%</td>
</tr>
<tr>
<td>2</td>
<td>Inputs and Semi-Finished Goods</td>
<td>10%</td>
</tr>
<tr>
<td>3</td>
<td>Finished Goods</td>
<td>20%</td>
</tr>
<tr>
<td>4</td>
<td>Specific Goods for Economic Development</td>
<td>35%</td>
</tr>
</tbody>
</table>

Source: Structure, Benefits, Challenges and the Way Forward of the CET (Factsheet)178

Figure 3.4 illustrates how the CET Customs duty rate structure was to encourage local value addition, applying low duties on essential goods, but applies high duties to finished goods in a bid to protect domestic industries form excess competition and discourage influx of foreign finished products.

3.3.9 Benefits of the CET179

- Intra-regional trade would be increased: more goods would be available to be traded regionally.
- The CET would guarantee predictability and stability in trade: importers would be able to make long terms plans with the confidence that the tariff would remain the same. Policies affecting import tariffs can no longer be changed arbitrarily.
- As a result of the predictability and stability in trade, more foreign direct investments would be attracted.
- Increased turnover resulting from an enlarged domestic market: the whole region would become a single market for imported products.
- Increase in economies of scale resulting in the enlargement of domestic industries.

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176 Different stakeholders often have divergent positions within countries as well. For instance, producer organizations in UEMOA countries have lobbied to use the ECOWAS CET as a way to increase tariffs for agricultural products compared to the pre-existing WAEMU CET, while importers of food staples in the same countries pushed to keep rates low, see Von Uexkull – Shui 2014, p. 1.
177 The double objective of this structure was to promote local value addition while applying low duties on essential goods. This tariff came into effect on January 1st, 2000, though some divergences remain between national tariffs of WAEMU countries, see Von Uexkull – Shui 2014, p.1.
• Increased production and productivity: with an expanded market to satisfy, production and productivity would increase.
• Discourage smuggling: to certain extent, smuggling is encouraged by the disparity in tariffs. The application of common tariffs across the region would remove the incentive to smuggle products into countries that previously had high tariffs for those products.

3.3.10. The CET Accompanying Measures
Understanding that the CET may open the regional market to certain risks; the following trade defence measures were included in the CET in order to counter any trade practice that has the potential to harm the ECOWAS Common market.

i. Safeguard Measures
The Safeguard Measures may be in form of restrictions on quantity to be imported or imposition of additional duties. The Measures are applied with the aim of protecting the specific industries in the community. Application of the measures may be to the entire community as a single territory or on behalf of a Member State. Safeguard Measures can be in force for a maximum period of 10 years.

ii. Anti-Dumping Measures
If a product imported into the community at such lower price causes injury or is likely to cause injury to the community industry, the community can adopt an anti-dumping measure by imposing extra duties (Anti-Dumping Duty) on the specific products and the exporter. This way, the community would be able to correct the unfair competitive

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180 At the 70th Ordinary session of the council of ministers, (Abidjan 20-21 June 2013), the Regulation C/REG.4/06/13 relating to safeguard measures, Article 2.1 established within ECOWAS safeguard measures in the application of the provisions of article 9 of Decision NDEC17/10106 adopting the ECOWAS Common External.
181 Article 5a ECOWAS Regulation C/REG.4/06/13, p. 3.
182 Article 2.2 ECOWAS Regulation C/REG.4/06/13, p. 3.
183 Article 5e ECOWAS Regulation C/REG.4/06/13, p. 3.
184 Article 15 ECOWAS Regulation C/REG.4/06/13, p. 6.
185 Section 2, ECOWAS Regulation C/REG.6/06/13, p. 1-2; Article 9 of Decision NDEC17/10106 adopting the ECOWAS Regulation C/REG.4/06/13.
186 Section 2, ECOWAS Regulation C/REG.6/06/13, p. 3-7.
187 the basic principle that a member may impose an anti-dumping measure if this Member determines, pursuant to an investigation conducted in conformity with the provisions of the Anti-Dumping Agreement 1994 that the products are:
- dumped;
- cause material injury or threat thereof to a domestic industry; and
advantage which the dumping country may gain within the Community.\(^\text{188}\) The ECOWAS anti-dumping measure shall be imposed for a period of five years, in the first instance and may be extended if situational review shows continued dumping.\(^\text{189}\)

iii. *Anti-Subsidy and Countervailing Measures*\(^\text{190}\)

Any product produced under a financial grant by a public authority which effectively lowers the cost of production of that product may be liable to a countervailing duty if imported into the Community. The aim of employing a countervailing measure is to cancel out subsidies enjoyed by the exporter of specific products which are deemed to cause injury to the domestic producers of similar products within the Community.

iv. *Supplementary Protection Measures*\(^\text{191}\)

This regulation allows Member States to alter 3% of the ECOWAS CET tariff lines by imposing Most Favoured Nation (MFN) duties which are different from the MFN duties under the CET. SPMs include Import Adjustment Tax and Supplementary Protection Tax.\(^\text{192}\)

a) *Import Adjustment Tax (IAT)*

This tax may be imposed where the MFN duty originally applies by a Member State is higher than the duty specified under the ECOWAS CET.\(^\text{193}\) The maximum IAT applicable is the difference between the duty applied by the Member State originally and the duty set by the

\[^{188}\] An effort to prevent unfair trade practices by third countries towards the ECOWAS Member States, see Article 1 ECOWAS Anti-Dumping Measures, note 206 above

\[^{189}\] paragraph 3, Article 57 Section 2, ECOWAS Regulation C/REG.6/06/13, p. 18.

\[^{190}\] ECOWAS Regulation C/REG.6/06/13.


ECOWAS CET and it would be applicable for a maximum period of 5 years from the 1st of January 2015.

b) Supplementary Protection Tax (SPT) \(^{194}\)
This tax may be imposed when the volume of importation of a product entering into the customs territory of Member State equals or exceeds 25% of the average import for the preceding 3 years of which data could be found. The SPT may also be imposed where the average of the Cost Insurance and Freight (CIF) import price of shipments entering the customs territory of a Member State falls below 80% of the average CIF import price for the last 3 years of which data could be found.

4 WTO ANTI-DUMPING AGREEMENT: SUBSTANTIVE REQUIREMENT

The rationale for adopting anti-dumping measures is that the act of dumping has actually taken place.\(^{195}\) The question whether products import between two countries has been determined as dumping or not, is answered by the definition of dumping.\(^{196}\)

Article VI of GATT 1994\(^{197}\) and the Agreement on the Implementation of Article VI of GATT 1994 (Anti-dumping Agreement)\(^{198}\) are the only legal instrument can be employed in current international anti-dumping litigation. The first provision of the WTO Anti-dumping Agreement of 1994 reads:

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.\(^{199}\)

This provision stipulates the procedure to be taken in implementing Article VI of GATT 1994 in practice. Article VI of GATT 1994 is the main provision of anti-dumping, but it requires a set of legal rules to be implemented.

4.1 Determination of Dumping

The Implementation of AD Agreement defines dumping as follows:

\(^{195}\) Bolton Beverley J. Int’l Law 2011, p.71; Another economic justification for anti-dumping duties is the fear of strategic dumping, where exporters are protected from competition at home and thus can sell their exports at a lower price than they sell in their domestic market, see G. NIELS, What is Anti-dumping Policy Really All About?, 4 (14) Journal of Economic Survey, (2000), p. 467 and Willig 1998, p. 59


\(^{197}\) Article 1 of Anti-Dumping Agreement 1994, p.2 states in its principle that an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. According Willig 1998, p. 59, The Article VI of the GATT 1947 : sec 1; The paradigmatic definition of dumping is ‘the practice of selling a good for export at a price below that charged for the identical good in the exporting market.’ See Bolton Beverley J. Int’l Law 2011, p. 71.

\(^{198}\) In US — 1916 Act, the Appellate Body considered that ‘the scope of application of Article VI [of the GATT 1994] is clarified, in particular, by Article 18.1 of the Anti-Dumping Agreement’. The Appellate Body then found that Article 18.1 of the Anti-Dumping Agreement requires that any ‘specific action against dumping’ be in accordance with the provisions of Article VI of the GATT 1994 concerning dumping, as those provisions are interpreted by the Anti-Dumping Agreement.

\(^{199}\) These provisions refer to determination of dumping, determination of injury, definition of domestic industry, initiation and conduct of investigation, and anti-dumping measures, see Anti-Dumping Agreement 1994, p. 165.
For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

This definition indicates that dumping can only be determined if these three conditions are met:

i. The price is less than the normal value of the products;

ii. There is a cause or threat of material injury to a domestic industry that produces like products, or a material retardation to the establishment of such a domestic industry;

iii. There is a causal relation between sales under the normal value and injury.

This agreement has made more explicit stipulations on how to determine normal value, compare export price with normal value, and explain the concept of like product.

A focus on the substantive aspect of anti-dumping connotes the legal provisions that regulate the system of legal relationship incurred in dumping and implementation of anti-dumping measures among the contracting parties. It includes: determination of dumping, determination of injury, the cause and effect relation of dumping and injury, and basic standards for adopting anti-dumping measures. This not only applicable to international anti-dumping agreements, but also country’s national anti-dumping laws, such as that of the European Union, the U.S.A.,

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200 Willig 1998, p. 60
201 Pam Nigeria Current Law Review 2007-2010, p. 46
204 Article 2.1 Anti-Dumping Agreement 1994, p.2.
205 Article 2.1 Anti-Dumping Agreement 1994, p.4.
207 Article 7.1 (iii), Anti-Dumping Agreement 1994, p.11.
209 Neufeld (UNCTAD/ITCD/TAB/10) 2001, p. 17
210 Anti-Dumping Agreement establishes the conditions in which a cumulative evaluation of the effects of dumped imports from more than one country may be undertaken. Authorities must determine the following:
- the margin of dumping from each country is not deminimis;
- the volume of imports from each country is not negligible;
- a cumulative assessment is appropriate in light of the conditions of competition among the imports and between imports and the domestic like product, see Article 3.3 Anti-Dumping Agreement 1994, p. 5; Pam Nigeria Current Law Review 2007-2010; Y. BI, note 93 above, p. 35
210 Article 3 Anti-Dumping Agreement 1994, p.4
China, Australia, Canada, Japan, South Africa, and China. The legal weight of analyzing these concepts and their definitions is emphasized by the notion that, the premise upon which the national anti-dumping laws of most countries lies is the Article VI of GATT 1994 and the WTO Anti-dumping Agreement.

Dumping\(^\text{211}\) is proven through comparing the normal value and the export price. Normally, the normal value is the price at which the like product\(^\text{212}\) is being sold in the exporting country’s market of the exporting. The export price is the price at which the product is sold by the exporter to the importing country. The following cardinal four steps are among the methods used for dumping calculation.

i. The observed or constructed export price;
ii. The observed or constructed normal value;
iii. The adjusted normal value and the adjusted export price (reflecting adjustments to ensure comparability); and
iv. The margin of dumping.

### 4.2 Determination of the Export Price

There is no definition of the term ‘export price’ in the AD Agreement; the export price will usually be the price the exporter sells the product when exported to the importing Member.\(^\text{213}\)

#### 4.2.1 Exceptions to Determination of the Export Price:

The AD Agreement identifies that in specific conditions, the price quoted from the exporter to the importer, or in case of a third party, may not be reliable.\(^\text{214}\) In such a condition, it can be tagged that there is no export price. This may happen for example, where the product is sold on delivery (i.e. the price at which the product which is not fixed until definite sales made to a purchaser in the importing country), or transported for extra processing to a related entity before

\(^{211}\)\textit{Anti-Dumping Agreement} 1994 aims at removing the trade-distorting effect of dumped imports and to restore effective competition in the market of domestic industry, see Y. BI, note 93 above, p. 35; \textit{Hoakman – Mavroidis Policy Research Working Paper (WPS No. 1735) 1997}, p. 5


\(^{214}\)\textit{Article 2.3 Anti-Dumping Agreement 1994}, p.3.
sale in the importing country.\textsuperscript{215} Another condition where the price quoted by the exporter could likely not be a reliable guide of the export price to be exercised upon in the dumping calculation is where the exporter trades the product to a related importer.\textsuperscript{216} This occurs very regularly where multinational electronic companies such as LG, Sharp, Samsung, etc.\textsuperscript{217} are concerned with the investigations. ‘Compensatory arrangement’ is where the exporter gives discounts, refunds or rebates, after the export transaction has taken place.\textsuperscript{218} Thus, this is another situation where price can be unreliable between the exporter and the importer or a third party. In view of such cases, the AD Agreement makes provisions for ‘constructed export price’ as another approach used in determining the export price in the dumping calculation. Such a price is to be determined based on the price at which the imported products are first resold to an independent buyer in the importing country.

Moreover, where the imported product is not resold to an independent buyer, or is not resold as imported, the authorities may decide on a reasonable basis on which to construct the export price.\textsuperscript{219} WTO Panel Report found that the USDOC acted inconsistently with Article 2.3 of the Anti-Dumping Agreement because it constructed the export price of an exporter, without properly considering whether the export price was unreliable because of association between the exporter and the importer or a third party.\textsuperscript{220}

\textbf{4.3 Determination of the Normal Value}

As discussed above, the AD Agreement states the grounds for determining normal value:\textsuperscript{221} the price at which the exporter sells the like product\textsuperscript{222} ‘when destined for consumption in the exporting country’, i.e. in the exporter’s domestic market.\textsuperscript{223} When normal value is difficult to be

\textsuperscript{215} Article 2.3 Anti-Dumping Agreement 1994, p.3.
\textsuperscript{216} Article 2.4 Anti-Dumping Agreement 1994, p.3; Pam Nigeria Current Law Review 2007-2010, p.56
\textsuperscript{217} World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO, p. 105
\textsuperscript{218} Article 2.3 Anti-Dumping Agreement 1994, p. 3; United Nation Conference on Trade and Development 2003, WTO Dispute Settlement on Anti-Dumping Measures, p. 8.
\textsuperscript{219} United Nation Conference on Trade and Development 2003, WTO Dispute Settlement on Anti-Dumping Measures, p. 8.
\textsuperscript{220} United States (2017) WT/DS488/R.
\textsuperscript{222} United Nation Conference on Trade and Development 2003, WTO Dispute Settlement on Anti-Dumping Measures, p 5
determined on the above ground, two other choices available are: the price quoted by the exporter in a third country or a constructed value attained by accumulating the cost of production of the like product in the country of origin a reasonable amount for selling, general and administrative expenses and for profits.\textsuperscript{224} India contended that the definition and calculation by the South African Board on Tariffs and Trade (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.\textsuperscript{225}

Figure 4.1: The AD Agreement recognises three possible options to determine normal value:

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{diagram}
\caption{The AD Agreement recognises three possible options to determine normal value:}
\end{figure}

Source: WTO E-Learning: Trade remedies and the WTO

4.3.1 Exceptions to Determination of Normal Value:

4.3.2 Third Country Market Price
From the Figure 4.1, the export price of a third country constitutes an execution to determination of normal value. Therefore, AD Agreement holds few rules on how normal value is to be calculated based on export prices to a third market, except that the third country should be ‘appropriate’, and that the export price to that country should be ‘representative’.\textsuperscript{226}

4.3.3 Constructed Normal Value
For constructed normal value (note Figure 4.1 above), a price is not charged by the exporter however is a value calculated by the investigating authority in the importing Member, solely for the purpose of its anti-dumping investigation.\textsuperscript{227} The AD Agreement points out that to obtain the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{224} Article 2.2.2 Anti-Dumping Agreement 1994, p. 3; Bolton Beverley J. Int'l Law 2011, p.76
  \item \textsuperscript{225} South Africa (1999) DS168/1.
  \item \textsuperscript{226} Article 2.2 Anti-Dumping Agreement 1994, p. 2; United Nation Conference on Trade and Development 2003, WTO Dispute Settlement on Anti-Dumping Measures, p. 8
  \item \textsuperscript{227} Article 2.2 Anti-Dumping Agreement 1994, p. 2; Bolton Beverley J. Int’l Law 2011, p.71
\end{itemize}
\end{footnotesize}
constructed normal value; an investigating authority is expected to add up the cost of production, and reasonable amounts for selling, general and administrative costs and for profits.\textsuperscript{228}

The AD Agreement has rules as to the form costs should be calculated. It also creates a form of rules for the calculation of the selling, general and administrative costs\textsuperscript{229} as well as of reasonable profit requirement as the Panel Report on European Communities and cotton-type bed linen form India considered the used of 18.65\% profit margin\textsuperscript{230} appropriate.\textsuperscript{231} 36.3\% employed in Panel Report in anti-Dumping duties dispute between Thailand and Poland.\textsuperscript{232}

4.3.4 Fair Comparison of Normal Value and Export Price

In broad provisos, the AD Agreement obliges that the comparison of the export price and the normal value be ‘fair’.\textsuperscript{233} More precisely, the AD Agreement stipulates that the comparison between export price and normal value must be made at the same level of trade, usually at the ex-factory level, and in respect of sales made at as nearly as possible the same time.\textsuperscript{234} Moreover, based on the effects of several WTO disputes, we know as well that using ‘zeroing’\textsuperscript{235} in dumping calculations contravenes among others the ‘fair comparison’\textsuperscript{236} rule.

\textsuperscript{228} Vermulst 2005, p. 4; World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO, p. 108.
\textsuperscript{229} Article 2.3 Anti-Dumping Agreement 1994, p. 3.
\textsuperscript{230} Willig 1998, p. 60
\textsuperscript{231} EC-Bed Linen (2000) WT/DS141/R.
\textsuperscript{232} Thailand (2002) WT/DS122/11.
\textsuperscript{234} Article 2.4 Anti-Dumping Agreement 1994, p. 3; United Nations Conference on Trade and Development, p. 13.
\textsuperscript{235} Zeroing refers to the practice, conducted in some jurisdictions, of replacing the actual amount of dumping calculated for model or sales comparisons that yield negative dumping margins. Zeroing, thus, has the effect of overstating dumping margins by denying the full impact of non-dumped or negatively dumped models/export sales on the dumping margin for the product as a whole, see Vermulst 2005, p. 4 and Ikenson Kluwer Law International 2007, p. 231. Article 2 of the Anti-Dumping Agreement 1994, p.2 establishes the parameters for determining the existence and extent of dumping, which is defined in Article 2.1 as occurring when ‘the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country’. In reaching a conclusion about the existence of dumping, Article 2.4 lays down the principle that ‘A fair comparison shall be made between the export price and the normal value’. And Article 2.4.2 Anti-Dumping Agreement 1994 provides guidance as to what would constitute fair comparison methods. Cases in which WTO Appellate Body ruled about zeroing: United States WT/DS322/AB/R 2007 (United States – Zeroing (Japan); In addition to these AB reports, zeroing was discussed by the Panels in EC – Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil, WT/DS219/R of 7 March 2003; and in United States – Anti-dumping measure on shrimp from Ecuador, WT/DS335/R of 30 January 2007.
4.3.5 Calculation of Dumping Margin

The dumping margin is the difference between the normal value and the export price\textsuperscript{237} and must be calculated as accurately as possible to assess an anti-dumping duty equal to the amount by which the normal value exceeds the export price.\textsuperscript{238}

The AD Agreement provides rules major on the calculation of dumping margins as described in the figure 4.2 below.\textsuperscript{239} In the typical case, the AD Agreement assert requirement of either the comparison of the weighted average normal value to the weighted average of all comparable export prices, or a trade-to-trade comparison of normal value and export price.\textsuperscript{240}

Figure 4.2: Basic formula for calculating the margin of dumping

\[
\left( \frac{\text{Adjusted Normal Value} - \text{Adjusted Export Price}}{\text{Adjusted Export Price}} \right) \times 100 = \% \text{Margin of Dumping}
\]

Source: WTO E-Learning: Trade remedies and the WTO

4.4 Determination of Injury and Causal Link

Required steps for the determination of injury\textsuperscript{241} and causal link:\textsuperscript{242}

i. Determination of what is the ‘like product’\textsuperscript{243} produced by the ‘domestic industry’.

ii. Identification of which producers constitute the domestic industry.

iii. Determination of whether the domestic industry is suffering injury.

iv. Determination of whether the injury suffered by the domestic industry is caused by the dumped imports.\textsuperscript{247}

\textsuperscript{238} Article 2.4.2 Anti-Dumping Agreement 1994, p. 4; Ndlovu Journal of Int'l Commercial Law and Technology 2010, p. 31; P Ehrenhaft et al.1997, p.3; Adamantopoulos - De Notaris Fordham International Law Journal 2000-2001, p. 50
\textsuperscript{239} World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO; Brink 2012, p.194
\textsuperscript{240} Brink 2012, p.189; Krishna Policy Research Working Paper (No. WPS 1823) 1997, p. 18
\textsuperscript{243} Article 2.6 Anti-Dumping Agreement 1994, p. 4; Pam Nigeria Current Law Review 2007-2010, p. 46.
\textsuperscript{244} Article 4.1 Anti-Dumping Agreement 1994, p.2; United Nations Conference on Trade and Development, p. 20
\textsuperscript{245} Article 4.1(i) Anti-Dumping Agreement 1994, p. 6.
\textsuperscript{246} Article 3.7 Anti-Dumping Agreement 1994, p. 5.
\textsuperscript{247} Article 3.5 Anti-Dumping Agreement 1994, p. 5
4.4.1 Like Product

The concept of like product\(^\text{248}\) is ‘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.’\(^\text{249}\) Thus, the imported product would necessarily be produced in the importing Member. Else, it would be impossible to advance with the examination of injury.\(^\text{250}\)

The investigating authority would have to consider all relevant factors, as cited in the earlier sections. Firstly, there would be need for the products' physical characteristics,\(^\text{251}\) and may well include resources, production procedure, end use, and users' assessments.\(^\text{252}\)

4.4.2 Domestic Industry

The AD Agreement states the term ‘domestic industry’ as ‘the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products’.\(^\text{253}\) Since importers are not themselves producers of the like product hence cannot be taken into account as ‘domestic producers’.

Why do we need to identification of a ‘domestic industry’ is important because the investigating authority has a duty to determine the presence of injury in relation to a particular domestic producer or group producing the product that is ‘like’ the investigated product? For that reason, information will have to be required from that or those group of domestic producers.

While theoretically the domestic industry comprised all the producers of the like product, the AD Agreement restrict the examining less than 100 per cent of the domestic producers to be considered as the ‘domestic industry’. In this case, the determination of injury will be centered on information involving to these producers.

The AD Agreement postulates for two sources on which the domestic industry can be well-defined ‘domestic producers as a whole’, is pointer to producers accounting for 100 per cent of

\(^{248}\) United Nation Conference on Trade and Development 2003, WTO Dispute Settlement on Anti-Dumping Measures, p. 5
\(^{249}\) Article 2.6 Anti-Dumping Agreement 1994, p. 4
\(^{250}\) World Trade Organisation WTO Technical Information on anti-dumping, p.1
\(^{251}\) Article 2.6 Anti-Dumping Agreement 1994, p. 4
\(^{252}\) World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO
\(^{253}\) Article 4.1 Anti-Dumping Agreement 1994, p. 6
domestic production of the like product. There could be conditions in which it is challenging or impracticable to assemble data from, or even to ascertain all domestic producers of the product. For instance, it could be a highly disintegrated industry with small producers in hundreds or thousands.\textsuperscript{254}

The AD Agreement advertently acknowledges the domestic industry to be defined as the domestic producers with collective production of the like product accounts for ‘a major proportion’ of whole domestic production of that product.\textsuperscript{255}

\textbf{4.4.3 Exclusion of Certain Domestic Producers from the Domestic Industry}

In certain circumstances, The AD Agreement identifies need to include all producers of the like product in the domestic industry. However, WTO Member States are allowed to omit the following producers from definition of ‘domestic industry’:

i. Producers related to the exporters or importers under investigation; or

ii. Producers who are themselves importers of the allegedly dumped product.\textsuperscript{256}

\textbf{4.4.4 Determination of Injury}

The AD Agreement does not contain the definition of the term injury,\textsuperscript{257} however specifies that three types of injury may be established in an anti-dumping investigation:\textsuperscript{258}

i. Material injury to a domestic industry;

ii. Threat of material injury to a domestic industry; or

iii. Material retardation of the establishment of a domestic industry.\textsuperscript{259}

\textsuperscript{254} Article 4.1(ii) \textit{Anti-Dumping Agreement} 1994, p. 6; World Trade Organization ‘Technical information on anti-dumping’, \textit{World Trade Organisation} 2012 WTO E-Learning: Trade remedies and the WTO.

\textsuperscript{255} \textit{World Trade Organisation} 2012 WTO E-Learning: Trade remedies and the WTO.

\textsuperscript{256} Article 4.1(i) \textit{Anti-Dumping Agreement} 1994, p. 6; \textit{United Nation Conference on Trade and Development} 2003, WTO Dispute Settlement on Anti-Dumping Measures, p. 22

\textsuperscript{257} United Nation Conference on Trade and Development 2003, WTO Dispute Settlement on Anti-Dumping Measures, p. 5; \textit{Krishna Policy Research Working Paper} (No. WPS 1823) 1997, p. 21

\textsuperscript{258} \textit{Pam} Nigeria Current Law Review 2007-2010, p.57

\textsuperscript{259} Note footnote 9, Article 3.1 \textit{Anti-Dumping Agreement} 1994, p. 4; \textit{Ndlova Journal of Int’l Commercial Law and Technology} 2010, p. 31; \textit{Khan Bharati Law Review} 2016, p. 128.
The AD Agreement omitted to define the types of injury above but set out the rule for an investigating authority to examine and determine whether a domestic industry has actually suffered ‘material’ injury or threat.²⁶⁰ Broad prerequisites applicable to injury determinations are that the AD Agreement requires that a determination of injury must be based on ‘positive evidence’ and involve an ‘objective examination’ of:²⁶¹

i. The volume of the dumped imports;

ii. The effect of the dumped imports on prices in the domestic market for like products; and

iii. The consequent impact of these imports on domestic producers of such products.

Therefore with the kind of the requirements provided in Article 3 of the AD Agreement, the Appellate Body held that, the requirements listed are essential and unqualified.²⁶² Notably there is no requirement as to whether the volume of dumped imports has increased, however, the investigating authority reflects whether there has been any increase of such.²⁶³ However, a decrease in the volume of dumped imports could somewhat be an issue being considered against a conclusion that the domestic industry has suffered injury due to dumped imports²⁶⁴. Moreover, the increase may either be in ‘absolute’ terms, or ‘relative’ to production or consumption.²⁶⁵ Thus, a situation might occur where there is no absolute increase in dumped imports due to the fact that, the total consumption of the like product has decreased, but dumped imports, (to production or consumption) in relative terms might have increased.

An investigating authority should research whether there has been a substantial price undercutting by the dumped imports as related to the price of the like product manufactured in the importing WTO Member State, or if the impact of such imports is to depress prices to a substantial degree, or to inhibit price increases that would ordinarily have occurred, to a substantial degree for the like product.²⁶⁶

²⁶⁰ World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO; Ehrenhaft et al.1997, p.3
²⁶¹ Article 3.1 Anti-Dumping Agreement 1994, p. 4.
²⁶³ Article 3.2 Anti-Dumping Agreement 1994, p. 5; United Nation Conference on Trade and Development 2003, WTO Dispute Settlement on Anti-Dumping Measures, p. 21
²⁶⁵ Article 3.2 Anti-Dumping Agreement 1994, p. 5.
²⁶⁶ Article 3.2 Anti-Dumping Agreement 1994, p. 5.
4.4.5 Effect of Dumped Products on the Prices of Domestic Like Products

Investigating authority has the duty to examine the effects of dumped products on the price within which the domestic industry sells the like products.\textsuperscript{267} It is worthy of note that the impact mentioned above can take the form of price undercutting, price depression price suppression. In few instances, price undercutting work alongside with price suppression.\textsuperscript{268}

The AD agreement does not provide the procedure or method to scrutinise or examine price undercutting. In general terms, the concept means selling the product lower than the normal price.\textsuperscript{269} Therefore, to examine if there is price undercutting through dumping entails comparing the price of the imported products with the price of the product produced by the domestic producers that trade in the like products locally.\textsuperscript{270}

Figure 4.3: Relationship of prices of dumped imports, and costs and prices of domestic like products.

![Graph showing relationship of prices](image)

Source: WTO E-Learning: Trade remedies and the WTO

In the figure 4.3 above, year 2011, the price of imported dumped products \(n\) is lesser than the price of the domestic like products (140 vs. 145), this gives a reflection of price undercutting. The information from the graph that the domestic cost of production is on the rise. Under normal situation, the domestic industry would have increased the price at which the products are sold. However, with the presence of price pressure from dumped products from 200 to 140, the

\textsuperscript{267} Article 3.3 Anti-Dumping Agreement 1994, p. 5.
\textsuperscript{268} Vermulst 2005, p. 96.
\textsuperscript{269} World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.
domestic industry is forced to engage in price decrease from 150 to 145. The illustrated practice can be termed price suppression.²⁷¹

4.4.6 Impact of the Dumped Imports: The Condition of the Domestic Industry

The impact of dumping on the domestic industry can be examined when all relevant economic issues and indices are considered particularly the shape of the domestic industry and the following:²⁷²

i. Actual and potential declines in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity;

ii. Factors affecting domestic prices;

iii. The magnitude of the margin of dumping;

iv. Actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.²⁷³

Since cases of dumping bother on evaluation of different factors, facts and circumstances within the context where the domestic industry operates, each injury investigations should be treated differently by the investigating authorities as no single factor or set of factors can ultimately be applicable in all cases.²⁷⁴

4.4.7 Specific Requirements for Determinations Based on Threat of Material Injury

For there to be an established case of material injury, it must be current and present for the application of anti-dumping measures.²⁷⁵ Note further that a threat of material injury to domestic industry is also necessary as another basis for application of anti-dumping measures.²⁷⁶ Threat means that there have been some notable changes which could affect the domestic industry negatively, for instance, an increase in the level of dumped imported products or reduction of the

²⁷¹ World Trade Organisation 2012WTO E-Learning: Trade remedies and the WTO.
²⁷² Article 3.4 Anti-Dumping Agreement 1994, p.2.
²⁷³ Article 3.4 Anti-Dumping Agreement 1994, p.2; Brown Law & Politics 2008, p.264
²⁷⁴ Article 3.7 Anti-Dumping Agreement 1994, p. 5; Vermulst 2005, p. 94-95
²⁷⁵ World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.
selling price of same.\textsuperscript{277} These instances are pointer that a material injury might occur in the future.

The AD agreement strictly stipulates that determination of dumping cannot be founded on ‘merely on allegations, conjecture or remote possibly’.\textsuperscript{278} Moreover, ‘the change in circumstances which would create a situation in which the dumped imports would cause injury’ is to be ‘clearly foreseen and imminent’.\textsuperscript{279}

The AD agreement stipulates some specific factors to be considered in determination of dumping where it concerns the domestic industry as it encounters a threat of material injury:

i. The rate of increase in dumped imports a significant rate of increase of dumped imports into the domestic market indicating the likelihood of a substantially increased importation.

ii. Capacity Sufficient freely disposable capacity of the exporter, or an imminent, substantial increase of that capacity, 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.

iii. Price Suppressing or Depressing Effects Whether the dumped imports are entering the market at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase the demand for further imports.

iv. Inventories of the imported product being investigated, whether held in the country of export or in the importing investigating country. (A buildup of inventories of the domestically-produced like product also might be relevant).\textsuperscript{280}

According to AD Agreement, there must be an affirmative injury determination that characterises the threat of material injury, ‘the application of anti-dumping measures shall be considered and decided with special care’.\textsuperscript{281} To this end, the investigating authorities is expected to make provisions for adequate discussions of the analysis and the reason that serves as the basis to impose anti-dumping duties when there is final determination of threat of material

\textsuperscript{277} Article 3.2 \textit{Anti-Dumping Agreement} 1994, p. 5.
\textsuperscript{278} Article 3.7 \textit{Anti-Dumping Agreement} 1994, p. 5; Vermulst 2005, p. 94-95
\textsuperscript{279} Article 3.7, footnote 10 \textit{Anti-Dumping Agreement} 1994, p. 5
\textsuperscript{280} Article 3.2 \textit{Anti-Dumping Agreement} 1994, p. 5; \textit{World Trade Organisation} 2012 WTO E-Learning: Trade remedies and the WTO.
\textsuperscript{281} Article 3.8 \textit{Anti-Dumping Agreement} 1994, p. 6
injury, putting afore evidence that shows if anti-dumping measures are taken timeously, the imminent material injury to the domestic industry may not be averted.\textsuperscript{282}

4.4.8 Demonstration of Causal Link

Where the investigating authority discovers that there has been dumping of like products by the exporting country and the domestic industry of the importing country suffers injury. The above does not proffer sufficient evidence for which anti-dumping measures could be applied. Emphatically, the AD agreement requires that there is a well-founded demonstration that the alleged dumping has caused injury and the demonstration is supported with requisite evidence based on examination.\textsuperscript{283} The Panel held that MOFCOM's demonstration of a causal relationship between the dumped imports and injury to the domestic industry is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement as it related to Canada.\textsuperscript{284}

In case of causation and non-attribution as required by AD agreement,\textsuperscript{285} the Appellate Body has decided that the investigating authority has a duty to show evidence in the cause demonstration that there is an affirmative genuine and significant relationship of cause and effect between the like products and injury.\textsuperscript{286} Moreover the investigating authority when conducting analysis on non-attribution, there must be an analysis of distinct and separate factors which caused injury through dumping.\textsuperscript{287}

In Mexico – Corn Syrup, for example, the Panel addressed the Mexican authorities’ analysis of an alleged restraint agreement between Mexican sugar refiners and soft drink bottlers.\textsuperscript{288}

\textsuperscript{282} World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.
\textsuperscript{283} Article 3.5 & 3.6 Anti-Dumping Agreement 1994, p. 5; United Nations Conference on Trade and Development, p. 13; United Nation Conference on Trade and Development, WTO Dispute Settlement on Anti-Dumping Measures, note 15 above, p. 27; Falade International Journal of Humanities and Social Science, 2014, p. 236
\textsuperscript{284} WTO Panel Report, China - Anti-Dumping Measures on Imports of Cellulose Pulp from Canada - Agreement under article 21.3(b) of the DSU, WT/DS483/6, 7 June 2017
\textsuperscript{285} Article 3.7 Anti-Dumping Agreement, p. 5; Vermulst 2005, p. 91.
\textsuperscript{286} Appellate Body Report, European Communities – Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil, WT/DS219/AB/R, 22 July 2003.
\textsuperscript{287} Article 3.7 Anti-Dumping Agreement 1994, p. 5.
\textsuperscript{288} Mexico (2001) WT/DS132/R, WT/DS132/AB/RW.
5 WTO ANTI-DUMPING AGREEMENT: PROCEDURAL REQUIREMENT

The AD agreement provisions must be complied with by the Member States, where an interested party is aggrieved reviews of final determination of dumping or reviews of determinations by the investigating authority he should seek redress before an independent judicial, administrative or arbitral tribunal whose duty is to adjudicate over matters within the jurisdiction of the importing country. The investigating authority could have contravened some provisions relating to the use of anti-dumping measures as contained in the national legislation on anti-dumping law.

Furthermore, any affected member can invoke AD agreement to set in motion WTO dispute settlement mechanism, where there is impression that the investigating authority of the importing country is believed to have contravened the substantive or procedural provision in line with implementation of AD agreement as a result of evaluation of dumping.

It is therefore necessary that every Member State that are users of anti-dumping measures must comply with the requirements as provided in the AD agreement.

Figure 5.1 Stages of investigation

Investigation of dumping activities must adhere to the following conceptual stages:

Source: WTO E-Learning: Trade remedies and the WTO

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289 Article 6.11 Anti-Dumping Agreement 1994, p. 11: For the purposes of this Agreement, ‘interested parties’ shall include: (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; (ii) The government of the exporting Member; and (iii) a producer of the like product in the importing Member or a trade and business association most the members of which produce the like product in the territory of the importing Member.


291 World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.


293 Article 1 Anti-Dumping Agreement 1994, p. 2.
Figure 5.1 shows the procedural stages that the investigation authority must comply with after a decision has been reached on conducting investigation on alleged dumping by exporter(s) after receipt of complaints filed by the representative of local industry.

Anti-dumping measures can only be implemented either as anti-dumping duty\textsuperscript{294} or price undertaking\textsuperscript{295} after an investigation which entails evaluation of factual evidence has been conducted in conformity with the AD Agreement.\textsuperscript{296} In the process of initiation,\textsuperscript{297} series of obligations will apply ranging from informing the parties involved such as domestic producers, importers exporters among others of the information that is needed for submission.\textsuperscript{298}

### 5.1 Information Gathering

The process of investigation commences with gathering of relevant information as evidence such as verification,\textsuperscript{299} examination and analysis of the gathered information would be core to the investigation.\textsuperscript{300} Relevant information found to be accurate and complete would be recognised at the preliminary and final determination which serves as the next stage of investigation process.\textsuperscript{301}

In case the importing country discover that the dumping margins is zero or ‘de minimis’,\textsuperscript{302} that the volume of dumped product in insignificant or negligible and the domestic industry is however not injured or the dumping activity has not caused injury, the resultant effect is that there will be no legal foundation for implementing anti-dumping measures. The importing country is required to terminate the investigation proceeding immediately.\textsuperscript{303}

\textsuperscript{294}Article 9 \textit{Anti-Dumping Agreement} 1994, p.13.
\textsuperscript{295}Article 8 \textit{Anti-Dumping Agreement} 1994, p. 12.
\textsuperscript{296}Article 5 \textit{Anti-Dumping Agreement} 1994, p. 7.
\textsuperscript{297}Ndlovu Journal of Int’l Commercial Law and Technology 2010, p. 31; Neufeld (UNCTAD/ITCD/TAB/10) 2001, p.4
\textsuperscript{298}Article 5.1 \textit{Anti-Dumping Agreement} 1994, p. 7.
\textsuperscript{300}World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.
\textsuperscript{301}World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO; Arts 4.1, 5.3 & 5.4 \textit{Anti-Dumping Agreement}; relevant information found to be complete and accurate will be relied upon at this stage and or final stage of determinations.
\textsuperscript{302}Note 211 above; Article 5.8 \textit{Anti-Dumping Agreements} 1994, p. 8. If the export price is equal to or higher than the normal value, dumping is not constituted. The dumping margin is then considered as zero. If dumping is constituted, and dumping margin is less than two percent, the margin of dumping is regarded as \textit{de minimis}.\textsuperscript{302} America, the European Union, South Africa and China all accept this \textit{de minimis} consideration in their anti-dumping laws, \textit{Pam Nigeria Current Law Review} 2007-2010, p. 52; \textit{Cho} Berkeley Journal of Int’l Law 2007, p. 215; United Nation Conference on Trade and Development, WTO Dispute Settlement on Anti-Dumping Measures, note 15 above, p. 36; Krishna Policy Research Working Paper (No. WPS 1823) 1997, p. 21.
The duration for the investigation process, to the final stage of determination of dumping, establishment of injury and decision to implement anti-dumping measures takes up to 12 months.\textsuperscript{304} There are other proceedings that are faster than the stipulated period, however in most cases, the process could be longer. The AD agreement has envisaged exceptional cases that could be longer than the stipulated period but provided that in no circumstance should investigation process be longer than 18 months from the date of initiation.\textsuperscript{305}

5.2 The process leading to the initiation of an anti-dumping investigation

AD agreement provides for series of requirement to be followed under anti-dumping investigation initiation.\textsuperscript{306}

Figure 5.2: The main elements of the pre-initiation stage

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure5.2.png}
\caption{The main elements of the pre-initiation stage}
\end{figure}

Source: WTO E-Learning: Trade remedies and the WTO

Figure 5.2 show that the domestic industry is the active party that initiates investigation on the ground of a written application.\textsuperscript{307} Exception to the above is that the investigating authorities of the importing country can in ex officio capacity initiate an investigation in special situations where there is substantial evidence of dumping, injury and causal link as the basis for initiation.\textsuperscript{308}

\textsuperscript{304} Art 5.10 Anti-Dumping Agreement 1994, p. 8; Caribbean Export Development Agency Tradewin 2010.
\textsuperscript{306} World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.
\textsuperscript{307} Article 5.1 Anti-Dumping Agreement 1994, p. 7; The complaints filed in the application is submitted by the domestic industry
\textsuperscript{308} World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.
The written application by domestic industry should entail evidence of dumping and injury causes to the domestic industry with a causal link effect between the alleged dumping and injury. The AD agreement point out that subtle affirmation of dumping, injury and causative effects without evidence is inadequate but information which is reasonably available.\textsuperscript{309}

Upon receipt of an application, the investigating authority is poised to examine how complete and accurate the evidence contained therein, in an effort to determine if there is sufficient evidence to validate the initiation process of investigation.\textsuperscript{310} The application shall be declined where the authority decides that there is insufficient evidence to showcase dumping, injury and causal link.\textsuperscript{311}

The sufficiency of evidence has proffered in the application does not automatically make initiation of investigation possible, however, the investigating authority is saddled with the responsibility to determine if the applicants sufficiently represents the interest of the domestic industry that is if the applicants have standing to bring the case.\textsuperscript{312}

The AD agreement entails two standing test that shall be applied in every case by the investigating authority:\textsuperscript{313}

i. The first part of the standing state that the domestic producers that give credence to the application shall account for more than 50 percent of the total production of the like product by all producers showing an impression about the application.

ii. The second part of the standing test is that domestic producers that support the application shall account for more than 25 percent of total domestic production of the like products.

5.3 Notice of Initiation

The moment the investigating authority has determined to initiate an investigation, the AD agreement mandates that public notice be given to that effect.\textsuperscript{314}

\textsuperscript{309} Article 5.2(i)(ii)(iii)(iv) Anti-Dumping Agreement 1994, p. 7.
\textsuperscript{310} Article 5.3 Anti-Dumping Agreement 1994, p. 8.
\textsuperscript{311} World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.
\textsuperscript{312} Article 5.4 Anti-Dumping Agreement 1994, p. 8; Adamantopoulos - De Notaris Fordham International Law Journal 2000-2001, p. 42
\textsuperscript{314} Article 5.5 Anti-Dumping Agreement 1994, p. 8.
The AD agreement further provides for the minimum content requirement for the notice of initiation as indicated in the figure 5.2 above. ‘The notice shall state the name of the exporting countries; a description of the product involved; the basis on which dumping is alleged in the application; a summary of the factors on which the allegation of injury is based; and contact information and deadlines for interested parties to make their representations.’315

5.3.1. Notification and Transmission of the Application

The AD Agreement stipulates that the authorities of the importing country promptly to notify the initiation of an investigation as it concerns the Member States from which the like product emanated and subject of the investigation.316 Furthermore, the interested parties involved in the investigation process are to be notified as well.317

The AD Agreement makes a stipulation that full non-confidential content of the application are to be disclosed to the importing countries provided to the known exporters and the authorities of the exporting member. Upon request of interested parties concerned, the full non-confidential content of the application are to be made available.318

The AD Agreement further place the duty on the authorities to provide opportunities for relevant information to be contributed by those industrial users of the like product investigated and representative consumer organisation where the product is regularly sold at the retail stage.319

5.4 Issuance of Questionnaires/Deadlines

According to the AD Agreement, the investigating authorities reply in form of questionnaire information required by the interested parties as soon as possible while the initiation has commenced.320

Usually, the said questionnaire meant for foreign producers and exporters seek information based on the price at which ‘those enterprises export the product under consideration to the importing

316 Article 5.5 Anti-Dumping Agreement 1994, p. 8.
319 United Nation Conference on Trade and Development 2003, WTO Dispute Settlement on Anti-Dumping Measures, p. 35.
320 Article 6.1 Anti-Dumping Agreement 1994, p. 8; Bolton Beverley J. Int’l Law 2011, p.76
Member, as well as on the domestic selling prices of the like product in the producers'/exporters' home market. These questionnaires sometimes also request information on these enterprises' cost of production for the product under consideration.321

The AD Agreement makes provisions for questionnaire as it relates to foreign producers, however, investigating authorities as a means of routine provides for questionnaires issued to other interested parties (domestic industry and the importers). The investigating authorities can further issue supplementary information request with a view to ask for further clarification or raise another issue in the cause of investigation.322

The foreign producers and exporters have a maximum of 30 days to respond to the questionnaire. The duration of 30 days is calculated from the date when the questionnaire is received and according to the AD Agreement; the questionnaire is deemed to have been receive one week after the questionnaire was sent. Notably, there could be an extension of the 30 days where a cause is shown and practicable.323

5.5 Treatment of Confidential Information

The information and data obtained for investigation and determination of dumping is superbly confidential.324

By taking into account other competitors and the public involved in the transaction of like products, the information requested to be submitted by interested parties must be treated with high level of confidentiality and not accessible to outsiders.325

Without the investigating authority coming to terms with the interested parties to treat the case as sensitive, any request will likely be ignored. With the aid of AD agreement, information obtained

321 World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.
324 Art 6.1 Anti-Dumping Agreement 1994, p. 8; Brink 2012, p. 245.
325 World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.
by investigative authority is treated with confidence and the interested parties are allowed to have access to the form filled therein.\textsuperscript{326}

The AD Agreement oblige the party making a request for confidential treatment to justify same and further submit the summary of the information that was given confidential treatment at the time of submission.\textsuperscript{327}

5.6 Analysis of the submissions made by interested parties/on-the-spot verification

The investigating authority makes analysis of the information received to determine dumping the moment it received the response and questionnaire from the interested parties:\textsuperscript{328}

i. Whether the product under consideration has been exported at dumped prices.

ii. Whether the domestic industry has suffered material injury or threat thereof; and

iii. If so, whether the material injury or threat thereof is caused by the dumped imports.

The investigating authority has the duty to uphold the accuracy of information given by the interested in the course of their investigation based on their findings.\textsuperscript{329} They discharge this duty by embarking on an immediate verification in the territory of the importers, exporters, domestic industry etc.\textsuperscript{330} Note that special procedure is required where the investigating authority determines to verify in the exporting country’s territory.\textsuperscript{331} The on the spot verification is not however compulsory.\textsuperscript{332} The on the spot verification in territory of the exporting country is usually costly for the developing countries who are the importers where the verification concerns information submitted by foreign interested parties.\textsuperscript{333} Thus, the investigating authority can satisfy themselves based on the accuracy of the information by complying with the obligation through any reasonable means.\textsuperscript{334} For instance, the means can include required provisions of

\textsuperscript{326} Article 6.5.1 Anti-Dumping Agreement 1994, p. 9.
\textsuperscript{327} World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO; Brink 2012, p.246; Vermulst 2005, p. 139.
\textsuperscript{328} Annex I Anti-Dumping Agreement 1994, p. 21.
\textsuperscript{330} Article 6.7 Anti-Dumping Agreement 1994, p. 10.
\textsuperscript{331} Annex I Anti-Dumping Agreement 1994, p. 21.
\textsuperscript{332} Vermulst 2005, p. 140
\textsuperscript{333} World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.
\textsuperscript{334} Article 5.3 Anti-Dumping Agreement 1994, p. 7.
back up documentation that shows how some questionnaires reply were calculated thereby comparing same with the public data.\textsuperscript{335}

5.7 Facts Available

In some cases, the interested parties fail and refuse to cooperate in absolute term with the investigation process.\textsuperscript{336} In certain instances, parties involved may not provide the requested information as requested by the investigating authority or supply inadequate information or even exceed the deadline before providing the required information.\textsuperscript{337}

The authorities are particularly permitted to use information from other sources on the basis of facts available.\textsuperscript{338} The AD agreement provides that where there is incomplete information as requested, the investigating authority are permitted ‘to fill the gap’ with the view to make whole, the lack of adequate information occasioned by the interested parties.\textsuperscript{339}

5.8 Imposition of Provisional Measures

The AD Agreement does not mandate the imposition of provisional measures, however left within the discretion of the Member State while complying with the rules set out by the AD Agreement.\textsuperscript{340} The measures can only be applied where:\textsuperscript{341}

i. An investigation has been initiated in accordance with the provisions of the AD Agreement; a public notice of initiation has been issued, and interested parties have been given adequate opportunities to submit information and make comments.

ii. A preliminary affirmative determination has been made of dumping, injury and causation; and

iii. The authorities concerned judge such measures necessary to prevent injury being caused during the remainder of the investigation.

\textsuperscript{335}Article 5.3 \textit{Anti-Dumping Agreement 1994}, p. 7.
\textsuperscript{336}Article 5.3 \textit{Anti-Dumping Agreement 1994}, p. 7.
\textsuperscript{337}Article 5.3 \textit{Anti-Dumping Agreement 1994}, p. 7.
\textsuperscript{338}Article 6.8 Anti-Dumping Agreement 1994, p. 10; The use of facts available is strictly subject to the rules contained in detail in Annex II to the Anti-Dumping Agreement 1994, p. 22; \textit{Ehrenhaft et al.1997}, p.3
\textsuperscript{339}Annex II to the \textit{Anti-Dumping Agreement 1994}, p. 22; \textit{United Nation Conference on Trade and Development 2003, WTO Dispute Settlement on Anti-Dumping Measures}, p. 39
\textsuperscript{341}Article 7.1 \textit{Anti-Dumping Agreement 1994}, p. 11; \textit{Bolton} Beverley J. Int’l Law 2011, p.78
The provisional measures can take the shape of provisional duty or a security by cash deposit or bond not exceeding the amount of preliminary determination of dumping margin.\textsuperscript{342}

### 5.9 The AD Agreement Set Forth Certain Time Limitations

The time limit for the application of provisional measures has provided by AD agreement shall not be shorter than 60 days after initiation of an investigation.\textsuperscript{343}

The AD Agreement stipulates the time limit for the application of provisional measures with general rule of four months with a likely extension to six months upon a request of exporters. A longer period of six to nine months is permitted where the authorities evaluate that an anti-dumping measures lower than the dumping margin would be adequate to eradicate injury.\textsuperscript{344}

### 5.10 Notice of Imposition of Provisional Measures / Notification

The AD Agreement provides guidelines on the observed minimum notice level of imposition relating to provisional measures. The notice usually contains the names of the suppliers, description of the product sufficient for customs purposes, the margins of Dumping established and a full explanation of the method used in the establishment and comparison of the export price and the normal value; considerations relevant to the injury and causation determination, and the main reasons leading to the determination.\textsuperscript{345}

### 5.11 Notice of Final Determination, Imposition of Definitive Measures; Notification

The investigating authorities are obliged to publish a notice upon final determination of dumping whether affirmative or negative and thereafter avail it to the members whose like products are at the center of the final determination and to other interested parties.\textsuperscript{346} The notice shall contain sufficient details of the findings and conclusion arrived at on all the issues of facts and law that are material to the investigation process.\textsuperscript{347}

Where a conclusion has been reached to impose a definitive measure or admit an undertaking, the authorities are obliged to publish a notice and make available a separate report which states

\textsuperscript{342} Article 7.2 Anti-Dumping Agreement 1994, p. 11.
\textsuperscript{343} Article 7.3 Anti-Dumping Agreement 1994, p. 11.
\textsuperscript{344} Article 7.4 Anti-Dumping Agreement 1994, p. 11.
\textsuperscript{345} Article 9.2 Anti-Dumping Agreement 1994, p. 13.
\textsuperscript{346} Article 12.1 Anti-Dumping Agreement 1994, p. 16.
\textsuperscript{347} Article 12.1.1 Anti-Dumping Agreement 1994, p. 16.
relevant information on issues of facts and law, rationale for the imposition of the measure or admission of the undertaking.\textsuperscript{348} The AD agreement set out rules on the minimum content required in the public notice.\textsuperscript{349} China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose the essential facts under consideration which formed the basis of its decision to impose the AD duties.\textsuperscript{350} The Government of the Republic of Turkey requests consultations with the Kingdom of Morocco with respect to the imposition of definitive anti-dumping measures by Morocco on imports of certain hot-rolled steel products from Turkey, and with respect to certain aspects of the investigation underlying those measures. Turkey considers that Morocco's investigation and definitive measures cannot be reconciled with Article VI of the GATT 1994, Articles 1 and 18 of the Anti-Dumping Agreement, and the specific provisions cited above.\textsuperscript{351}

5.12 Imposition and collection of definitive anti-dumping duties
In line with AD agreement, anti-dumping measures cannot be imposed if:\textsuperscript{352}

i. There is no dumping, injury to the domestic industry and/or a causal relationship between the two;

ii. The margin of dumping calculated is \textit{de minimis}\textsuperscript{353} (less than 2%); and

iii. The volume of imports is negligible; the investigation must also be terminated. The dumped import will be termed usually as negligible, where the volume of dumping from a specific country is less than 3\% of dumped import of like products in the importing country. Note, however that where the accumulation of the imported like products by the exporting country is more than 7\%, then the issue of dumping of like products which is less than 3\% may not be treated as eligible by the importing authorities.

Where the conditions above have been considered, and the importing country takes a decision to apply ant-dumping duty, the AD agreement provides guidelines relating to collection of such

\textsuperscript{348} Article 12.2.2 \textit{Anti-Dumping Agreement} 1994, p. 17; on the basis for any decision made under subparagraph 10.2 of Article 6 \textit{Anti-Dumping Agreement} 1994.

\textsuperscript{349} Article 12.2.1 \textit{Anti-Dumping Agreement} 1994, p. 16; Neufeld (UNCTAD/ITCD/TAB/10) 2001, p. 5

\textsuperscript{350} China (2014) WT/DS440/R.

\textsuperscript{351} Morocco (2016) WT/DS513/1.


\textsuperscript{353} Cho Berkeley Journal of Int’l Law 2007, p. 415
duty. The cardinal rule is that the anti-dumping duty shall not exceed the margin of dumping as outlined in line With the AD agreement. In case where the amount of anti-dumping duty exceeds dumping margin, the excess shall be refunded. Korea’s domestic support for beef for 1997 and 1998 was not correctly calculated and exceeded the de minimis level, contrary to Article 6 of the Agreement on Agriculture, and was not included in Korea’s Current Total AMS, contrary to Article 7.2(a) of the Agreement on Agriculture.

The imposition of measures in the territory of members is permissive that is, the Member States have discretion not to impose measures or not to impose the full amount of dumping, even where the entire requirements are fulfilled. In some cases, Member State may decide not to impose measures or to impose measures below the margin of dumping with a view to protecting the users’ interest or the final consumers of the product.

From the above, it is pertinent that the AD agreement encourages the members to use ‘lesser duty’ rule. The implication of the rule is that where the importing Member State has the impression that imposing lower duty than the margin of dumping will adequately remove the injury to the domestic industry, then such rule should be embraced.

5.13 Retroactive Application of Duties

As a rule, definitive duties are applied and such duties can only be collected on dumped imports made after the effective date of the final determination. Furthermore, definitive anti-dumping duties cannot be collected on dumped import that happened before an investigation is initiated.

However, two exceptions to this rule are:

358 Article 9.1 Anti-Dumping Agreement 1994, p. 13.
359 World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.
360 Article 9.1 Anti-Dumping Agreement 1994, p.2, note 1 above; Neufeld (UNCTAD/ITCD/TAB/10) 2001, p. 10
361 Article 8.1 Anti-Dumping Agreement 1994, p. 12.
i. The first such situation involves the collection of definitive anti-dumping duties for the period during which provisional measures were applied (for all practical purposes ‘converting’ the provisional measure into a definitive measure). For this to be permissible, the injury finding generally must be based on present material injury, unless a determination is made that in the absence of a provisional measure a threat of material injury would have become present material injury. (No retroactivity is permitted in case of a material retardation finding, however).  

ii. The second such situation involves the collection of definitive duties up to 90 days prior to the date of application of provisional measures. This is only permissible where there is a history of injurious dumping or the importer was or should have been aware that injurious dumping was taking place, and where the injury is caused by massive dumped imports in a short period.

5.14 Price Undertaking

The imposition of anti-dumping duties can take another turn where there is offering and acceptance of price undertaking according to AD agreement. The principle establishes that an exporter may sign an undertaking with importing country’s authority excluding the domestic industry in a way to settle an anti-dumping investigation by revising its price or halt exporting like products at dumped price. Where the undertaking is settled between the party and accepted, Anti-dumping duties cannot be imposed on the imported like products in as much as the undertaking subsist.

In The final determination of dumping and imposition of duties, no price increase shall be higher than the dumping margin in an effort to eliminate injury. In other words, price import must equate dumping margin in extreme cases but not higher. As the AD agreement provide absolute limit to price increase, such limit is absent when an investigating authority decides to accept an undertaking for price increase below the amount of the dumping.

364 Article 10.6 Anti-Dumping Agreement 1994, p. 15.
367 Neufeld (UNCTAD/ITCD/TAB/10) 2001, p. 7
However, where a breach is established, the undertaking may be withdrawn. Anti-dumping duties can be applied to substitute the withdrawn undertaken.\footnote{Article 8.4 Anti-Dumping Agreement 1994, p. 12.}

5.15 Duration of Anti-Dumping Measures
An anti-dumping duty is required to subsist in as much as it is necessary to counteract dumping that causes injury.\footnote{Article 11.1 Anti-Dumping Agreement 1994, p. 15.} However, the duration for imposition of any measure (i.e. duty or price undertaking) according to AD Agreement must be terminated on a date not later than 5 years from of its imposition from the date of the most recent expiry (‘sunset’) review or, if it has covered both dumping and injury, the most recent changed circumstances review. Member State, may however apply anti-dumping measures for shorter periods of time.\footnote{Article 11.3 Anti-Dumping Agreement 1994, p. 15}

5.16 Reviews

5.16.1 New-shipper Review
Exporters or producers that are new to transacting trades on export with the importing Member on the like product under investigation are entitled to a review to get individual margins of dumping.\footnote{Krishna Policy Research Working Paper (No. WPS 1823) 1997, p. 27} However, to liberty of exercising the stated right, these exporters or producers have an obligation to display that they have no link or related to any of the exporters or producers who the anti-dumping duties have been imposed. ‘New shipper reviews are to be initiated and carried out on an accelerated basis, compared with normal duty assessment and review proceedings. The exporters or producers are exempted from anti-dumping duties while the review is being carried out, though the authorities have the right to withhold appraisal or to demand a security to certify disbursement of duties retroactive to the initiation of the review where dumping is established.\footnote{Article 9.5 Anti-Dumping Agreement 1994, p. 14; World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO;}

5.16.2 Expiry or Sunset Review
As stated above, anti-dumping measures (both duties and price undertaking) as a general rule has a time limit of 5 years from date of imposition. The AD Agreement permits an exemption from the stated principle where, an investigating authority founds that the expiry of the measure would
be likely to lead to furtherance or repetition of dumping and injury.\textsuperscript{373} In its final determination in the sunset review proceedings initiated on 2 April 2004, South Africa concluded that the expiry of the anti-dumping measure is not likely to lead to the continuation or recurrence of dumping.\textsuperscript{374}

A mere probability that the dumping or injury would prospectively linger or return, is inadequate to extend the application of the anti-dumping measure exceeding the statutory 5 year limit.\textsuperscript{375} The AD Agreement places no limit on the totality of times a measure encounter an extension owing to sunset reviews, nor where applicable, an overall extreme stage of application for an anti-dumping measure. Certainly, there are some measures that have been sustained in force for 10 or 20 years or longer, through a series of reviews.\textsuperscript{376}

5.16.3 Changed Circumstance Review

After the anti-dumping measures have been imposed, the material factors upon which the initial measure was imposed may change. For example, there could be a decrease in the normal value, or the exporter may stop exporting to the country that imposes the measure. As a consequence of such variations, the dumping margin may face a drastic reduction, decrease or outright disappearance, or the domestic industry may cease to manufacture the like product in issue.\textsuperscript{377}

With such probability in mind, the authority will be left to review according to AD Agreement where it is necessary to continue imposition of measures, if logical; such review can be carried out on their own initiative or on an application from an interested party verified by positive information. In such a circumstance, the authorities evaluate whether the sustained implementation of the duty is required to balance dumping, whether the injury would probably persist or return if the duty were terminated or altered, or both. If in the review the authorities decide that the anti-dumping measure is no more necessary, it must be abolished instantly.

Another conceivable result of such a review is that while the measure may continually be sustained, its extent may be adjusted.\textsuperscript{378}

\begin{notes}
\textsuperscript{373} Article 11.3 Anti-Dumping Agreement 1994, p. 15; Caribbean Export Development Agency Tradewin 2010.
\textsuperscript{374} South Africa (2008) WT/DS374/2.
\textsuperscript{375} World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.
\textsuperscript{376} World Trade Organisation 2012 WTO E-Learning: Trade remedies and the WTO.
\textsuperscript{377} Article 11.3 Anti-Dumping Agreement 1994, p. 15.
\textsuperscript{378} Article 11.3 Anti-Dumping Agreement 1994, p. 15.
\end{notes}
5.16.4 Judicial review (Appeal) Before Domestic Tribunal
Member States that have enacted anti-dumping legislation are required by the AD Agreement to have in place ‘judicial, arbitral or administrative tribunals, or other procedures, for the purpose of reviewing, or hearing appeals of, administrative actions relating to final determinations and to reviews of determinations.’ These tribunals are expected to maintain independence from the investigating authorities.

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380 Brink 2012, p. 296.
6 ANALYTICAL VIEW OF ANTI-DUMPING AND COUNTERVAILING BILL, 2010

6.1 The Substantive Requirement of the Bill

The Anti-Dumping and Countervailing Bill 2010⁴⁸¹ stands to be enacted as national legislation on anti-dumping procedure considering the obligation of Nigeria under the WTO Anti-Dumping Agreement outline and this can easily be said because Nigeria is a signatory to the WTO.⁴⁸²

We must note that it is not compulsory for a country to have national legislation or domesticate Anti-dumping Agreement.⁴⁸³ However, once a country decides to do so, it under obligation to draft its legislation to be consistently adhere to the provisions of the WTO AD Agreement,⁴⁸⁴ because if the aforementioned discrepancies are found in the national legislation, it may lead to conflict of interest between its obligation to WTO and protecting the arbitrary interest of domestic industries; thereby the intent for which Anti-Dumping Agreement was promulgated will be defeated.⁴⁸⁵

Keep abreast that prior to the introduction of the Bill, there had been in existence a subsisting legislation known as Customs Duty Act 1958 (Dumped and Subsidised goods)⁴⁸⁶ which regulated any trade transactions between Nigeria and the exporting nation. In an effort of the Nigeria government to make the Act 1958 to be compatible with the current WTO Agreement, the Act has been under review since 1991 whereby if at the end of the revision, it can be proscribed and substituted with the Anti-Dumping and Countervailing Act once passed into law.⁴⁸⁷ A standard will be set accordingly to cause its provision in conformity with Nigerian obligation to WTO as a member.⁴⁸⁸

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⁴⁸¹ Anti-Dumping and Countervailing Bill, 2010
⁴⁸³ Article 16 Anti-Dumping Agreement 1994, p. 18 also World Trade Organisation: WTO Technical Information on anti-dumping, p. 1
⁴⁸⁴ Article 1, Anti-Dumping Agreement 1994, p. 2.
⁴⁸⁵ Article 2.2 Technical Regulations and Standards 2013(WTO Agreement Series: Technical Barriers to trade).
⁴⁸⁸ Ogunkola – Aga 2007, p. 249
A notification\(^{389}\) was given by Nigeria to the WTO Committee on Anti-Dumping Practices\(^{390}\) and Committee on Subsidies and Countervailing Measures and Subsidiary Bodies.\(^{391}\) It states thus;\(^{392}\)

The Customs Duties (Dumped and Subsidies Goods) Act 1958 provides for the imposition of a special duty on any goods deemed to be dumped by companies or subsidised by any Government or authority outside Nigeria. Under the Act, goods are regarded as having been dumped if the export price is lower than the ‘fair market price’. The provisions of this Act may be invoked if there is a threat of material injury to potential or established industries in Nigeria, and if the imposition of a special duty does not conflict with Nigerian international agreements. Nigeria has not submitted any notifications on anti-dumping or countervailing duties since 1998. Reference was made, however, in the 2004 Budget Statement, to the need to protect domestic industries from dumping and unfair competition within the framework of remedies provided for by the WTO and regional trade agreements. A Bill on anti-dumping and countervailing measures is currently under preparation.

6.1.1 Anti-Dumping Measures

The Bill aims to provide for anti-dumping measures, where there have been complaints of dumping against an exporting nation and investigation has been launched by an importing nation such as Nigeria in this circumstance. Then, we can reliably say that if an exporting nation is found liable of dumping; there can be application of anti-dumping measure. However, the definition of anti-dumping measure is omitted in the Bill (although provisions made for countervailing duty definition)\(^{393}\), specifically, provides for definition and interpretation of various and series of terms incorporated in the Bill.\(^{394}\) This signifies

\(^{389}\) By virtue of Article 18.5 & 18.6 *Subsidy and Countervailing Measures Agreement* 1994. The authorities of the importing countries may require from exporting countries but not compel them to sign price undertaking and what constitute injury to local industry. Article 32.6 instructs WTO member countries to inform the committee on any changes in national anti-dumping law that is related to SCM Agreement, see *Subsidy and Countervailing Measures Agreement* 1994.

\(^{390}\) Article 16 of the Anti-Dumping Agreement 1994, p. 18.

\(^{391}\) Conditions to form the Committee are stipulated in Article 24, *Subsidy and Countervailing Measures Agreement* 1994.


\(^{393}\) Part 1, Section3, *Anti-dumping and Countervailing Bill* 2010.

legislatures’ effort to ingrain necessary terms into the Bill on the ground of interpretation\textsuperscript{395} of concepts pertinent to the Bill, (the conceptual meaning) of this omission is viewed as a fundamental and huge gap in the Bill because where there has been a determination of dumping against an exporting country; the question will be what can be termed as a pivot upon which anti-dumping measures are to be rested and validated? Furthermore, how can we determine such measure under the Nigerian legislation for anti-dumping?

Note that AD Agreement specifically makes provisions for the application of anti-dumping measure; \textsuperscript{396} same is being referred to as anti-duty or price undertaking\textsuperscript{397} in the implementation of such anti-dumping measure.\textsuperscript{398} Really, we can point one that the appellate body in the U.S.A case of 1916 Act\textsuperscript{399} defines anti-dumping measure as all measures taken against dumping. Be it provisional measures, anti-dumping dates or price undertaking in essence the absence of anti-dumping measure in the Bill shifts the focus of the Bill from curbing excess dumping into Nigerian market to ambiguous and vague legal provisions that may make effective implementation of anti-dumping measure a mirage.

Under the law, the intent of legislation seeks solace within the definition and interpretation of various terms found in the Act. Where there is an omission in the concrete definition or interpretation of a particular concept, it is obvious that any attempt to decipher the true meaning or intent of the law will end in obscurity – no direction will be given to the intent of the lawmakers. In the case of China Broiler Product, the USA challenged the definition accorded to the domestic industry is described by China on the basis of incompatibility with the provisions of the AD Agreement. The USA further stated that the procedural step taken by China’s ministry of Commerce (MOFCOM) that procured public notice of the preliminary and final stages of determination of anti-dumping duty were flawed with irregularities and fall below the requirement of Articles 1 to 12.2 of the AD Agreement.\textsuperscript{400}

\textsuperscript{395}Reader needs to adopt statutory construction to interpret the meaning or scope of a particular word or phrase in a statute with a view to getting contextual clues, see Clerk - Connolly George Town University Law Center 2006.
\textsuperscript{396}Article 1 of Part I Anti-Dumping Agreement 1994, p. 2.
\textsuperscript{397}Articles 8 and 9 Anti-Dumping Agreement 1994, p. 12 and 13.
\textsuperscript{398}Article 7 Anti-Dumping Agreement 1994, p. 11.
\textsuperscript{399}United States, Anti-dumping Act 1916- Recourse to Arbitration by the United States under Article 22.6 of the DSU, WT/DS136/ARB, 24 February 2004.
\textsuperscript{400}China (2016) WT/DS427/13
The above postulations address the issue that any country willing to domesticate the WTO Anti-dumping Agreement must comply with the provisions found therein otherwise any contrary national legislation will be declared incompatible or inconsistent with the WTO AD Agreement requirement.  

6.1.2 Dumping

According to anti-dumping agreement, dumping occurs when product emanating from exporting country is being placed for sale at a lesser normal value at the market of the importing country. Dumping can be said to have been established when the launched investigation is concluded upon material facts and evidence proving a case of dumping. We can get vivid notion of dumping when the export is being compared based on the AD Agreement provisions that:

A product is to be considered dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than compared price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

In another vein the concept of dumping is being defined according to the Bill:

The situation where the export price of goods imported or intended to be imported into Nigeria is less than the normal value of such goods in the market (country) of origin as determined in accordance with the provisions of this Act.

The AD Agreement definition pointed out four cardinal impressions: determination of normal value, how to determine export price, what constitute ordinary course of trade and features of like product. However, the Bill, in its definition of dumping introduced additional concept not contained or intended by the AD Agreement. If the additional concept is marked out; ‘export price of goods imported’ and those ‘intended to be imported’ as the determinant of dumping, there would be inconsistent requirement as outlined by the WTO AD Agreement. The addition made by the Bill in determining dumping seems to pose challenges as to how to ascertain

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401 Article 1, Anti-Dumping Agreement 1994, p. 2.
402 Article 2.1, Anti-Dumping Agreement 1994, p. 2; Brown Law & Politics 2008, p.270
404 Part 1, Section3, Anti-dumping and Countervailing Bill 2010.
determination of normal value, how to determine export price, what constitute ordinary course of trade and features of like product, because what constitute ‘intended to be imported’ into Nigeria maybe difficult to investigate and tagged dumping as only foreign products in Nigeria sold at less normal market value can be engaged in such exercise, not the one intended to be imported.

6.1.3 Export Price
Export price asserts key role while determining dumping under the AD Agreement or national legislation where the WTO ADA has been domesticated. Export price can be defined as the price at which products are being exported to another country known as the importing country.\textsuperscript{405} Note that the export price may be constructed price bearing in mind certain conditions for such price to be ‘constructed’.\textsuperscript{406} The Bill unlike ADA defines export price as price paid or payable for an export product destined for the country.\textsuperscript{407} We can say that such a definition is vague because in the definition there was no definite is addressing exporting or importing country.

6.1.4 Interested Parties
The main and important three key parties during anti-dumping investigation proceeding are: the foreign exporter from an exporting country, the importer in the importing country and domestic producers of the like product that are being investigated. In the course of the investigation, the aftermath of which will ordinarily be predisposed and can easily have impact on future investment based on above mentioned three key players.\textsuperscript{408} Thus the definition of the interested parties as subscribed by the Bill comprises: (a) producer, exporter or importer of the budget goods; (b) a trade of business association of when the majority of its member are producers, exporters or importers of budget goods; (c) the government of the country in which the budget goods are produced or from which they are exported.\textsuperscript{409}

The definition of the interested parties in the Bill widens the intent and contemplation of ADA. The only definition in line with ADA is paragraph A while paragraph B and C are at variance with the provisions of ADA. The use of the expression such as the government by the Bill in

\textsuperscript{405} Article 2.1 Anti-Dumping Agreement 1994, p. 2.; Brown Law & Politics 2008, p.270
\textsuperscript{406} Article 2.3 Anti-Dumping Agreement 1994, p. 3.
\textsuperscript{407} Part 1, Section 3, Anti-dumping and Countervailing Bill 2010.
\textsuperscript{408} Vermulst 2005, p. 9.
\textsuperscript{409} Part 1, Section 3, Anti-dumpng and Countervailing Bill 2010.
place of the exporting members makes the interpretation of that particular section of the Bill to differ from intendment of the provisions found in ADA. The Adoption of expression in the Bill such as ‘the government of the origin of the investigated produce’ does not limit the origin of the investigated product may not be the same is that of the exporting country government to ease interpretation and implementation this is not the case putting the Bill in perspective.

The subsequent paragraph, the term territory referred to lacks description and no certitude as to the provisional meaning of the term as utilised in the said paragraph. The definitions above as stated seriatim do not comply with clarify in the meaning that can afford consistencies with the aim of ADA.\(^{410}\)

6.1.5 Related Parties

The Anti-Dumping Agreement makes an elaborated explanation on what is meant by related parties.\(^{411}\) In the anti-dumping investigation proceeding not all parties are interested parties, which in tune means that there could be parties that are related parties and unrelated parties within the definition of interested parties, related parties under ADA is directed connected to how there can be established of a determined domestic industry.

According to Brink, the determination of normal value and export price can easily be impacted by the definition of the concept called related parties.\(^{412}\) The Bill made reference to domestic industry in its clarification but miscarries to make mention to the term related parties. With this nature of gap, that can impede the essence of related parties, which is to determine the normal value and the export price in the course of investigation of dumping. If we do not share the sacrosanct definition of related parties, this will create a loophole that can make implementation of the Bill regarding the concept not be incompliance with the WTO Anti-dumping Agreements.

6.1.6 Normal Value

To determine whether dumping has taken place in an importing country, the investigating authority has the duty to inquire whether a like product has been imported into the market of a country at a lesser normal value after the export price has been ascertained in the ordinary course

\(^{410}\) Article 6.11(i) (ii) & (iii) *Anti-Dumping Agreement* 1994, p. 2.
\(^{412}\) Brink 2012, p.761.
of trade particularly the like products are bound for consumption in the importing and exporting country.\footnote{Article 2.1 Anti-Dumping Agreement 1994, p. 2; Brown Law & Politics 2008, p.270} The notion of normal value is well-defined in the Bill as ‘the price comparable to the export price, in the ordinary course of trade, for the investigated product when destined for consumption in the investigated country.’\footnote{Part I sec 3 Anti-Dumping and Countervailing Bill, 2010.} The above definition plainly and inaccurately neglects the note made in the ADA definition to ‘the like product’ and ‘the exporting country.’\footnote{Part 1, Section3, Anti-dumping and Countervailing Bill 2010.}

The Anti-dumping Agreement makes provisions for exceptional case where there is no sale of like product in the ordinary course of trade but price can be compare when like products are exported to a third country\footnote{Article 2.3 Anti-Dumping Agreement 1994, p. 3.} or cases where there’s no export price .\footnote{Articles 4.1, 5.3 and 5.4 Anti-Dumping Agreement 1994, p. 6, 7 and 8.} The Bill is quiet as to how these exceptional circumstances can be presided over. This omission generates a major deficit and the dependence of the lawmakers on vague words and terms where the WTO Anti-dumping Agreement is distinct and exact has not attained the envisaged objective of bringing in line Nigerian anti-dumping regime with its WTO obligations.

### 6.2 The Procedural Requirement of the Bill.

#### 6.2.1 Initiation and investigation

Under the AD agreement where there has been a receipt of application, the investigating authority has a duty to ensure that steps are taken in the determination of sufficient evidence to kick start investigation process. The investigation authority must comply with examining the adequacy and accuracy of the evidence as contained there in the application. Furthermore, the authority must engage in the process of determining whether there is sufficient representation of the domestic industry by the applicants.\footnote{Part 1, Section3, Anti-dumping and Countervailing Bill 2010.} The Bill states that in the initiation of investigation ‘upon receipt of application by or on behalf of an industry, the minister assisted by the department responsible for trade shall examine
accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify initiation of investigation’.\textsuperscript{419}

The AD agreement makes two critical obligations on the investigating authority when initiating investigation process: examination of the accuracy and adequacy of the evidence contained in the application in determining if there is sufficient ground to satisfy investigation initiation and, the representative capacity of the applicants in the domestic industry.\textsuperscript{420} The Bill only complies with the first phase required in the AD agreement while it substitutes the second phase with discretionary decision of the minister.

6.2.2 \textit{Retroactive Imposition of Anti-Dumping Duty}

The AD Agreement provides for circumstances where anti-dumping duties can be imposed and collected as such that:\textsuperscript{421}

A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and
(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

The Bill contains provisions on the implementation and collection anti-dumping duties.\textsuperscript{422} It further makes available retroactive imposition and collection of anti-dumping duties;\textsuperscript{423} however, it omitted to give circumstances for such measures to such measures to be implemented

\textsuperscript{419} Part V sec 27(3) \textit{Anti-Dumping and Countervailing Bill}, 2010.
\textsuperscript{420} Articles 5.3 and 5.4 \textit{Anti-Dumping Agreement} 1994, p. 7 and 8.
\textsuperscript{421} Article 10.6 \textit{Anti-Dumping Agreement} 1994, p. 15.
\textsuperscript{422} Part IX sec 57(2) \textit{Anti-Dumping and Countervailing Bill}, 2010.
\textsuperscript{423} Part IX sec 52(2) \textit{Anti-Dumping and Countervailing Bill}, 2010.
retrospectively. In Mexico-HFCS, it was held that under exceptional circumstances as provided in Article 10.6.\textsuperscript{424} Member State may engage in retrospective duties imposition.\textsuperscript{425}

### 6.2.3 Refund Application

Under AD agreement, there are guidelines for a refund to be made upon application.\textsuperscript{426}

The Bill makes provision that:

Where the amount of the anti-dumping or countervailing duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request to the government of any duty paid in excess of the margin of dumping or subsidisation.\textsuperscript{427}

It further makes provision:

A refund under subsection (4) shall be made within twelve months, and in any case not exceeding eighteen months after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping or countervailing duty and such refund shall be made within ninety days from the day the decision was made.\textsuperscript{428}

The Bill creates ambiguity when it omitted to provide for the quarters in which the application for refund is to be directed and who is obliged to make a refund.

### 6.2.4 Offence Relating to Information

As provided in the Bill that every party to an investigation is restricted from willfully giving false or misleading information to the Committee or disclose to a third party any confidential information provided during the investigation process without the Committee’s consent and, without lawful excuse withhold information requested by the Committees. Any person found

\textsuperscript{424} \textit{Anti-Dumping Agreement} 1994.

\textsuperscript{425} Appellate Body Report and Panel Report, Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, WT/DS132/13, 26 November 2001

\textsuperscript{426} Article 9.3.2 \textit{Anti-Dumping Agreement} 1994, p. 13.

\textsuperscript{427} Part IX sec 57(4) \textit{Anti-Dumping and Countervailing Bill}, 2010.

\textsuperscript{428} Part IX sec 57(5) \textit{Anti-Dumping and Countervailing Bill} 2010.
liable in accordance with the above stated provisions of the Bill will be fine the sum of Two Million Naira or 6 months’ imprisonment or both.\(^{429}\)

However, the AD Agreement stipulated that where an interested party fails to supply the necessary information within a reasonable time or hampers investigation by denying the authorities access to its relevant information, the AD agreement permits preliminary and final determination to be exercised based on facts available.\(^ {430}\) Hence, the AD agreement does not in any way criminalise or penalise any interested party that fails to supply relevant information and thereby makes the provisions of the Bill ‘on offences relating to information ‘consistent with the AD agreement.

\(^{429}\) Part XIII sec 75 *Anti-Dumping and Countervailing Bill* 2010.

\(^{430}\) Article 6.8 *Anti-Dumping Agreement* 1994, p. 10.
7 SOUTH AFRICA’S EXPERIENCE ON ANTI-DUMPING MEASURES

Right from inception, South Africa was a prolific user of the anti-dumping instrument since 1914. It conducted at least 137 investigations by advent of GATT. This informed the impression that South Africa was the first country in Africa to promulgate laws on anti-dumping measures.

At the period of 1970s and 1980s, South Africa operated a closed economy which signaled high tariffs to protect domestic industries because these industries lacked the required capacity to engage foreign producers in an open competition.

South Africa initiated investigations to the rate of 229 between 1995 and 2014. These steps made the country to be ranked amongst top ten users of anti-dumping measures. In 1998, South Africa top the chart of the WTO Members that initiated anti-dumping cases and earned recognition as the biggest user of the instrument for the period 1995–2004 considering the import value of the cases initiated.

Table 7.1. South African Years of AD Initiations and Measures

<table>
<thead>
<tr>
<th>Year</th>
<th>Initiations</th>
<th>Duties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1914–1947</td>
<td>137</td>
<td>N/A</td>
</tr>
<tr>
<td>1948–1958</td>
<td>211</td>
<td>29</td>
</tr>
<tr>
<td>1959–1978</td>
<td>265</td>
<td>N/A</td>
</tr>
<tr>
<td>1979–1994</td>
<td>270</td>
<td>N/A</td>
</tr>
<tr>
<td>Total pre-WTO</td>
<td>883</td>
<td>N/A</td>
</tr>
<tr>
<td>1995–1999</td>
<td>130</td>
<td>88</td>
</tr>
<tr>
<td>2000–2004</td>
<td>45</td>
<td>25</td>
</tr>
<tr>
<td>2005–2009</td>
<td>37</td>
<td>15</td>
</tr>
<tr>
<td>2010–2014</td>
<td>17</td>
<td>6(9*)</td>
</tr>
<tr>
<td>Total under WTO</td>
<td>229</td>
<td>134(137)</td>
</tr>
</tbody>
</table>

Source: WTO Rules Division.

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432 Brink 2012, p. 54-55.
433 Brink 2015, p. 1
436 Brink 2015, p 9.
The above illustrates the level of South African numerical engagement in anti-dumping between 1914 and 2014.

7.2. Institutions on Anti-Dumping Law

7.2.1 Board of Trade and Industry

A part-time Board of Trade and Industry (the Board) was formed in 1921 and was replaced with a permanent Board in 1924. When the Board was established, it enjoyed a status of an independent statutory body and worked with support staff from the Department of Trade and Industry. From the start, it has the duty to maintain and develop domestic industries in South Africa. Other duties comprise trade remedies and tariff increases and decreases.

Since 1922, the Board adopted a protectionist views on economic policy. For instance, it promoted industries on capacity to replace import, quotas and choosy in tariffs application as well as formula duties. Before Board Amendment Act of 1992, the Board dealt with dumping on an ad hoc basis, that is, there was absence of specialist unit on dumping, and the directorate handled injury investigation on the product, while Customs was responsible for the dumping investigation.

7.2.2 Board on Tariffs and Trade

The Board name was replaced with the Board on Tariffs and Trade in 1986, however, its operation and structure remained unchanged and it maintained its status as an independent institution save reports made to and getting its budget from the Department of Trade and Industry.

\[ \text{References:} \]
437 Notices 1044 and 1045 of 8 Jul. 1921
438 Board on Trade and Industries Act 33 of 1924.
439 Brink 2012.
440 Board Report 1 (1921).
441 Brink 2015, p. 1.
442 Brink 2012, p. 21
443 Brink 2015, p. 1
7.2.3 Customs

Customs act of conducting investigations on the dumping ceased in 1992. The routine then was to engage customs representatives located in different countries, who inquired into the normal prices within which the goods were ordinarily sold in the exporting country instead of getting data from various companies. However, August 1992 marked the end of the above Customs duties and subsequently only implements and administers anti-dumping duties.\(^{444}\)

7.2.4 International Trade Administration Commission

The International Trade Administration Commission (ITAC) was established in June 2003 in accordance with the International Trade Administration (ITA) Act.\(^{445}\) Trade Remedies is part of the three specialist divisions under ITAC.\(^{446}\)

The duty of ITAC covers every facet of investigations except the final determination and the implementation. It receives and reviews applications; commences investigations; conducts the dumping, injury and directs verification visits. Upon conclusion of an investigation, it addresses its recommendation to the Minister of Trade for final determination.\(^{447}\)

Under the law, ITAC is an independent authority exposed only to the Constitution and to policy directives issued by the Minister.\(^{448}\) Other agencies of South Africa are obligated to aid the Commission to maintain its independence and impartiality.\(^{449}\)

7.3 Anti-Dumping Legislation

7.3.1 Early Legislation\(^{450}\)

Concepts of dumping and anti-dumping were first introduced into South African legislation by enacting The Customs Tariff Act in 1914\(^{451}\) with effect from 7 July 1914.\(^{452}\) However, the Customs Tariff Act of 1914 did not comprehensively cover dumping.

\(^{444}\) Customs and Excise Act No.91, 1964.
\(^{445}\) Brink 2015, p. 3.
\(^{446}\) Brink 2015, p. 3.
\(^{447}\) Brink 2015, p. 3.
\(^{448}\) Section 7(2) International Trade Administration Act, 2002.
\(^{449}\) Section 7(3) International Trade Administration Act, 2002.
\(^{450}\) Brink 2012, p.28-45; Brink 2015, p. 4.
\(^{451}\) Brink 2015, p. 4.
In 1924, the Board restructured South African anti-dumping system by conducting two investigations.\textsuperscript{453} Consequently the definition of normal value was changed and the limit on the level of duties was removed except the margin of dumping.\textsuperscript{454}

Several minor improvements were effected between from 1925 to 1943, South African anti-dumping legislation witnessed minimal improvements; however, the first significant reform occurred in the Customs Act 1944. The mode of applying anti-dumping duties on certain products were regulated\textsuperscript{455} and interpreted some terms such as ‘export price’,\textsuperscript{456} ‘domestic value’,\textsuperscript{457} ‘actual cost’\textsuperscript{458} and ‘value for duty purposes’.\textsuperscript{459}

South Africa applied GATT Article VI under the Protocol of Provisional Application of GATT; South Africa enacted the GATT Act to provide validity to South Africa’s obligations under GATT. However, GATT never became part of South African municipal law.\textsuperscript{460}

The Minister of Finance set up a Committee to examine South Africa’s anti-dumping system and its report was printed in 1975. It compared South Africa’s anti-dumping legislation and procedures to Article VI of GATT, the Anti-Dumping Code 1967 and reports of the GATT Committee on Dumping Practices and recommended the way which the divergences between the existing legislation and these documents should be addressed.\textsuperscript{461}

Legislations were amended to reflect the findings and it was thereafter included that an anti-dumping and a countervailing duty should be prohibited to be imposed ‘on the same imported goods on account of the same circumstances’,\textsuperscript{462} and that an anti-dumping duty should not be imposed on goods re-exported.\textsuperscript{463} The Act further made provision for duties to be levied on the country of origin, instead of the country of export,\textsuperscript{464} it defined origin as ‘the territory in which

\textsuperscript{452}Brink 2015, p. 4.
\textsuperscript{453} Brink 2012, p.29-30; Brink 2015, p. 5.
\textsuperscript{454} Brink 2015, p. 5.
\textsuperscript{455} Sections 86 & 87 International Trade Administration Act, 2002.
\textsuperscript{456} Section 84 International Trade Administration Act, 2002.
\textsuperscript{457} Section 7(2) International Trade Administration Act, 2002.
\textsuperscript{458} Brink 2015, p. 6
\textsuperscript{459} Brink 2015, p. 6
\textsuperscript{460} Brink 2015, p. 6
\textsuperscript{461} Brink 2015, p. 6
\textsuperscript{462} Section 15 the Second Customs Amendment Act 1977
\textsuperscript{463} Section 15 the Second Customs Amendment Act 1977
\textsuperscript{464} Section 16 the Second Customs Amendment Act 1977

76
[goods] were produced or manufactured, whether or not it is also the territory of export in relation to those goods;\textsuperscript{465} contained provision on the imposition of provisional anti-dumping duties for a period not exceeding three months.\textsuperscript{466}

Amendments changed the period within which a preliminary duty could be imposed were amended in 1983,\textsuperscript{467} while fourth definition for dumping was amended in 1986. It stated that providing that dumping would take place if the export price from a country was lower than ‘the highest comparable price for identical or comparable goods when exported from any other territory to the Republic in the ordinary course of trade’.\textsuperscript{468}

The 1986 amendments also expanded the territorial application of the Board’s findings to the whole of the Southern African Customs Union (SACU),\textsuperscript{469} that is, to apply its decisions not only to South Africa, but also to Botswana, Lesotho and Swaziland (and, after its independence, to Namibia).

Some amendments were made in 1995 to bring the legislation more in line with the WTO AD Agreement, including the definition of normal value.\textsuperscript{470}

\textit{7.3.2 Current Legislation}\textsuperscript{471}

The primary current legislation is contained in the ITA Act,\textsuperscript{472} with the detailed provisions incorporated in the subordinate Anti-Dumping Regulations.\textsuperscript{473} There are also specific provisions in the Customs Act that directly deal with anti-dumping. In addition, the Constitution, the Access to Information Act\textsuperscript{474} and the Administrative Justice Act\textsuperscript{475} all play a role in investigations, specifically ensuring access to non-confidential information and a fair administrative process, including transparency of proceedings.

\textsuperscript{465} Section 16 the Second Customs Amendment Act 1977
\textsuperscript{466} Section 18 the Second Customs Amendment Act 1977
\textsuperscript{467} Brink 2015, p. 6
\textsuperscript{468} Brink 2015, p. 6.
\textsuperscript{469} Brink 2015, p. 6.
\textsuperscript{470} Section 1 (a), Board on Tariffs and Trade Amendment Act, 1995.
\textsuperscript{471} Brink 2012, p. 2-7
\textsuperscript{472} International Trade Administration Act 2002.
\textsuperscript{473} Cronje Trade Law Centre 2013
\textsuperscript{474} Promotion of Access to Information Act, 2000.
\textsuperscript{475} Promotion of Administrative Justice Act, 2000.
The ITA Act defines dumping,\textsuperscript{476} normal value\textsuperscript{477} and export price,\textsuperscript{478} provides that ITAC is responsible for conducting anti-dumping investigations\textsuperscript{479} and that parties may apply to ITAC for anti-dumping protection.\textsuperscript{480} It contains various provisions on confidentiality,\textsuperscript{481} but does not contain any other substantive or procedural provisions.

The Anti-Dumping Regulations provide for the substantive issues, including the normal value methodology,\textsuperscript{482} constructed export price,\textsuperscript{483} margin of dumping,\textsuperscript{484} material injury\textsuperscript{485} and causality,\textsuperscript{486} as well as the procedural issues.\textsuperscript{487} The Act and Regulations are generally in line with the WTO Anti-Dumping Agreement and in some instances provide greater clarity,\textsuperscript{488} but are in violation of the Agreement in other respects.\textsuperscript{489}

The ADR supports ITA Act by providing any missing information and block loopholes that can help in the areas of substantive and procedural issues concerning anti-dumping.\textsuperscript{490}

As being stated above, the ITA Act is the core law on anti-dumping in South Africa; it generates an avenue to reconstitute the Board as a Commission.\textsuperscript{491} In the letters of the ITA Act, ‘the ministering make regulations:

i. Regarding the proceedings and functions of the commission, after consulting the commission.

ii. To give effect to the objective of this Act;

iii. On any matter that may or must be prescribed in terms of this Act.\textsuperscript{492}

\textsuperscript{476} Section 1 \textit{International Trade Administration Act}, 2002.

\textsuperscript{477} Section 32 (2) (b) ii) \textit{International Trade Administration Act}, 2002.

\textsuperscript{478} Section 32 (2) (b) i) \textit{International Trade Administration Act}, 2002.

\textsuperscript{479} Section 16 (1) (a) \textit{International Trade Administration Act}, 2002.

\textsuperscript{480} Section, 26(1) (c) (i) \textit{International Trade Administration Act}, 2002.

\textsuperscript{481} Sections 33-37 \textit{International Trade Administration Act}, 2002.

\textsuperscript{482} Section 8 \textit{Anti-Dumping Regulation} 2003.

\textsuperscript{483} Section 10 \textit{Anti-Dumping Regulation} 2003.

\textsuperscript{484} Section 12 \textit{Anti-Dumping Regulation} 2003.

\textsuperscript{485} Section 13 \textit{Anti-Dumping Regulation} 2003.

\textsuperscript{486} Section 16 \textit{Anti-Dumping Regulation} 2003.

\textsuperscript{487} Section 21-37 \textit{Anti-Dumping Regulation} 2003.

\textsuperscript{488} \textit{Brink} 2015, p. 8

\textsuperscript{489} \textit{Brink} 2015, p. 8

\textsuperscript{490} \textit{Joubert} case study 38 Managing the challenges of WTO participation

\textsuperscript{491} Section 7 \textit{International Trade Administration Act}, 2002.

\textsuperscript{492} Section 59(a, b, c) \textit{International Trade Administration Act}, 2002.
In the dissection of the ITA Act it is observed that it contains three schedules and 64 sections while the ADR is divided into three parts which makes it to comprise 68 sections.\textsuperscript{493} The ADR provides for other information that is relevant in the areas delving on representation by third parties, adverse parties meetings, confidential information and oral hearings.\textsuperscript{494} Furthermore, it makes provision on substantive issues such as determination of the margin of dumping, normal value, material injury, casualty, threat of material injury, material retardation of the establishment of an industry, lesser duty role etc.

Before there can be a probable publication of ADR, ITAC must verifiably rely on the anti-dumping agreement, the anti-dumping regimes of the EU, US, New Zealand and Australia as yard stick or prototype towards the realisation of drafting of ADR.\textsuperscript{495} The ADR additionally received support, background contribution from the USA, New Zealand lawyers, Canada as well as local legal practitioners and academics.\textsuperscript{496}

7.4 Training and Learning from other Jurisdiction

South Africa happened to be first country in African continent to promulgate anti-dumping legislation: however, it was the fourth country asides Australia, Canada, New Zealand to promulgate the said anti-dumping legislation in the world.\textsuperscript{497} Notably, south Africa has always engaged in the process of improving and revamping its anti-dumping law or system by going on the voyage of discovery to other jurisdiction with the a view to getting a purposely enhance technical capacity and legal knowledge and know-how that can bring substance to its anti-dumping measures and procedure and be in tandem with the WTO Anti-dumping Agreement. In a statement, brink state that:

Several staff members have attended course or workshops in Belgium, Korea, Switzerland and the U.S to improve the level of skills in the Directorate. The Rules Division of the WTO, the U.S Department of commerce, a U.S trade lawyer, Belgian trade lawyer and Dutch trade lawyers have conducted training course in South Africa,

\textsuperscript{493} Anti-Dumping Regulation 2003.  
\textsuperscript{494} Sections 2, 3-6 Anti-Dumping Regulation 2003.  
\textsuperscript{495} Joubert case study 38 Managing the challenges of WTO participation  
\textsuperscript{496} Joubert case study 38 Managing the challenges of WTO participation  
\textsuperscript{497} Brink 2012, p.2; Pam Nigeria Current Law Review 2007-2010, p. 46; Prusa Canadian Journal of Economics, 2001, p. 6
while a leading Belgium law firm extended a standing invitation to provide training to the Directorate’s staff. Two other Belgian law firms also conducted training sessions in Pretoria.\textsuperscript{498}

### 7.5 National Economic Forum (NEF): Collaborative Effort by Business, Government and Labour

In a bid to strengthen the national legislation on anti-dumping measures, the model culminated into formation of National Economic Forum (NEF) by businesses, Government and labour (workforce) of the South Africa.\textsuperscript{499} The above represent the body that since 1994 undertake a review of South Africa’s anti-dumping system in order to scrutinise and modify the previous dispensation of anti-dumping system to afford a comprehensive regime that is compliant with the WTO Anti-dumping Agreement.\textsuperscript{500}

NEF strictly applies reasons for national legislation for anti-dumping and countervailing measures to combat decadence of dumping and economic malpractice from foreign markets and to further establish an entity or institution to safeguard anti-dumping.\textsuperscript{501}

In 1996, the Board went a bit further to engage the public by stretching out invitations and comments to be contributed to reflect how economic decision can be influenced for growth enhancement in South Africa.\textsuperscript{502} In Joubert’s view, the NEF collaboration was formidable to the extent that:

Countries should always keep in mind that it’s the private sector that trades, not governments. A common problem faced by all countries is a lack of proper consultation between government and stakeholders to ensure that their concerns are addressed when government determines trade policies. It is important that a government establish opportunities for public-private dialogue in order to involve all sphere of society in its decision-making processes, as policy making cannot take place in a vacuum.\textsuperscript{503}

\textsuperscript{498} Brink 2012, p. 692-693
\textsuperscript{499} Joubert case study 38 Managing the challenges of WTO participation.
\textsuperscript{500} Brink 2012, p. 693
\textsuperscript{501} Joubert case study 38 Managing the challenges of WTO participation.
\textsuperscript{502} Brink 2004, p. 693
\textsuperscript{503} Joubert case study 38 Managing the challenges of WTO participation.
7.6 The Judicial and the Commission Reviews

With the aid of the provision of ADR, the commission\textsuperscript{504} has the tendency and task to conduct reviews of the anti-dumping duties.\textsuperscript{505} The set of reviews that the commission may incline to conduct based on the ADR are: interim reviews, sunset reviews, new shippers review and circumvention reviews.

In other circumstances, ADR gives an avenue for judicial reviews to be made subsequent to the commission review. The judicial reviews pave way for interested parties who could be aggrieved of the commission’s review to challenge same before a competent court which have jurisdiction on anti-dumping law.

The beauty of such judicial review as that the aggrieved party may prior to final investigation and determination by the commission bring afore the preliminary decision of the commission. Note that this does not affect or exclude the interested parties to bring before the court the final decision made by the commission.\textsuperscript{506} The formal way to bring the above complaint is by filing an application against the commission’s decision to the High Court for a review of the determination, decision or any case proposal as pronounced by the commission.\textsuperscript{507} The High Court is vested with the judicial power while carrying out its jurisdictional duty ‘to make an order for the payment of costs against any party, or against any person who represented a party in the proceedings according to the requirements of the law and fairness’.\textsuperscript{508}

Where the decision of the commission is being upheld by the High Court, appeal lies with the Supreme Court of Appeal or the Constitutional Court, with leave first sought and obtained (the leave in this instance means the permission of the high court for the appellant to proceed to the higher court and appeal such decision based on the judicial review).\textsuperscript{509} Therefore, the decision of the High Court is not absolute and such judgment can be appealed to higher for a further judicial review. The Magistrate Court also has stint of role to signal in the array of anti-dumping judicial system of South Africa concerning imposition of any penalty provided for under the ITA Act. Therefore, certain jurisdiction lies within the ambit of the Magistrate Court.

\textsuperscript{504} Used to be known as ‘the Board’
\textsuperscript{505} Sections 40-63 \textit{Anti-Dumping Regulation} 2003.
\textsuperscript{506} Sections 44-64 \textit{Anti-Dumping Regulation} 2003.
\textsuperscript{507} Section 46 \textit{International Trade Administration Act}, 2002.
\textsuperscript{508} Section 46(3) \textit{International Trade Administration Act}, 2002.
\textsuperscript{509} Section 56 \textit{International Trade Administration Act}, 2002.
In the case of ITAC V. SCAW\textsuperscript{510}, there was a legal obscurity in the interpretation of the duration and procedure for the review in a case of anti-dumping duties. The High Court and Constitutional Court of South Africa were brought to give a legal opinion on the subject matter. In the aforementioned case, the minister for Trade and Industry (Minister) imposed as at 2002 anti-dumping duties on rope, stranded wires and cable of steel which emanated from foreign producers. The decision was surveyed and imposed grounded on the observation and recommendation submitted by the Board on Tariffs and Trade (now called ITAC). SCAW, which happened to be the Applicant/Respondent, was the steel products manufacturer in South Africa. The duties imposed for a five-year period as at 2007 and prior to the expiration, SCAW convey a request to ITAC for a commencement of a ‘Sunrise Review’ with the purpose to retain the duties in position.

ITAC put headlong to the Minister in 2008 that anti-dumping duties characterised wit Bridon UK’s products be abolished. SCAW became aggrieved of such recommendation subsequently brought litigation before the High Court where it prayed and court granted:

i. An order stopping ITAC from transmitting its recommendation to the Minister for consideration, pending the final determination of SCAW’s application for the review of the recommendation.

ii. An order preventing the Minister and the Minister of Finance from performing their respective obligations in respect of the recommendation.

ITAC rejected the decision of the High Court and filed an appeal before the Constitutional Court and held that:

> That the interim interdict was final in effect and that it caused irreparable harm. The interests of justice therefore dictated that the interim interdict be appealable… that leave to appeal against the interim interdict should be granted as it implicated questions of separation of powers and South Africa’s international trade obligations, issues which are not the subject of SCAW’s pending review application in the High Court… that decisions regarding the setting or lifting of anti-dumping duties are patently within the domain of the executive, and that the interdict prevented the Ministers involved from

\textsuperscript{510} \textit{International Trade Administration Commission v SCAW South Africa (Pty) Ltd (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC).}
performing their legislative functions. It was inappropriate for the High Court to grant the
interdict, because it improperly breached the doctrine of separation of powers.\textsuperscript{511}

It is obvious that the court was actively involved in the interpretation and resolution of cases
involving foreign producers and domestic industries in South Africa which signaled the scenario
of international trade related issues that can afford a full avenue for application of anti-dumping
law in South Africa.

7.7 Research and Publications

In the developing a legal system of a country, research and publications usually play a notable
role in the scheme; same is applicable to the development of anti-dumping system in South
Africa. In the statement of Brink, anti-dumping system of South Africa between 1992 and 2004
encountered a momentous and series of studies and publications. A couple of research studies
delved into by university student concerned the anti-dumping system, comparative analyses
where textbooks were written by scholar making on focus on South Africa specific substantive
and procedural guidelines used and implemented in different countries on anti-dumping system,
series of newspaper articles, and internal document documents untied by the Directorate.

Brink further stated that, series of legal opinions evolved to the account of the Board from the
quarters of the State Attorney with view to getting around questions resting on application of
provisional measures, the compatibility of South African public law wit international law and
other similar questions. Brink believes that the legal opinions given by the State Attorney on the
account of the Board must have been requested when it came to the notice of the Board that the
procedures used by it are not in tandem with international practices and obligations, hence, a
move to remedy the nonconformity in the international scene.\textsuperscript{512}

7.8 Engaging WTO Technical Assistance and Capacity Building Initiative

Of the WTO’s 142 Members and 30 acceding observers, 80% are developing countries. The
development dimension therefore has to be, and is, a central element in the WTO’s activities.
WTO technical assistance and training are delivered through a variety of different channels.

\textsuperscript{511} Per Moseneke DCJ in ITAC v SCAW.
\textsuperscript{512} Brink 2012, p. 733-736
WTO technical assistance activities essentially consist of two core activities: providing legal and economic advice and training in the purpose and implementation of WTO agreements. Developing countries’ needs, trading experiences and capacities are extremely diverse; so are their needs for trade capacity building. The ingenuity is at per with the Doha Ministerial declaration:

We confirm that technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system, and we welcome and endorse the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration. We instruct the Secretariat, in coordination with other relevant agencies, to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty reduction. The delivery of the WTO technical assistance shall be designed to assist developed and developing countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system.\(^{513}\)

The role of the division is ‘to ensure the smooth functioning of all WTO bodies serviced by the division. This includes facilitating news and on-going negotiations and consultations, monitoring and actively assisting in the implementation of WTO agreements in the areas of anti-dumping, subsidies and countervailing measures, safeguards, trade-related investment measures, state-trading and civil aircraft. It also includes providing all necessary implementation assistance, counseling and expert advice to WTO members concerning the above agreements, providing secretaries and legal officers to WTO dispute settlement panels involving these agreements and participating in the WTO technical assistance programme’.\(^{514}\)

The bodies serviced by the Rules Division include the Negotiating Group on Rules, the Committee on Anti-Dumping Practices amongst others.\(^{515}\)

\(^{513}\) Doha WTO Ministerial Declaration 2001 WT/MIN(01)/DEC/1.
\(^{514}\) World Trade Organisation 2014 Secretariat and Budget.
\(^{515}\) World Trade Organisation 2014 Secretariat and Budget.
More importantly, the South African has importantly benefitted in no small measure on anti-dumping system from the technical assistance of the Rules Division of the WTO with a view to aligning its procedures and practices in line with the ADA.
8 CONCLUSION

This research shows that dumping in international trade manifests where imported product is sold below a normal market price to such an extent that it affected adversely or caused injury to the domestic industry that produces like product. As the part of WTO’s aim and objectives, it encourages Members States to embrace trade liberalisation to enhance economic growth. However, such scheme has encountered abuses when countries indulge in unfair trade practice (predatory dumping) which is devoid of competition towards the economy of the importing Member States.

Furthermore, WTO prohibits the use of technical barriers that create unnecessary obstacles to trade; such barriers are usually employed by the Member States to protect domestic industry from dumped imports by foreign exporters. Thus, the WTO anti-dumping measures (AD Agreement) come handy as recognised trade remedies to curb dumping excesses. Whilst implementing the provisions of AD Agreement, Member States must take into cognizance the substantive aspect of AD Agreement such as determination of dumping, determination of injury, definition of domestic industry, and the procedural aspect of same such as initiation and subsequent investigation, evidence, provisional measures, price undertaking, imposition and collection of anti-dumping measures amongst other.

It is worthwhile for a Member State to incorporate anti-dumping law into its national legislation, however, no WTO Member State is under obligation to nationalise WTO Anti-Dumping Agreement. Once a Member State decides to enact the anti-dumping law as part of its national legislation, it must be consistent with the provisions of the WTO AD Agreement.

Without a viable anti-dumping law in Nigeria, the country lacks trade remedies to address the incursion of predatory dumping that could be inimical to the economic growth of the country. Therefore, the Anti-Dumping Bill, 2010 (as trade remedies) is imperative because the WTO Member States are prohibited from employing technical barrier to protect the domestic industry against foreign competition.

The research revealed that the Nigerian proposed regulatory regime fails the litmus of consistency with the objectives of the WTO AD Agreement. The Bill is fraught with flaws ranging from omission and failure to interpret terms such as anti-dumping measures and how it
can be determined. Other terms that are interpreted in the Bill such as dumping, export price, interested parties, normal value and related parties are inconsistent with the objectives of the WTO AD Agreement.

In summary, the substantive and procedural features of the Bill betray the objective of the WTO AD Agreement and make impossible implementation of the proposed Nigerian anti-dumping regime without violating the objectives of the WTO AD Agreement because some provisions contained therein are not consistent with its obligation under the WTO AD Agreement.

Although, Nigeria legal system is based on Common Law\textsuperscript{516} while South Africa legal system is a hybrid of Common Law and Civil Law.\textsuperscript{517} This informed the writer’s view to adopting functional method (focus on the practical effect and purpose of rules) of comparative legal science to explore the experience under South Africa’s current anti-dumping regime and how lessons learned thereafter can be used to remedy the flaws contained in the Nigerian Anti-Dumping and Countervailing Bill, 2010.

From the above research, the writer discovered that South Africa’s current anti-dumping regime strives to be consistent with the objectives of the WTO AD Agreement in the following way:

i. South Africa’s antidumping legislation dates back to 1914, making it the fourth country after Canada, New Zealand, and Australia to adopt specific anti-dumping legislation. South Africa was one of the founding members of the original GATT Treaty that came into force in 1947. South Africa committed itself, in accordance with the agreements reached during the Uruguay round to the lowering of tariffs and moving away from the protectionist regime.\textsuperscript{518}

ii. South Africa’s current anti-dumping regime set out regulatory legislations as contained in the International Trade Administration Act with the detailed provisions that define dumping, normal value, and export price incorporated in the subordinate Anti-Dumping Regulation (ADR) to ‘enable gradual transition towards consistency with the provisions of Anti-Dumping of 1994. This entailed comprising definition of dumping, normal

\textsuperscript{516} Asein 1998, p. 241.
\textsuperscript{517} Lenel 2002, p. 7.
\textsuperscript{518} Joubert case study 38 Managing the challenges of WTO participation; Theron 2007, p. 3.
value, export price and fair comparison constant with anti-dumping agreement. There are also specific provisions in the Customs Act that directly deal with anti-dumping, all play a role in investigations, specifically ensuring access to non-confidential information and a fair administrative process, including transparency of proceedings.

iii. South Africa created institutions for the administration of its anti-dumping regime and the accompanying legislation. The International Trade Administration Commission (ITAC) with the exception of the final determination and the implementation thereof is responsible for all aspects of investigation; while Custom has been responsible only for implementing and administering any anti-dumping duties.

iv. South Africa’s anti-dumping regime thrives better by learning from other jurisdictions through sending staff members of its institutions to attend courses or workshop in Belgium, Korea, Switzerland and the U.S.A to enhance the country’s technical capacity and legal knowledge on procedural and substantive anti-dumping measures as they relate to AD Agreement. There has been series of training in South Africa by experts in the aspect of anti-dumping law form other jurisdictions. The aim of the above is to ensure how regulations that have successfully practiced in other jurisdiction can be introduced into the South Africa legal system.

v. South Africa further engages in the WTO technical assistance and capacity building initiative for developing countries. It provides advice and training for the purpose and implementation of WTO Agreements.

vi. In a bid to protect the country’s economic interest, there are collaborative efforts among the private sectors, government and labour force in South Africa known as National Economic Forum on how to strengthen the established institutions against predatory dumping. It plays role of consultation between government and stakeholders on trade policies and application of national legislation for anti-dumping.

vii. Development of anti-dumping system in South Africa is notably influenced by research and publication. Between 1992 and 2004, series of research, publication in form of textbooks, articles in journals written by scholars who made comparative analyses suggesting specific substantive and procedural guidelines to the South African government officials and institutions on anti-dumping system.

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519 Brink 2015, p. 6
The above anomalies in the Bill drives this research to take a look into the South Africa’s experience on the developed and regulated anti-dumping system and how such legislation can influence Nigeria in its effort to enact national legislation on anti-dumping with the aim of being consistent with the WTO AD Agreement.

In the light of the above defects attributed to the Anti-Dumping and Countervailing Bill 2010, the writer hereby recommends the following solutions to remedy the flaws in the Bill; Nigeria is encouraged to:

i. Extract from the South Africa’s experiences and rely largely on some factors such as: legal transplant from other jurisdictions for a well-structured legislation on Nigerian current anti-dumping regime and a gradual transition towards consistency with the provisions of the WTO AD Agreement.

ii. Partner and cooperate with effort from South Africa on Trade Law Centre (TRALAC) founded in South Africa whose goal is set on capacity building especially on trade related development in the Southern and Eastern region. A suggested coalition will greatly enhance Nigeria in the area of capacity building to enhance both its economic and legal growth.

iii. Engage and consult experts in the field of anti-dumping legal system to enable remedy any institutional abnormalities.

iv. Fast-track collaborative efforts among the private sectors, government and labour force. This improves progressive consultation between the government and the private sector on trade policies and application of national legislation for anti-dumping. Such steps make possible a review of anti-dumping system that accommodates the private sector’s interest.

v. Build institutional structure for the administration of its anti-dumping regime and the accompanying legislation for an adequate investigation, final determination and the implementation of anti-dumping duties.
vi. Invest on research for viable development of anti-dumping system. The effect is that there would be series of research and publication in form of textbooks, articles in journals written by scholars from research institutes making comparative analyses suggesting specific substantive and procedural guidelines to the government officials and institutions on anti-dumping system.

If the above recommendations are followed, Nigeria will have an anti-dumping regime (substantive and procedural aspect) that is compliant with its objectives under the WTO AD Agreement. The trade remedies available to investigate, determine and implement anti-dumping duties (where applicable) will be fair to the local industry and exporters. The country would largely benefit from the success recorded in the anti-dumping system of other jurisdiction as well as capacity building in that regard.