THE EFFECTS OF EXCHANGE RATE FLUCTUATIONS ON THE DETERMINATION OF ANTI-DUMPING MEASURES IN SOUTH AFRICA

By

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DECLARATION BY STUDENT

I declare that the thesis entitled, “The effects of exchange rate fluctuations on the determination of anti-dumping measures in South Africa” is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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ABSTRACT

The main aim of this thesis is to investigate the effects of exchange rate fluctuations on the determination of anti-dumping measures in South Africa. The provisions of Article 2.4.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (commonly referred to as "the Anti-dumping Agreement" or "ADA (1994)"), which explain how exchange rate fluctuations should be assessed in calculating anti-dumping measures, are problematic as they are opened to different interpretations. Due to the limited guidance in Article 2.4.1 of the ADA (1994), investigating jurisdictions evaluate each inquiry on a case-by-case basis and to their own advantage. This often results in an unfair calculation of various anti-dumping measures against foreign exporters and countries, leading to a large number of disputes and the lodging of appeals with the World Trade Organisation (WTO) Appellate Body. This thesis investigates these issues using two case studies based on information obtained from non-confidential applications submitted to the International Trade Administration Commission of South Africa (ITAC) by industries within the Southern African Customs Union (SACU). This study confirms that the way in which exchange rate fluctuations are calculated can have a significant effect on the size of the anti-dumping penalties applied by the authorities. The study also shows that the public interest and the welfare effects of anti-dumping measures on consumers are not considered by the authorities in determining such measures. The study recommends that policy makers review Article 2.4.1 of the ADA (1994) with a view to standardising the way in which exchange rate fluctuations are dealt with in the determination of anti-dumping duties and to consider the welfare effects of such measures on consumers and the public at large.

Keywords:

Exports; duties; investigation; injury; exchange; fluctuation; date of sale; currency; market

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LIST OF ABBREVIATIONS

AC	Average cost
AD	Anti-dumping
ADA	Anti-dumping Agreement or the Agreement
ADC	Anti-Dumping Code
ADD	Anti-dumping duty
ADM	Anti-dumping measure
ADR	Anti-Dumping Regulations
ATC	Average total cost
BC	Below costs
BLNES	Botswana, Lesotho, Nambia, Eswatini
Brazil	Federative Republic of Brazil
BADL	Brazilian Anti-Dumping Law
BADRD	Brazilian Anti-Dumping Regulation Decree
BoFT	Bureau of Fair Trade for Imports and Exports
BTIA	Board on Trade and Industries
BTI	Board on Trade and Industries
BTT	Board on Tariffs and Trade
China	People’s Republic of China
CIF	Cost, insurance and freight
CEU	Council of the European Union
CEC	Commission of the European Communities
CFR	Code of Federal Regulations
COM	Cost of manufacturing
Customs Act	Act 91 of 1964
DDI	Directorate of Dumping Investigations
DSU	Dispute Settlement Understanding
EU	European Union
EUADR	European Anti-dumping Regulations
EEC	European Economic Communities

Egypt	Arab Republic of Egypt
FC	Fixed costs
FE	Financial expenses
Fob	Free on board
GE	General expenses
GATT	General Agreement on Tariffs and Trade
IIP	Injury investigation period
ITA	United States International Administration
ITA Act	Act 71 of 2000
ITAC	International Trade Administration Commission of South Africa or the Commission
MC	Marginal cost
MTN	Multilateral trade negotiations
NME	Non-market economy
NZADL	New Zealand Anti-Dumping Law
NTB	Non-tariff barrier
NV	Normal value (Domestic selling price in the country of export)
PAIA	Promotion to Access to Information Act
PAJA	Promotion of Administrative Justice Act
PoI	Period of investigation
R & D	Research and development expenses
RoU	Record of understanding
RSA	Republic of South Africa
SAADL	South African Anti-Dumping Law
SADC	Southern African Development Community
SARS	South African Revenue Service
SFRY	Socialist Federal Republic of Yugoslavia (SFR Yugoslavia)
SG&As	Selling general and administration expenses
TC	Total cost

UNCTAD	United Nations Conference on Trade and Development
URAA	Uruguay Round Anti-Dumping Agreement
URAC	Uruguay Round Anti-Dumping Code
US	United States of America
USADL	United States Anti-Dumping Law
USDoC	US Department of Commerce (Commerce)
USITC	US International Trade Commission
VC	Variable cost
VoC	Voucher of correction
WTO	World Trade Organisation

CHAPTER 1: GENERAL INTRODUCTION

1.1 Context and background

Following the collapse of the Bretton Woods fixed exchange rate system which lasted from 1946 to 1973, exchange rates became highly volatile. Under the globally managed floatingexchange rate system that has prevailed since 1973, exchange rates are determined by the interaction between the demand and supply of currencies in foreign exchange markets (Krugman, 1987:1). Many studies evaluate the relationship between exchange rate changes and the volume of imports. However, to the author's knowledge, there are no empirical case studies that study the link between exchange rate variations and the calculation of anti-dumping measures, in South Africa specifically.

Following South Africa's transition under apartheid to the international community, economic sanctions were lifted. This situation led to trade liberalisation where tariffs were lowered and aligned to those of developing countries. Many countries, including South Africa, have increasingly turned to non-tariff barriers (NTBs) such as anti-dumping measures to protect their local industries. Such NTBs were used both legitimately to protect local industries harmed by unfair trade practices such as predatory dumping, but also in many cases to shield such industries from legitimate foreign competition (Joubert, 2005:2, quoted from Barral et al., 2004:51). The need for NTBs increased in the United States (US) during the 1980s (Stallings, 1993:493, quoted from Corden (1987:3). Another reason often given for protection is the infant industry argument. Pugel (2016:230) found that there is a need for infant industries to be protected. It is argued that protecting such industries will enable them to grow and compete internationally in the absence of tariffs. It is also stated that although infant industry protection is needed temporarily, it differs from the optimal tariff argument and is dynamic. It is argued that because infant industries do not have the economies of scale to compete with foreign manufacturers, protecting these industries will prevent harm resulting from cheap imports. This will lead to an increase in domestic production, consumption,

employment and government revenue. It is true that this type of protection is dynamic because infant domestic producers “learn by doing” during the manufacturing process. At the beginning, they are unable to produce at a lower cost per unit, but end up overcoming inefficiencies. However, there is also a disadvantage associated with affording protection to infant industries. The industries could face retaliation from other foreign manufacturers through trade diversion. Anderson and Thuresson (2008:6) found that when the imports which were subject to investigations decrease, the domestic market share and imports from a third country increase. When there are anti-dumping measures (ADMs) in place against dumped imports, the products subject to investigations become more expensive in the domestic market of the importing country. Consumers in the importing domestic country will still be eager to purchase products, but at the lowest possible price. Exporters from other countries will also benefit, as their products will be relatively cheaper and have a larger market share in the domestic importing country, since no ADMs are imposed against them.

It is argued that apart from trade diversion, there are other disadvantages of affording infant industries protection. First, infant industries could face retaliation from exporters who are ignoring rules of origin. The Agreement on Implementation of ArticleVI of the General Agreement on Tariffs and Trade 1994 (commonly referred to as the“Anti-dumping Agreement” or “ADA (1994)”) defines “rules of origin as those laws, regulations and administrative determinations of general application applied to determine the country of origin of goods except those related to the granting of tariff preferences. Rules of origin are therefore needed to attribute one country of origin to each product and for implementing other trade policy measures, anti-dumping measures and countervailing duties”. Determining where a product comes from is not easy when raw materials and component parts are used as inputs in many different manufacturing plants across the globe. Second, protection given to infant industries is in practice often difficult to remove. Entrenched interests in the protected industries will always lobby the government to prevent the removal of protective tariffs by claiming injury from imports where none exists. Dumping is defined as the sale of a foreign good in the domestic market at a lower price

than in the exporter's home market. The determination of whether dumping has occurred is made by comparing the normal value (NV) also referred to as "domestic selling price inthe country of export") with the export selling price. Willig (1998:59) explains that toestablish dumping, there should be 2 different national markets where identical products are sold at different prices. Adjustments such as transport, freight and insurance costs etc. must be accounted for in order to arrive at ex-factory levels. Salvatore (2004:280) explains dumping in terms of its classification as persistent, predatory or sporadic.

Persistent dumping is the continuous and long-term sale of a product by the exporter in the importing domestic country at a lower price than in its home market, with the aim of maximising profits. By continually selling in the importing country, the exporter acquires the market share and ends up being a monopolist. For persistent dumping to be effective, the demand for the product in the importing country should be constant and the price should be elastic.

Predatory dumping takes place when an exporter sells its product in a foreign market below cost, with the intention of putting the domestic producers' importing market out of business. The provisions of the ADA (1994), however, do not prohibit an exporter from selling products in the export market at lower prices than it does in its home market. If an exporter sells an identical good in a foreign market at a lower price than it does in its domestic market, this is not considered illegal and is not discouraged by the anti-dumping law (ADL). It is argued that trade restrictions such as anti-dumping measures (ADMs) are needed to protect domestic industries against injury caused by dumped imports. It is also stated that it is not easy to establish the type of dumping, and that domestic manufacturers lobby for authorities to impose ADMs against exporters in order to limit imports and increase domestic production and profits. To counteract predatory dumping, the ADA (1994) clearly states that before authorities can impose ADMs against foreign exporters and countries, there should be proof of dumping and injury suffered by the domestic industry, as well as a causal link between dumping and injury to a domestic industry.

Sporadic dumping takes place when the exporter sells its surplus stock in the importing domestic country at below cost or lower prices than it does in its

domestic market. This type of dumping is occasional and the aim of the exporter is to sell surplus stock without reducing domestic prices. Loehr (1997:12) found that the injury in the importing industry is not significant as the intention of the exporter is not to dump product. This type of dumping can be occasional and short-term because the exporter has the surplus inventory which it needs to export to the importing domestic country. Unlike predatory dumping where the exporter has the predatory intention to dump its rivals, the intention is not to eliminate competition in the importing domestic country. Instead, the aim is to sell its product, realise a lower profit margin, and to cover its marginal costs. To calculate ADMs, investigating jurisdictions must perform a conversion of the NV or export selling price, using exchange rates within the investigation period of dumping (Kim, 2000:9). This thesis investigates the relationship between exchange rate variations and the determination of anti-dumping measures in South Africa using selected case studies from the International Trade Administration Commission of South Africa (commonly referred to as the "ITAC") as examples.

1.2 Problem statement

Notwithstanding the fact that there is an international anti-dumping law in place, which sets the use of exchange rates during calculation of dumping measures, it does not provide much flexibility to investigating jurisdictions. There is an increase in the number of litigations and appeals lodged with the World Trade Organisation (WTO) Appellate Body by various investigating jurisdictions involving the potential misuse of exchange rates in the determination of anti-dumping dumping measures. The provision of Article 2.4.1 of the ADA (1994) stipulates that:

"When the comparison requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall

allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates duringthe period of investigation".

Exchange rate distortions may result in an inappropriate calculation of anti-dumping measures, thereby penalising a foreign exporter unnecessarily, and disadvantage domestic consumers due to higher import prices than would otherwise have been the case. If the domestic currency appreciated significantly during the investigation period, the selling prices would be much lower than would otherwise have been the case. This could result in accusations of dumping and the imposition of higher anti-dumping duties compared to a situation where the exchange rate was relatively stable. Although the exporter is allowed considerable time to adjust export prices to reflect sustained movements in exchange rate fluctuations during the investigation, this may prove difficult to do in practice. These problems are most pronounced in trade between developed and developing/emerging market economies. Exchange rates between the currencies of developed economies such as the US, European Union (EU), United Kingdom (UK) and Japan are much more stable than between developed and emerging market economies such as South Africa (For example, the South Africa Rand (R)/US$ exchange rate is far more volatile than that of the Euro (€/US$).

1.3 Hypothesis and research questions

The basic hypothesis in this study is that the way in which trade jurisdictions treat currency movements in their dumping investigations may have significant effects on the calculation and imposition of anti-dumping measures. The specific research questions are:

(i) How do changes in the exchange rate influence the calculation of anti-dumping measures?

(ii) Why do differences in anti-dumping duties due to exchange rate fluctuations matter?

(iii) What has been the international experience in dealing with the effects of exchange rate changes on the determination of ADMs?

How does the ITAC in South Africa deal with currency movements in its dumping investigations?

(iv) How, if at all, would the ITAC's dumping determinations differ if it used alternative ways of accounting for exchange rate fluctuations?

1.4 Objectives

The main objective of this study is to explain the relationship between changes in exchange rates and the determination of ADMs in South Africa. The following are important:

(1) To protect domestic industries against injurious imports, ADMs must be imposed against exporters and countries. The ADA (1994) states that when calculating ADMs, there must be a price comparison between NV and export selling price. Such a comparison requires conversion of currency between the 2 prices in either the exporter or importer's currency. Exchange rate changes influence the calculation of NV and export selling price and the subsequent determination of ADMs and the level of protection offered to domestic industries (See Chapter 5, Tables 5.2 to 5.3 in the text and Tables 5.7 to 5.17 in the appendices; Tables 5.5 to 5.6 in the text and Tables 5.18 to 5.28 in the appendices.).

(2) Differences in ADMs emanating from incorrect application of exchange rates will result in exporters being unfairly penalised and the domestic industries benefitting unnecessarily by way of getting high anti-dumping duties in their favour. The incorrect calculations of ADMs will also result in investigating jurisdictions lodging litigations against each other based on different ADMs imposed against exporters and countries. The ADA(1994) states that "Members may challenge the imposition of anti-dumping measures and can raise all issues of compliance with the requirements of the ADA (1994) before a panel is established under the DSU. A failure to respect either the substantive or the procedural requirements can be taken to dispute settlement and may be the basis for invalidation of the measure".

(3) Calculating accurate values of exchange rates during dumping

investigations by investigating jurisdictions is difficult in the absence of a proper guideline, as this always results in investigating jurisdictions applying exchange rates to their advantage. West (1991:106) found that the determination of proper ADMs means that those industries which need anti-dumping protection against dumped imports will be protected and those found not to be dumping during investigations will not be unfairly penalised.

The following investigations confirm, amongst others, how the different exchange rates have distorted the calculation of ADMs. See Sub-section 4.2.2.1 in Chapter 4.

In the matter regarding ***Melamine Chemicals, Inc., Appellee, v. the United States, Appellant***, the USCIT"), the United States Court of Appeals, Federal Circuit delivered judgements in 1984. The details of the case were as follows:

In 1979, the United States Department of Treasury (commonly referred to as "Treasury Department") initiated an anti-dumping investigation against Melamine Chemicals, Inc (Melamine) on imports of Melamine in Crystal Form from the Netherlands. Melamine was found not to be dumping the subject product in the United States of America (US) during the PoI and the Treasury Department therefore published the negative determination. Following its assumption of the Treasury Department's role in anti-dumping investigations, the Department of International Trade Administration (ITA) concluded that the Treasury Department had erred in not finding Melamine to be dumping the product in the US. It amended the determination and found Melamine to have dumped the subject product in the US market during the PoI. In challenging the determination, Melamine argued that ITA was not supposed to apply exchange rates from the quarter before the anti-dumping duty was imposed. ITA argued that the substantial exchange rate variations during the PoI was the reason why it considered exchange rates in the preceding quarter, and that it was not feasible for the exporter to anticipate future exchange rate fluctuationsat the time it was setting an export price. The judgement was that the ITA should have used exchange rates for the quarter in which the product subject to investigation was exported (Kennedy, 1986:28-29, quoted from Melamine Chemicals, Inc., Appellee v, the United States, Appellant, 732 F.2d 924d at 925-926 (Fed, Cir

1984); US Department of Commerce: 1997 (See 19 C. F. R. 353.60(b) (1989); Melamine Chemicals, Inc., v the United States, Appellant, Amendment of final determination, Fed. Reg 45. no. 29,619; 29, 620 (1980).).

In the anti-dumping investigation on ***Porcelain-on-Steel Cooking Ware from Mexico v United States,*** two exchange rates, namely the official or government-controlled exchange rate and the free exchange rate for Mexico, were certified and published by the Federal Reserve and the Treasury Department. To calculate export prices during the PoI, Commerce converted the official exchange rates from Mexican Peso into US$. This is because of the official exchange rates being considered as the actual exchange rates that the Mexican exporters legitimately use (US Department of Commerce, 1986: Porcelain-on-Steel Cooking Ware from Mexico, 51 Fed. Reg. at 36,435)

In Luciano Pisoni Fabbrica Accessori Instrumenti Musicali and Enzo Pizzi, Inc., Plaintiffs v the United States, Defendant, the USCIT delivered its judgement on 12 June 1986. The details of the case were as follows:

The Plaintiffs, an Italian producer of Woodwind Instrument Pads in Italy and its United States importer, challenged the final determination by Commerce on Pads for Woodwind Instrument Keys from Italy at less than fair value. In the investigation, Commerce found that there were no unexpected movements in exchange rates during the PoI, but rather a steady increase in the US$ value relative to the Lira, which is the exporter's home market currency. The plaintiff argued that Commerce should haveused an appropriate currency conversion approach for its domestic sales that eliminates dumping margins (Luciano Pisoni Fabbrica Accessori Instrumenti Musicali Enzo Pizzi,Inc., Plaintiffs v the United States, Defendant, 640 F. Supp 255 (Ct. Int'l Trade 1986). ThePlaintiffs further objected to the decision, citing the ruling in Melamine Chemicals Inc. v.United States, in which USCIT determined that the dumping margin should have been calculated using exchange rates for the quarter in which the exporter set its prices, ratherthan the quarter prior to the investigation (See Sub-section 4.2.2.1 in Chapter 4.). Despite the volatility in exchange rates, the USCIT maintained that the United States Anti-Dumping Law (USADL) would be violated if Commerce used quarterly exchangerates to calculate the ADM and found no

dumping (West, 1991: 112, quoted from Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v United States, 640 F. Supp255 (Ct. Int'l Trade 1986)).
(4) The ITAC in all its investigations considers 12-months average exchange rates (See Table 5.2 and Table 5.5.). Although the ADA (1994) allows investigating authorities to use specific ways of dealing with changes in exchange rates, the fact that the anti-dumping law is not well-defined means that the ITAC has discretion to use alternative exchange rate methods, including average exchange rates, when calculating anti-dumping duties.
(5) Should the ITAC use exchange rates at the beginning of the period of investigations or alternatively ignore variations in exchange rates by using exchange rates in each month of the investigation periods, the ADMs would differ. The ADMs calculated for both applications confirm this explanation (See Chapter 5, Table 5.3 in the text and Tables 5.7 to 5.17 in the appendices; Table 5.6 in the text and Tables 5.18 to 5.28 in the appendices.).
In particular, this study will investigate whether exchange rate fluctuations have led to the imposition of either higher or lower ADMs than would otherwise have been the case, with reference to actual dumping and Sunset Review applications submitted to the ITAC by the domestic industries concerned. To this end, the study will first provide a thorough review of the relevant literature on dumping in the context of international trade theory and policy; set out and explain the main provisions of the ADA (1994); and give some background on the international experience and problems encountered in the practical implementation thereof.

1.5 Research method

The methodology used here to investigate the relationship between exchange rate fluctuations and the determination of ADMs relies on empirical case study analysis. Both qualitative/descriptive and quantitative analyses are used. However, no econometric models and estimations are employed in the analysis of the data. The literature review is based on secondary internet sources, journal articles, books and theses. The empirical analysis is based on the information gleaned from 2 non-confidential applications submitted to the ITAC by the

Southern African Customs Union (SACU)'s domestic industries. The 2 case studies were selected as they exemplify the effect that changes in exchange rates can have on the determination of ADMs (See Chapter 5, Tables 5.2 and 5.3 in the text and Tables 5.7 to 5.17 in the appendices; and Tables 5.5 and 5.6 in the text and Tables 5.18 to 5.28 in the appendices.). Data used for the calculation of NVs, export selling prices and exchange rates were obtained from the non-confidential applications submitted to the ITAC by domestic industries. The reason why the data from the applications were used is that the non-confidential applications were simpler to obtain, as they are publicly accessible documents issued to interested parties for comment. It was also challenging to obtain this type of data from other authorities because of the sensitivity of the information.

To determine the correctness of information on exchange rate data and export selling prices for the investigation periods in the applications, the ITAC obtained similar information from the OANDA Corporation (2014), Fx-rate (2016) and SARS (2014 & 2016). This information is reliable because it was used by the ITAC *as prima facie* evidence to initiate the 2 investigations. The information is dependable, as it was forwarded to importers and exporters for their comment, including governments of the alleged countries involved in investigations. The information is also dependable because it was published in the *Government Gazettes* (Republic of South Africa, 2014a & 2017). Furthermore, the information was submitted to the WTO and included in the WTO's semi-annual reports (Committee on Anti-Dumping Practices, 2016:2 & 2018:3).

The comprehensive research and analysis by other authors in the study and comparative analysis of the way investigating authorities use exchange rate variations during anti- dumping investigations are significant in establishing the relationship between exchange rate fluctuations and the determination of ADM in South Africa.

The ADA (1994) stipulates that when performing currency conversions during an investigation period, fluctuations in exchange rates should be ignored. However, like some other jurisdictions, the ITAC tries to smooth out such currency movements by taking a 12-months average of the exchange rate. In each of the

case studies outlined below, the currency conversions and calculation of anti-dumping duties is done by:

(i) Taking the 12-months average exchange rate, as done by the ITAC (The actual determinations in each case);

(ii) Taking the average exchange rate in the first month of the investigation periodapplying this rate to the rest of the investigation; and

(iii) Ignoring currency movements and using the ruling exchange rates in each monthof the investigation period.

The effects of each of these different ways of dealing with currency movements on the calculation of ADM will then be compared for each case study.

Each application has its own investigation period of twelve months. The first application concerns the allegation of dumping of Wheelbarrows originating in or exported from the People's Republic of China (China) over the investigation period 1 February 2013 to 31 January 2014. The purpose of the application was to request the ITAC to investigate whether imports of wheelbarrows originating in or imported from China were being sold at dumped prices, thereby resulting in material injury to the SACU domestic industry (ITAC, 2014a). The second application was with respect to the Sunset Review of the ADM that is in place against imports of Unframed Glass Mirrors originating in or exported from Indonesia over the investigation period 1 July 2015 to 30 June 2016. The purpose of the application was for the ITAC to review and determine whether withdrawal of the duty imposed against imports of unframed glass mirrors exported from Indonesia would likelylead to the continuation or recurrence of dumping and material injury to the SACU domestic industry (ITAC, 2016).

1.6 Literature survey

This section gives a brief review of the topics and issues around dumping determinations and the key sources used in the explanation thereof. The effects of exchange rates changes on the calculation of ADMs is a challenging topic in international trade and the least investigated. Understanding the protection offered to domestic industries through the imposition of ADMs is complex as it

requires interpretation of the different provisions of the ADA (1994) and domestic legislation. The literature study will cover some of the analyses made by other authors who have key knowledge and contributed to such a study internationally.

Krupp (1990: iv) explains that when there is depreciation of the foreign currency, dumping will occur and, following the imposition of ADMs, domestic prices will increase and the exporter's market share will decrease (and vice versa for foreign currency appreciation). The author agrees with the above study, in that depreciation of the foreign currency leads to an increase in exports. As exports become more competitive, there will also be an increase in the quantity that is demanded at lower prices, thereby resulting in the dumpingof foreign products in the importing market. He found that if the exporter's foreign currency appreciates unexpectedly, the foreign firm may choose to increase its salesto the importing domestic market for the next period. Even though the foreign firm can increase its foreign output in anticipation of export sales during currency appreciation, this would not be a viable option. When there is a dumping investigation initiated against an exporter and a country, exporting will be to its disadvantage, as there will most probably be preliminary measures in place to protect domestic industries. The justifiable option would only be applicable if the exporter were to submit a price undertaking to the importing investigating authority following preliminary determination, in which it undertakes to revise its prices to be equal to or higher than the product subjected to the investigation. The author also found that if firms make output and sales allocations for their respective markets before knowing the exchange rate change, there can be no reaction to exchange rate change. If the exchange rate is known, as confirmed by Krupp(1990:29), the firm's revenues will be affected in line with the exchange rate that it obtains. Although this is true, however, when the exporter has perfect information on pricing and products in a particular market, whether exchange rate information is known or not does not matter, as it is certain of the profits that will be realised from its sales. In most instances, such a situation takes place where the exporter's market is foreclosed to foreign rivals and has a cost advantage resulting in low export prices.

This explanation is consistent with the Stackelberg (1934) duopoly model in

which an exporter decides his actions based on what the domestic industry in the importing country pursues as it has complete and perfect information regarding the importing domestic market. The strategic thinking of exporters to set prices at competitive levels that absorb exchange rate changes in profit margins explains why they are not so sensitive to exchange rate changes.

Krupp (1990:67) stated that when there is depreciation, foreign firms pass through part ofthe depreciation in the form of higher prices or decreased output, but this is not enough to offset the entire exchange rate change. The presence of variations in exchange rate changes during a dumping investigation period makes it hard to explain the one-on-one relationship between the 2 variables. Jabara (2009:4) found that the reason why exchange rate pass-through could be low is that, amongst other things, exporters price to market by lowering or raising their profit margins to offset the effect of exchange rate change. While the author agrees with the studies, it is important to note that a low exchange rate pass-through depends on how elastic the demand for the product is in the importing country. If there a high demand for the product in the importing country, it is unlikely that exporters will pass the effects of the exchange rate changes in their prices, but will rather absorb them in their profit margins. This is because they would still want to retain the market share in the importing countries.

To reduce the uncertainty resulting from exchange rate changes, Cheng and Chen (2007:1) considered the use of the real option approach when a firm is faced with uncertainty resulting from volatility in exchange rates. It is argued that a firm can wait to exploit favourable exchange rates in order to limit the risks associated with the volatility of exchange rates, and then choose the rates that maximise potential profits. Since the ADA (1994) is not clear on the use of currency movements during an investigation, choosing to exploit favourable currency movements to maximise the profit potential or reduce the impact of adverse currency movements and downward risks would be ideal. This is because the exchange rate to be used for currency conversion would be known. This knowledge would enable authorities to perform the proper currency conversion for either NVs or export selling prices, and to calculate accurate ADMs. This would also minimise disputes by investigating authorities arising from

the imposition of incorrect ADMs against exporters and countries.

1.7 Expected outcome and significance

The outcome expected in the study is that there will be different levels of protection that would result from the application of the 3 different methods of currency conversion as explained above. In cases where the domestic currency appreciates significantly during the investigation period, it is expected that the calculation of the dumping margin and anti-dumping duties will be highest when using method (i), lowest for (iii) and intermediate for(ii). In cases where the domestic currency depreciates significantly, it is expected that there would be no bias towards higher dumping margins and anti-dumping duties because such depreciation implies higher import prices than would otherwise have occurred. In such cases, anti-dumping applications by domestic industries are less likely to succeed.

1.8 Scope and delimitation

The scope of the study covers a determination on the relationship between exchange rate changes and the calculation of anti-dumping duties (ADD) in South Africa. The study first deliberates on the theory of dumping and justification for anti-dumping measures. The definition of dumping and the methods that are used to determine dumping are explained. The study explains the development of anti-dumping law internationally, and in South Africa. It gives an analysis of the role of the ADA (1994) in conducting dumping investigations and adjudication of trade disputes. The thesis provides a comprehensive analysis on how investigating jurisdictions, including the ITAC, deal with the currencyconversion during the calculation of ADMs. The analysis serves as guidance to other researchers and policy makers on how to improve the existing international anti-dumpinglaw. It also offers aid to investigating jurisdictions to eliminate errors resulting from the misuse of exchange rates during the determination of dumping measures and reducing disputes between investigating authorities following the imposition of anti-dumping measures. As

the study reviews empirical studies on the link between exchange rate changes and the calculation of dumping measures, 2 anti-dumping cases are used to explain this relationship. It provides results that confirm that exchange rate fluctuations dohave an impact on the calculation of dumping duties. The study finally concludes and makes recommendations accordingly.

The delimitation in the study is that although the import data was easily accessible in the applicants' non-confidential applications, it initially presented some inaccuracies and hindered the calculation of export selling prices. In any dumping investigation conducted by the ITAC, when determining the validity of the applicants' import data, it must be compared with that obtained from the South African Revenue Service (SARS). This is because SARS' import data is the most reliable used by the ITAC when calculating dumping. The discrepancies between the applicants' information and that of SARS werethat the latter issues a voucher of correction (VoC) to amend any details, including import statistics that have already been captured for various shipments with customs. On this basis, the import data obtained from SARS was used to calculate export selling prices inthe empirical studies. Regarding the investigation reports from the WTO website, there were differences in statistics as other investigating authorities took time to submit their reports to the institution. The author accessed available information on the website whilewriting the thesis.

1.9 Chapter's layout

Chapter 1 is the general introduction of the study. It gives the background and context ofthe study (this chapter).

Chapter 2 discusses the theory of dumping and justification of dumping measures. It provides an analysis of the definitions of dumping, the techniques used to determine whether dumping has taken place and the various techniques applied when calculating anti-dumping duties. ADMs measures are justified when the foreign exporter sells its product in the domestic market at below the price or cost of production in its home market. This is a form of unfair trade that harms the domestic import-competing industry resultingin lower profits, output, and possibly

even lower employment in the industry concerned. The chapter also discusses the effects of exchange rate changes on anti-dumping applications, and the benefits of free trade without tariffs, as postulated by Ricardo (1817). It also focuses on the significance of including public interest consideration in theWTO (1994) and the welfare effects of imposing anti-dumping measures.

Chapter 3 explains the historical evolution of anti-dumping law in the context of international trade, tariff and NTBs, both internationally and in South Africa (as the main member of the SACU, which also includes Botswana, Lesotho, Namibia and Eswatini- Swaziland). The main provisions of the ADA (1994) are described and explained, and the role of the WTO in administering and adjudicating trade disputes forms an important part of this Chapter.

Chapter 4 compares and contrasts the different ways in which different investigating jurisdictions evaluate exchange rate distortions and dumping measures. It offers adetailed explanation of the provisions of Article 2.4.1 of the ADA.

Chapter 5 presents empirical case studies of the effects of exchange rate changes on the determination of anti-dumping measures. It assesses the dumping and sunset review applications to evaluate the effects of exchange rate variations on the calculation of dumping measures in South Africa. Three different ways of accounting for currency movements are compared in each case study, as explained under the methodology section in this chapter.

Chapter 6 covers the general conclusion of the study. It provides the concluding remarks,followed by the recommendations of the study, and further areas of research on the investigated matter.

CHAPTER 2: THE THEORY OF DUMPING AND JUSTIFICATION FOR ANTI-DUMPING MEASURES

2.1 Introduction

“If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it off them with some part of the produce of our own industry, employed in a way in which we have some advantage” (Mitry et al., 2014:469, quoted from Khöler, 2003).

According to Ndlovu (2010:31), dumping is a form of unfair competition or trade. It is unfair because the perpetrators are exporters who enjoy special privileges in their domestic market, where they charge very high prices, while relying on the absence of real competition in the importing country. This occurs because the presence of dumped imports at lower prices in the importing country makes it difficult for a domestic industry to continue selling its products. The domestic industry, in most cases, would try to compete with the dumped imports, but end up experiencing, for instance, a decline in sales volumes, cutting back its production and losing its market share. Economically, it is accepted for an exporter to charge different prices for identical goods in its domestic andforeign markets because of different elasticities of demand. It is a common practice for an exporter to practice price discrimination by charging lower prices in a foreign market than it does in its domestic market, and this should not be regarded as harmful to the importing domestic country. Saunders and Mirus (2003:7), quoted from Viner (1923), explain that from the perspective of the importing country as a whole, there isa sound economic case to be made against dumping only when it is reasonable to suppose that it will result in greater injury to the domestic industry than benefit to consumers.

The question of whether or not dumping is unfair or unacceptable will be dealt with later in this chapter. The economic rationale for dumping will be examined, as well as anti- dumping measures and their welfare effects. Trade restrictions against dumping are an example of nontariff trade barriers (NTBs). Such NTBs increased significantly after the lowering of traditional tariff barriers with

successive rounds of World Trade Organisation (WTO) trade negotiations and agreements. The misuse of anti-dumping measures is a form of the "new protectionism" which has threatened to undermine the collective welfare benefits of trade liberalisation. The layout of this chapter is as follows: Section 2.2 defines dumping and Section 2.3 discusses the types of dumping. Section 2.4 explains the market distortions arising from the imposition of anti-dumping measures. Section 2.5 discusses the welfare effects of anti-dumping measures, while Section 2.6 explains the benefits of free trade without using tariffs, by considering the comparative advantage model. Section 2.7 discusses how currency depreciation and appreciation affect anti-dumping applications. Section 2.8 explains the techniques for calculating anti-dumping measures and Section 2.9 deals with the important issue of how anti-dumping measures are calculated. Section 2.10 considers the determination of material injury. Throughout this and subsequent chapters, frequent reference is made to the technical terminology and provisions of the Implementation of the ADA (1994), which is the key reference document for all issues regarding dumping and the resolution of disputes.

2.2 Definition of dumping

Dumping is the practice of selling a product in a foreign market at an illegally cheap price. Exporters are often found to sell their products to a foreign market at below cost of production or below the price it normally charges its home market customers (Tran, 2012:73). Deardorff (1989:4) found that price discrimination occurs internationally when there are two separated markets in different countries. This the practice is called dumpingbut only if the lower price is charged in the export market. The fact that an exporter is selling at a lower price in the export market than in its own market does not necessarily constitute dumping. Loehr (1997:3) found that the economic and the WTO definitions are different. The economic definition compares prices and variable costs and these expenses are not easy to measure even where considerable information is available. The WTO definition reflects protectionists' interest of the main contracting parties to the WTO. The ADA (1994), on the other hand, does not prevent exporting countries

from engaging in dumping. It only condemns predatory pricing which causes or threatens material injury to the domestic industry or materially retards the establishment of the domestic industry. Anderson and Thuresson (2008:4) stated that there are reasons an exporter dumps its product in export markets. First, it dumps its product in the export market to maximise profit. This it does by setting prices in such a way that its marginal cost and marginal revenue are equal. Second, the reason an exporter charges different prices in different markets for the same product is that the elasticity of demand in the different markets is not equal. Tran (2012:74) explains that dumping may, amongst others, also occur because manufacturers are able to dump their excess capacity in importing domestic countries, as they receive subsidies from foreign governments. Such subsidies enable manufacturers to dump for an extended period of time, which may destroy industries in export markets. This supports the assertion made by Mastel (1996:80) that government subsidies are the reason why dumping occurs. The domestic industries at times exploit the protection tool offered by the anti-dumping law without proper justification. This confirms why Zhou and Cuyvers (2009: 807) agreed with the study conducted by Vandenbusseche and Zanardi (2007:5) which doubted that anti-dumping actions are limited to unfair trade practices alone. Anti-dumping laws can be abused by special interests once they are in place. The termination of the investigation into the alleged dumping of Non-Articulated Welded Link Chains manufactured from Round Section Iron or Steel Wire, Bars or Rods with a diameter of 4 mm or more, but not exceeding 20 mm (“welded link chains”), originating in or imported from China by the Minister of the DTIC confirm the reason why it is argued that domestic industries that are unable to compete within their respective sectors may be tempted to lobby for protection using the ADL. The basis for the rejection was that the Minister of the DTIC concluded after the ITAC’s recommendation that there were no reasonable grounds to establish that the domestic industry was suffering injury or a threat of injury because of the dumped imports from China (Republic of South Africa, 2023:3-5). The past couple of decades have seen an increase in the prevalence and forms of dumping and responses thereto in the form of different anti-dumping measures (Rafaat & Salehizadeh, 2002:269). Sub-section 2.2.1 and Sub-section

2.2.2 distinguish between the classical and legal definitions of dumping.

2.2.1 Classical definition of dumping

Willig (1998:59) defines dumping as the practice of selling an identical good at a lower price in the export market than in its domestic market. He regards this as price discrimination between national markets. The exporter's price will be at net ex-factory level because costs such as transportation are taken into consideration. For price discrimination to take place there must be separated markets where different prices are maintained for the same product. The separation of different markets occurs because of transport costs and the protection afforded to domestic industries against dumped imports in their own country. This makes re-importation of the product unlikely and enables different competitive market conditions to prevail. It is stated that for price discrimination to take place, the exporter must have significant market power, but collusion or monopoly are not necessary for dumping to occur, since oligopolists possess market power to make price discrimination profitable. The author agrees in that it is uncommon to find exporters colluding with each other and establishing a monopoly to gain competitive advantage over domestic producers during dumping determinations. However, collusion among exporters is possible if a group of exporters forms a cartel aimed at eliminating competition from local producers and establishing a monopoly power in the importing domestic markets. It is also true that an oligopolist possesses market power to discriminate between markets because it is able to produce a homogeneous product and sell sufficient quantity to maximise profit.

Grimwade (2009:9) found that dumping occurs because there is a monopoly power by a single supplier who is able to segment the markets to prevent re-exporting. The reason for such discrimination is that there is a different elasticity of demand for the same product and this allows the exporter to maximise profits by dividing its output between the foreign and domestic markets in order to realise its total revenue. It is also argued that dumping increases the welfare in the importing domestic industry by reducing prices and increasing real incomes of

consumers. Saunders and Mirus (2003:8), quoted from Church and Ware (2000:165), describe dumping as third degree price discrimination because the monopolist is able to charge different prices to different consumer groups in different markets. The argument is that because the monopolist has knowledge about product prices in the importing domestic market, it is easier to sell and charge different prices to different groups of consumers. To maximise profits, it will charge higher prices where the market is inelastic and lower prices where the market is elastic. Saunders and Mirus (2003:8), quoted from Niels (2000:475) further, state that the welfare of the importing country increases as a result of the dumped imports, even if this is also a cost to domestic producers. The authors further argued that as soon as the monopolist enters the domestic market, it increases its prices and the consumer surplus declines. The domestic producer will continue selling at the same price regardless of whether there is dumping or not. Kerr (2001:213-215) argues that when the exporter is faced with different demand curves in different markets for a homogeneous product, this is not considered as illegal. However, when the exporter sells with the intention to drive competitors out of the market in order to attain monopoly power, this is prohibited by the ADA (1994).

2.2.2 Legal definition of dumping

Article 2.1 of the ADA (1994) considers “a product is to be considered as being dumped, that is, 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”.

Tharakan (2000:3-4), quoted from Willig (1998:4), explains that the WTO (1994) definition contains two elements, namely international price discrimination (price dumping) and cost dumping. Price dumping takes place where two or more prices are charged for the identical product in two or more separated markets. For this type of dumping to occur, there should be two separated markets, namely

the home and export market, the exporter must have a dominant market share in its home market, and must face a higher price elasticity of demand in the importing domestic country. If these conditions are met, the exporter will then be able to charge a lower price in the foreign market than in its domestic market, in order to realise profits. It is stated that while price discrimination is explained in Article 2.1 of the ADA (1994), it is not easy to determine punitive action for this type of dumping.

To impose ADMs, the ADA (1994) clearly states that before investigating authorities can impose ADMs, there should be proof of dumping of the subject product in the importing domestic country, material injury and a link between injury and dumping. In the absence of causality, no ADMs can be imposed. Tharakan (2000:5-6, quoted from Trebilcock and Howse, 1999:182-183) explains that cost dumping takes place when sales are made at below average total cost (ATC) or marginal cost. The authors argue that price dumping may or may not explain predatory dumping. If predatory dumping occurs, punitive measures must be applied. It is also stated that such sales are considered not to be in the ordinary course of trade and should be disregarded during the calculation of dumping in the investigation period (See Sub-section 2.3.1.1 of this chapter.). This confirms the study in which Deardorff (1989:2) found that selling below ATC by the exporter is a short-run response when its market is depressed. It is explained that exporters selling below ATC does not mean they are imperfectly competitive because even those who are perfectly competitive continue to sell when their prices drop below ATC as long they remain above marginal costs. This type of pricing is exercised when only a portion of the exporter's costs are fixed.

2.3 Types of dumping

Willig (1998:61) provided two categories of dumping based on the motivation of the exporters and the characteristics of the circumstances that underlie them. They are classified into "monopolising" and "non-monopolising dumping", which are discussed below.

2.3.1 Monopolising dumping

There are 2 sources of monopolising dumping, namely strategic and predatory, and these are regarded as the cause of a loss in welfare.

2.3.1.1 Strategic dumping

Strategic dumping takes place when the exporter's home market is protected against foreign rivals because of NTBs such as anti-dumping measures are in place. The exporterhas a larger market share and foreign rivals are unable to enjoy the economies of scale (Tharakan, 2000:5, quoted from Willig, 1998:7). Barfield (2004:8), quoted from Hindley and Merserlin (1996:8-9) and Deardorff (1989:6), explains that the exporter has market power which it combines with low export prices and the cost in the importing country outweighs the benefits that accrues to foreign exporters. Bown and McCullock (2012:9) also confirm that the reason why exporters benefit from strategic dumping is because their markets are protected by NTBs such ADMs against other importing markets. Willig (1998:70) found that strategic dumping results in a number of adverse effects in the importing country. He stated amongst others, that it limits the size of the market in the importing domestic country and export opportunities of the domestic suppliers. Secondly, domestic suppliers are constrained in such a way that they are unable to invest in the expansion of their business, resulting in higher costs and fewer opportunities for selling their products in the domestic market.

2.3.1.2 Predatory dumping

Predatory dumping occurs when low-priced exporting is aimed at driving domestic producers out of business in order to dominate the importing market (Willig, 1998:65). This type of dumping is more harmful to the domestic importing countries as foreign suppliers can exercise monopoly power over domestic consumption by destroying the productive capability of alternative sources of supply. The losses to domestic producers from dumped imports exacerbates the injury suffered due to predatory dumping. The anti-dumping law does not address

the issue of predatory pricing. It addresses the issue of price discrimination between two markets, which is calculated by comparing the NV and export selling price (Competition Commission of India, 2009: ix). Anti-dumping policy does not prohibit exporters from engaging in price discrimination. Exporters may experience different elasticities of demand between consumers in the domestic and their respective export markets. It only prohibits dumping and recommends imposition of anti-dumping measures on exporters when theirdumped imports cause injury to the domestic industry (Willig, 1998: 65 & 73).

Pugel (2016:225) found no conclusive proof of widespread predatory dumping despite a rich folklore in support of the allegation. It is stated that predatory dumping is likelyto be rare in modern markets. An exporting firm that is considering predatory dumping must weigh certain losses from low prices in the short run against the possible but uncertain profits in the more distant future. As long as an exporter has sufficient information on the prices and products of a specific market in which it is keen to dump its product and make a profit, the possibility of exercising predatory dumping by, for instance, undercutting and depressing another exporter's prices is likely to take place. Sheppard and Atkins (1994:2) found that when exporters exercise predatory pricing, they find it in their best interests to sell products so cheaply that competitors are forcedout of business. The firm that lowered the price will have a monopoly and can realise profits which were lost when the imports were sold at lower prices. Consumers benefit from low-priced imports but this will be for a short-term as monopolist has the market power to raise profits. The Competition Commission of India (2009:13) argued that the anti-dumping law is only concerned about comparing NV and export selling price and not the cost of production and the intention of exporters behind discrimination. It is stated that the law does not emphasise predatory dumping but sales which is below cost of production which is not in the ordinary of trade . Sheppard and Atkins (1994:2), on the other hand, argued that it is difficult to provide examples of predatory pricing. It is stated that the conditions for proving predatory dumping are difficult and the way in which it is interpreted isflawed. It is argued that as long as the investigating

jurisdictions are able to establish that there is dumping, injury and the cause of injury to the domestic industry is caused by the dumped imports, it is sufficient to explain that predatory dumping is taking place. Factors such as decline in the domestic industry's market share, decline in domestic sales volumes, price undercutting, depression and suppression all contribute to explaining predatory dumping.

The ADA (1994) explains that before a jurisdiction can impose ADMs, all the factors mentioned above should be considered. Florêncio (2007:18), quoted from Jones and Sufrin (2004:385-387), found that predation requires that three factors be met. First, the price charged by the exporter must be at a remunerative level. Second, the predator must have a monopoly in the export market. Third, the predator must be able to eliminate competition in the importing domestic country or entrance firms and able to charge lower prices than those charged in the domestic industry. Predators always have perfect information about the price information in the importing domestic country. Their actions are based on what the domestic industry in the importing country pursues.

2.3.2 Non-monopolising dumping

Non-monopolising dumping consists of market expansion. It also captures cyclical and state trading activities.

2.3.2.1 Market expansion dumping

Market expansion dumping takes place when the exporter is dumping to increase its monopoly and later charge monopoly prices. This type of dumping affects consumers in the export (Barfield, 2004:7). Willig (1998:61) defines market expansion dumping as exporting at a lower price than is charged in the export market with the aim of expanding sales. The aim is to earn additional profits by selling at a smaller margin above marginal and transport costs than is charged in the export market. Exporting firms charge lower mark-ups in the importing market,

as they face a high elasticity of the demand with respectto the price. The key difference between the elasticity of demand in the exporter's domestic market and the export market arises from three factors. First, buyer preferencesfor the product may be stronger at home than abroad. Second, there may be various products which are close substitutes for the product in question. Third, the exporter may have a smaller portion of the market share in the importing country than its home market.This is because of buyer preferences, transportation and other costs, protection at home,or relative proximities to other sources of supply and market opportunities.

2.3.2.2 Cyclical dumping

Cyclical dumping takes place when producers sell below full or marginal cost during a recession, in order to keep the plant in business. It is argued this is a natural phenomenon which can also be harmful in cases where certain firms can do it and others cannot. The most important thing is to check whether the exporters can benefit from the cyclical peaks and off-load the dumped product during a downturn. The difficulty arises where producers associated with cyclical dumping are also characterised by prices which are anti- competitive. Thus, indicating that the main concern with this type of dumping should not be the immediate effects of rivals off-loading their surpluses onto export markets,but the effect that the rules of competition have on market structures and distribution activity (Holmes & Kempton, 1997:11-12). Barceló III (1972: 511) stated that with regard to cyclical dumping, the positive effects on the competitive process have more to do with the conduct than the market structure. Price shading through dumping in a foreign market in response to decreasing demand at home can have very healthy effects on competitive conduct, by undermining any tendency toward oligopolistic price discipline in the import market. It is argued that in the face of downturns in demand, it may be costly, especially if the market into which dumped goods are shipped also feels the effect of decreasing demand. This is analogous to the problem of cutthroat competition among groups of undisciplined oligopolists, with high, fixed overheads and low day-to-day

operating costs.

2.3.2.3 State trading dumping

State trading dumping arises when state-owned firms in countries with a non-convertible currency export goods in order to have access to hard currency. With this type of dumping, domestic price in the foreign market cannot be compared with the ex-factory export selling price in the domestic country because exchange rates have minimum effect or because home prices are not determined according to free market principles. Dumping is calculated by way of comparing the export selling price with a cost-based constructed normal value (Willig, 1998:63; Competition Commission of India, 2009:16). To finance imports, the exporting firm must acquire hard currency from countries in the free world trading system. The exporting nation gains from sales which were priced below the cost- based constructed normal values, owing to the additional benefits derived from imports made possible by the hard currency provided by the exports.

2.4 Market distortions arising from imposition of anti-dumping measures

There are various market distortions that arise as a result of anti-dumping measures which are imposed by various investigating authorities.

First, anti-dumping measures give rise to “harassment effects”. By initiating a dumping investigation, a foreign producer/exporter, in most instances, reduces competition from abroad by limiting itself to exporting or going out of business. This is the reason why they use the ADL to harass or intimidate competitors. It is argued that this type of intimidation is likely to take place when the cost of filing a dumping application is lower than the potential benefits accruing to the domestic industry (McGee & Yoon, 1995:277, quoted from Bovard, 1991:supra note 9, at 78-83).

Second, the ADL has a “chilling effect” on imports. It is argued that a decline in imports takes place because exporters are aware of the possibility by investigating authority to imposing ADMs against the alleged dumped imports. It

is also stated that the ADL has price effects in that a foreign exporter can alter its prices in case a duty for the previous year is taxed subsequent to the finalisation of the investigation. During the course of the investigation, exporters also face uncertainty regarding the decision to be made by the authority. It is further argued that their behaviour is influenced by the threat or uncertaintyresulting from the possibility that investigating authorities will impose ADMs. A decline in imports takes place because of the relatively high probability and the amount of anti-dumping duty (Ziga, 2002:13, quoted from Niels, 2000:470-471). McGee (1996:27-28) pointed out that the ADL is protective because domestic producers are protected at the expense of consumers against unfair competition from foreign manufacturers. Domestic producers who are unable to compete with exporters always lobby for protection against NTBs such as ADMs. The argument is that when there is a threat of a dumping investigation, exporters are less aggressive in terms of their prices. This is because theyfear that authorities might initiate an investigation against their products. However, even if they attempt to revise their prices, the possibility of authorities initiating investigations is likely if they continue to sell in other markets. This situation will lead to domestic producers raising their prices in the knowledge that exporters will not undercut their prices.

Third, anti-dumping measures result in “trade diversion”. Vandenbussche and Zanardi (2007:4), quoted from Prusa (2001:603); Konings et al., 2001:294); and Niels,2003:4), highlighted cases in which ADMs were imposed against investigated countries, which resulted in a decline in exports to the benefit for non-named importers inthe investigation. The increase in exports from other countries does not completely outweigh the lost exports from other countries. However, the exports to the domestic importing country that is imposing ADMs will be less than they were before the protection.

Fourth, anti-dumping protection involves reputation and learning effects. According to Vandenbussche and Zanardi (2007:5), exporters are hesitant to export their goods to countries which are frequent users of anti-dumping protection. In order to avoid anti-dumping complaints from the importing domestic industries, these exporters will export low volumes of their products

and higher prices. The authors pointed out that a recent paper published by Blonigen (2006:719-721) shows that the possibility of lodging a dumping application within a particular sector depends on how many applications were lodged and investigated in that sector. This confirms why there is learned behaviour in the domestic importing country. The more it has been involved in lodging dumping applications in the past, the more the industry is likely to lodge further applications against exporting countries in the future. It is expected that the frequency of ADMs will have a negative effect on trade flows, which shows that signalling and learning are taking place.

Fifth, anti-dumping protection gives rise to ADM jumping and inward foreign direct investment. In order to avoid ADMs, exporters set up their manufacturing facilities within a country that is protected by ADMs. This can be a profitable strategy if the previouslyexporting firm has a firm-specific advantage that can be transferred across borders toovercome the fixed cost of establishing an extra plant (Vandenbussche & Zanardi, 2007:5).

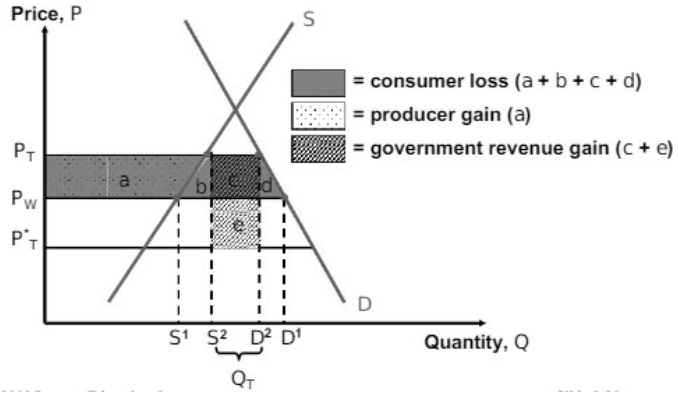
Sixth, several theories have shown that anti-dumping protection can result in the formation of international cartels and tacit collusions. Grimwade (2009:17) refers to a study conducted by Prusa (1992:5) in which it was found that the withdrawal of the anti-dumping application does not mean that the domestic industry's application has failed. It means that the industry might have entered into a collusive agreement with its foreign rivals. The authors also stated that a study conducted by Rutkowski (2007:501) found that the withdrawal of antidumping applications in the EU was related to a rise in import prices and reduced volume of imports, confirming that collusion did take place.

2.5 Welfare effects of anti-dumping measures

In Figure 2.1, P on the vertical axis represents the price of the quantities, and quantities are shown on the horizontal axis. Prior to the imposition of the anti-dumping duty, consumers were able to purchase quantities at D1 at the world price of PW. Subsequent to the imposition of the anti-dumping duty, the world price PW will move to PT. Consumers' loss is marked by areas a+b+c+d. Area d

is also considered a loss to the consumers, as it was also part of the consumer surplus, without affecting domestic producers' domestic surplus prior to the imposition of the duty. The government revenue is PT - PW multiplied by the imported quantities of D2-S2. This is marked by areas c and e. Following the imposition of the anti-dumping duty, producers sell more at a higher price. The producers' revenue is marked by area a, which is the producer surplus.

Figure 2. 1: The welfare effects of anti-dumping measures



Source: Qian (2010: 15), borrowed from Krugman and Obstfeld (2006:195)

From Figure 2.1, it is clear that although ADMs are imposed to restrict imports that cause injury to domestic industry and to save jobs, the effect of the measures on consumers and households as participants in the economy is not taken into account. Consumers and households pay higher prices for goods that could have been acquired at lower prices from foreign producers. Domestic producers and governments enjoy the profits and revenues from charging high prices in the domestic markets.

2.6 Benefits of free trade

Pugel (2016:192) found that NTBs can, amongst others, increase domestic production ofthe product; increase employment of labour and other resources in this domestic production; and decrease domestic consumption of the imported product. However, free trade also comes with its own benefits. For example, the

trade liberalisation explained in the Southern African Development Community (SADC) Trade Protocol is an example of why free trade is necessary and beneficial for domestic industries and the economic welfare of the country. The Protocol provides for the suspension of trade liberalisation measures to protect domestic industries against dumping by other SADC exporters into their domestic markets (Flatters, 2001:5). The Protocol also aims at reducing tariffs, and measures aimed at improving trade facilitation by lowering the cost of imported goodswithin the SADC region. This is beneficial to consumers and domestic producers who import intermediate goods and raw materials for production (Flatters, 2001:22, Filmer & Mushiri, 2001). Ricardo (1817) provides insight into why comparative advantage is a better explanation for trade without tariffs. This question is answered in the next section.

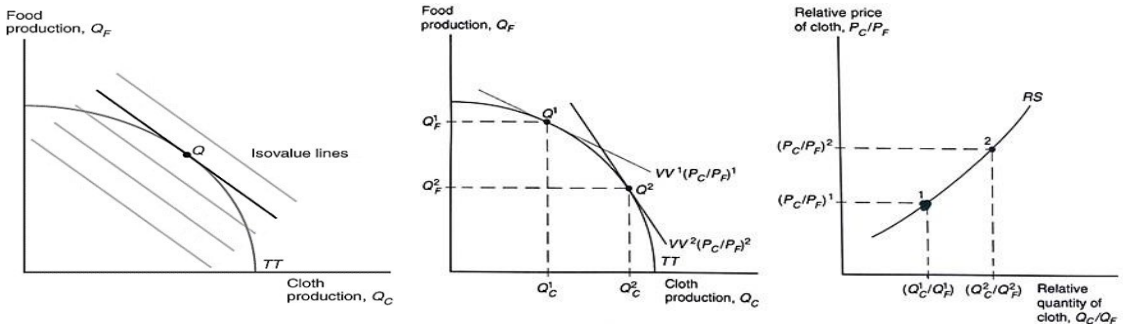
2.6.1 Comparative advantage

Ricardo (1817) provides insight into why comparative advantage is a better explanation for trade without tariffs. According to his theory, each country can benefit from trade by exporting products in which it has the greatest relative advantage (or at least relative disadvantage) and importing products in which it has the least relative advantage (or the greatest relative disadvantage). The model is a double comparison between countries and products and is based on the principle of opportunity cost. It states that a country will export products that it can produce at low opportunity cost, in return for the importing of products that it would otherwise produce at high opportunity cost (Pugel,2016: 43). The standard trade model is based on four key relationships:

(i) “the relationship between the production possibility frontier and relative supply curve;
(ii) the relationship between relative prices and relative demand;
(iii) the determination of world equilibrium by world relative supply and world relative demand; and
(iv) the effect of terms of trade on a nation’s welfare” (Krugman et al., 2011:146).

Figure 2.2 examines Ricardo's (1817) comparative advantage model by focusing on the production possibility curve (PPC), also referred to as the "production possibility frontier (PPF)". It also explains how relative prices affect relative supply.

Figure 2. 2: Production possibilities and relative supply curve



Source: Krugman et al. (2011:146-148)

In Figure 2.2(a), a country produces 2 goods, namely food (F) and cloth (C). TT denotes the PPC. The PPC curve shows the combinations of two commodities which can be produced with a given level of resources, usually labour. The isovalue lines indicate the production of 2 goods where the market value of output is constant. This is where the economy can afford maximum consumption. Point Q is tangent to the PPC andthis is where the economy optimises its production under budget constraints. The slope of the isovalue line is negative and exemplifies the relative price of cloth to food (P_C/P_F). $P_CQ_C+P_FQ_F=V$, where V indicates the value of output at market prices. The value of the economy's consumption must be equal to the value of its production, which is $P_CQ_C+ P_F D_F = P_CQ_C+ P_FQ_F = V$.

In Figure 2.2(b), as the relative price of cloth increases from $VV^1(P_C/P_F)^1$ to $VV^{2(}(P_C/P_F)^2$,the relative production of cloth increases from Q^1 to Q^2. As the relative price of cloth increases, more cloth and less food will be produced. Therefore, the relative supply of cloth will increase as the price of cloth increases. In Figure 2.2(c), as the relative price of cloth increases from $(P_C/P_F)^1$ to $(P_C/P_F)^2$,

the relative production of cloth increases from (Q_C^1/Q_F^1) to (Q_C^2/Q_F^2) The supply curve slopes from right to left, indicating that there is a positive correlation between the relativeprice and relative quantity of cloth.

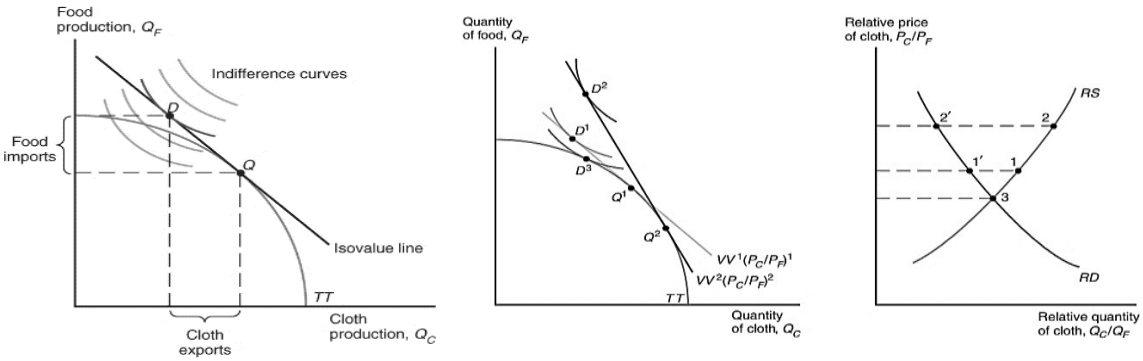
The graphical presentations in Figure 2.3 examine how relative prices affect relative demand. The focus will also be on the application of indifference curves. Each point on an indifference curve indicates a combination of two goods that would provide the consumer with the same utility. The consumer is indifferent between the 2 products as it attains the same utility. Indifference curves have the following 3 properties:

(i) Indifference curves slope down from left to right: If an individual is offered less food (F), then he/she must be given more clothing (C) to be equally well off;

(ii) Indifference curves are always convex in the direction of the origin: Based on the law of diminishing marginal utility, a consumer is always willing to sacrifice lesserunits of a commodity for every additional unit of another good; and

(iii) Higher indifference curves indicate a high level of satisfaction: An individual will prefer having more of both goods, as he/she derives more satisfaction from consuming both".

Figure 2. 3: The relationship between relative prices and relative demand



(a) **(b)** **(c)**

Source: Krugman *et al.* (2011:148-150)

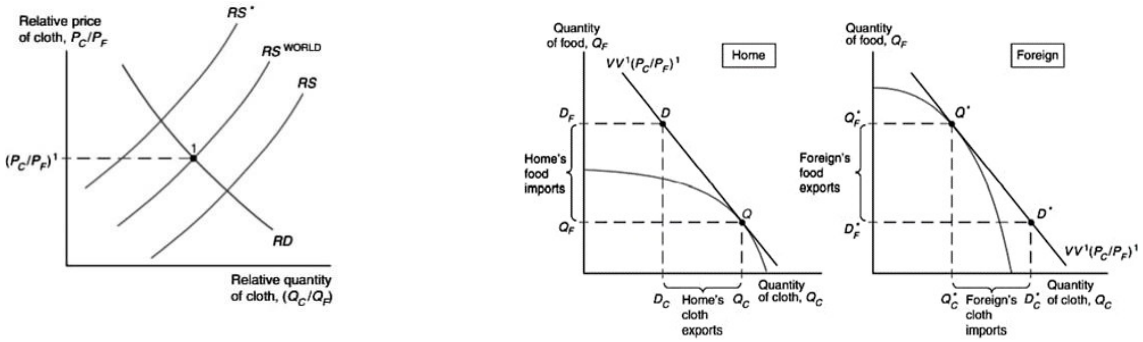
In Figure 2.3(a), the economy produces at Q and consumes at D. Point D is where

the isovalue line is tangent to the highest indifference curve. At this point, the economy produces more cloth and less food, which means that it will export more cloth and import less food. In Figure 2.3(b), as there is an increase in the relative price of cloth from $VV^1(P_C/P_F)^1$ to $VV^2(P_C/P_F)^2$, the quantity produced changes from Q^1 to Q^2 and consumption shifts from D^1 to D^2. This shows an improvement in the welfare of the economy, as the isovalue line is tangent to the highest indifference curve. It also explainswhy the economy is the exporter of cloth. As the relative price of cloth increases, the economy can trade for a larger amount of food.

Figure 2.3(c) shows the relative demand supply curves. It illustrates how the relative supply of cloth induces the relative demand of cloth from point 1 to point 2, as well as leading to a decrease in relative consumption of cloth from 1^1 to 2^1. This gives a downward sloping relative demand curve and an upward sloping relative supply curve. Point 3 shows an equilibrium, where the relative demand curve is equal to the relative supply curve. Based on the analysis, the income effect is evident, as an increase in the economy's welfare results in a change in the price of one good relative to the other. This is represented by a shift from 1 indifference curve to the other. The substitution effect takes place when one good is substituted for another, i.e. when the price of 1 good changes relative to the other.

From the analysis above, it is clear that a rise in PC/PF from D^1 to D^2 increases the welfareof the economy. On the other hand, when there is a decline in the terms of trade (TOT) (P_C/P_F) from D^2 to $D^{1,}$ the welfare of the economy decreases. Figure 2.4 shows the relative supply of cloth for Home (RS) and Foreign (RS*), as well as for the rest of the world (RS^{world}). The relative demand for Home and Foreign is similar to that of the rest of the world.

Figure 2. 4: World relative supply and relative demand and welfare effects of changes in terms of trade



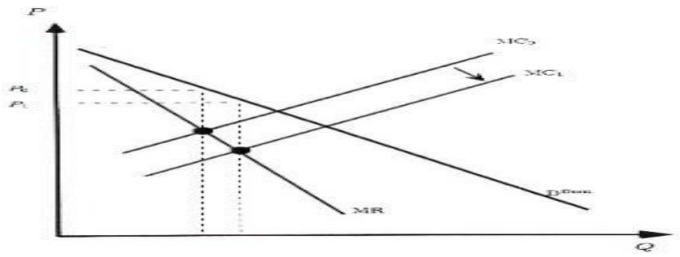
Source: Krugman *et al.* (2011:152-154)

In Figure 2.4(a), equilibrium $(P_C/P_F)^1$ takes place at point 1, where the world relativesupply (RS^{WORLD}) and relative demand (RD) intersect. Figure 2.3(b) shows Home market producing quantity of cloth (Q_C) and quantity of food (Q_F) and Figure 2.3(c) indicates Foreign market producing quantity of cloth Q^*_C and Q^*_F, where $Q_C/Q_F > Q^*_C/Q^*_F$. The relative supply to the world for cloth and food is $(Q_C+Q^*_C)/(Q^*_F+ Q^*_F)$and the relative demand for cloth and food for foreign and home market is$(D_C+D^*_C)/(D_F+D^*_F)$. At the equilibrium price, the Home exports of cloth (Q_C-D_C) is equal to Foreign imports of cloth $(Q^*_C-D^*_C)$. Similarly, at the equilibrium price, Home imports of food (Q_F-D_F) is equal to Foreign exports of food $(D^*_F-D^*_F)$. The PPC for Home and Foreign at equilibrium $(P_C/P_F)^1$ are tangent to the isovalue lines at points Q and Q* (see Figure 2.4(b) and Figure 2.4(c)). This analysis has shown that a rise in TOT increases a country's welfare, while a decline in TOT reduces its welfare. In other words, a country's welfare increases when it sells its own goods at higher prices andbuys imported goods at lower prices. While the purpose of the study is to determine the effects of exchange rate fluctuations on the calculation of anti-dumping measures, it is also worth noting that currency depreciation and appreciation can affect anti-dumping applications submitted by domestic industries. The link between currency movements and anti-dumping applications is explained below.

2.7 The effects of currency depreciation and appreciation on anti-dumping applications

When there is a depreciation of foreign currency, it is expected that there will be an increase in the aggregate demand for the product in the importing domestic country. Depending on the price elasticity of demand, dumping is likely to occur, as consumers are able to afford imported goods at lower prices, in comparison with domestic products. In order to avoid competition from imported goods, domestic producers would then seekprotection in the form of applying for DM against exporters. As soon as a DM is implemented, domestic producers benefit at the expense of consumers, since they charge higher prices for goods that could have been purchased more cheaply fromforeign suppliers. Consumption of the product declines because of the higher pricescharged by domestic manufacturers. In Figure 2.5, P (vertical axis) indicates price and Q (horizontal axis) depicts quantity. MC and MR specify marginal cost and marginal revenue respectively, and D^{DOM} is the demand curve that represents domestic market demand.

Figure 2. 5: Effects of depreciation and appreciation on anti-dumping application



Source: Knetter and Prusa (2003:4)

Knetter and Prusa (2003:3-4) found that when there is depreciation of currency in the exporting country, the costs denominated in domestic currency units fall from MC_0 to MC_1. Exporters would, under such circumstances, lower the domestic currency price of foreign goods. Profits to be realised would also be reduced in the same industry by lowering margins or market share. When there is an appreciation of currency inthe exporting country, it is likely that the

foreign exporter will not be found to be dumping in the domestic importing country. The authors (2003:4) explained that lodging a dumping application is related to the likelihood of finding dumping and injury. It is therefore likely that exchange rate appreciations or depreciations will precipitate anti-dumping applications.

Calculating dumping involves complex methodologies that are prescribed by the ADA (1994). The steps necessary for calculating dumping are discussed below.

2.8 Techniques of calculating anti-dumping measures

2.8.1 Normal value

The ADA (1994) defines NV as a comparable price in the ordinary course of trade, for the like product destined for consumption in the domestic market of the exporting country. This shows that NV is a common phenomenon in every country that trades withthe rest of the world.

2.8.1.1 Sales in the domestic market of the exporting country

Ordinary course of trade: In any dumping investigation, the first step when calculating NV in the country of export is to determine whether sales in the domestic market of the exporting country are comparable to those sold in the importing domestic country. If sales in the domestic market of the exporter are not in the ordinary course of trade, this means that there are no comparable sales of the like in the domestic market of the exporter (Bekker, 2004:146, quoted from the GATT Secretariat, 1994:168). If there are sales that are below cost and made to related parties, they are not considered to be in the ordinary course of trade. Another instance is when there is a particular market situation and sales volumes are low during the PoI. In both instances, such sales must also be excluded from the calculation of NV as they are considered unreliable (Bekker, 2004:146).

Exclusion of sales below cost from the calculation of normal value: The exclusion of sales that take place below cost occurs in several instances. These

include cases:

(i) “when they are made within an extended period (normally 1 year but may not be less than 6 months);

(ii) when they occur in substantial quantities, that is, when the weighted average price of the domestic sales in the country of export or export sales to the third country is below the weighted average total cost for the investigation period or when sales below cost represent at least 20% of domestic sales in the country of export or export sales into a third country; and

(iii) when they are at prices that do not provide for the full recovery of total cost within a reasonable period” (Republic of South Africa, 2003a: 15-16, Section 8.2).

A precaution needs to be taken during a dumping investigation. When calculating sales below cost (SBC), it is imperative that investigating jurisdictions calculate all volume of sales which were sold at a loss, and provide a full schedule of all transactions for domestic sale volumes.

Exclusion of sales between related parties from the calculation of normal value: Sales that take place between related parties occur when they are not at arm’s length, that is, they do not reflect market conditions standard. To determine whether sales areat arm’s length, investigating jurisdictions compare domestic prices to those of independent parties at average terms. If the difference between the two average prices is significant, domestic prices to independent parties are not considered to be at arm’s length and hence are excluded from the calculation of normal value (Czako et al., 2003:151).

The particular market situation: Bekker (2004:147), quoted from Das (1999:209), explains that a particular market situation takes place when there is strict government control over prices, which means that prices are not determined based on market conditions, but rather based on social and political considerations. The particular market situation could include non-market economies. China was previously considered to be a non-market economy and its selling prices could not be used to calculate domestic selling prices in China

(ITAC, 2006). The ITAC, in its previous investigations, opted to use a selection of a third or surrogate country to determine domestic selling prices in China (See Sub-section 2.3.1.4 of this chapter.). This confirms the study by Bekker (2004:147), quoted from Stanbrook and Bentley (1996:37), in which it was found that a particular market situation could prevent a proper comparison between NV and export selling price.

Low volume of sales: Bekker (2004:148-149), quoted from GATT Secretariat (1994:168) found that normal values based on actual selling prices in the market economy could be deemed unreliable because of the low volume of sales in the exporter's domestic market, and such sales do not permit a proper comparison. The domestic sales in the country of export must be sufficient in relation to the quantity or volume of the like product that is being imported and investigated under a dumping action. In order for sales to be in the ordinary course of trade, the domestic sales must constitute 5% or more of the total volume of exports of the product under investigation.

Article 2.2 of the ADA (1994) states that if there are no sales in the ordinary course of trade, investigating authorities must disregard domestic selling prices in the exporting country and establish the NV using alternative methods. Other approaches for determining the NV are discussed below.

2.8.1.2 Constructed normal value

Where an investigating authority is unable to use the domestic sales in the country of export, NV must be determined based on the constructed methodology. The constructed NV can be used by investigating authorities when an exporter responds in the investigation or when it is considered to be the best available information for initiating a dumping investigation The ADA (1994) defines constructed normal value as the company's actual cost of production plus reasonable selling, general and administrative expenses (SG&As) and a reasonable profit. Brink (2013:533), quoted from Bienen et al.,2013), defines a reasonable profit with reference to the actual profit realised on sales of the

product under investigation, profit realised on the narrowest range of products that can be identified, the profit realised by other sellers on sales of the same category of products in that market if the profit margin cannot be properly isolated from the information kept by the producer under investigation, or any other reasonable basis.

Bekker (2004:161), quoted from Kaplan *et al.* (1988:418), found that the administrative burden behind the calculation of this method is more cumbersome than the work required in obtaining the actual selling price of the like product in the exporter's domestic market or an export price to a third country. Although this is true, the data also make it easier for investigating jurisdictions to understand how an exporter's actual costs of production are calculated and allocated to different products in investigations. In this regard, reference is made to the non-confidential exporter response submitted to the ITAC by Qingdao Youhe Handtruck Co. Ltd, an exporter of the wheelbarrow from China. There were various models produced by the exporter, Qingdao Youhe Handtruck Co. Ltd, namely WB6400-C, WB6400-B, WB6414-D, WB6414-C and WB9400. The Commission in its determination calculated different costs allocated to each of the products in order to arrive at an average ex-factory price (ITAC, 2015). Vermulst (2005:34-35) argued that costs have to be calculated on the basis of records kept by exporter or producer provided they are in accordance with the generally accepted accounting principles (GAAP) and reasonably reflect costs associated with the production and sale of the product under consideration.

Bekker (2004:162), quoted from Waer (1993:60-61) and White (1997:117), also criticises the construction method, believing that the dumping decision depends on the value of the constructed NV, which is known before anti-dumping action is initiated. The South African Anti-Dumping Regulations (ADR) states that "if the domestic price is not available to the applicant, the applicant must state its efforts to obtain suchinformation. If it is still unsuccessful after having undertaken reasonable efforts to obtain the domestic price, the applicant may submit information in respect of the NV by constructing such value or with reference to the export price from the exporting country or country of origin to any third country (Republic of South Africa, 2003a: 26-27, Section 23.42(a)-(b)).

2.8.1.3 Normal value based on the export selling price to a third country

Where there are no domestic sales in the ordinary course of trade during the PoI, NV must be determined based on the like product when exported to an appropriate third country, provided that the price is representative. In the South African context, it is required that the selected country must meet the following requirements:

(i) “volumes exported to that country are comparable to volumes exported to the SACU;

(ii) customers exported to in that country are comparable to customers exported to in the SACU, that is, if the company only exported to wholesalers, a country should be selected where exports were only to wholesalers, and

(iii) the country exported to should have a domestic manufacturing industry” (ITAC, 2015).

In its final determination regarding the alleged dumping of wheelbarrows originating or imported from China, sales to other markets were used as a basis for calculating the domestic selling price in China for Qingdao Yongyi - the exporter (ITAC, 2015:24). The exporter did not have sales of the like product on the Chinese market during the period of investigation. However, it had sales of wheelbarrows to a third market (Sri Lanka), which were comparable to those exported to the SACU market. All exportsales to Sri Lanka and to the SACU market were made through trading companies, and Sri Lanka has a domestic industry for the manufacture of wheelbarrows.

2.8.1.4 Normal value based on the export selling price to a third country

Section 32(4) of the International Trade Administration Act (2002) makes provision for the selection of a third or surrogate country in order to determine domestic selling prices in the country of origin where there is government intervention. The third orsurrogate country selected should have an industry at a similar level of development to that in the exporting country, a domestic producer

in that country, which is not related to any SACU manufacturers of the subject product.

2.8.1.5 Record of Understanding

The Record of Understanding (RoU) is a memorandum signed between the InternationalTrade Administration Commission of South Africa (ITAC) and the Bureau of Fair Trade for Imports and Exports (BOFT) of the Ministry of Commerce of the People's Republic of China (China). In terms of this agreement, China was granted market economy status. This implies that all investigations conducted by the ITAC involving Chinese companies are carried out in accordance with Section 32 of the ITA Act and the ADR (ITAC, 2006). However, a distinction was made between treatment of investigations prior to initiation and their subsequent phases.

If the domestic selling price information in China is not available, or the SACU industry is unable to determine whether or not they are comparable to those in the ordinary course of trade, it can consider alternative methods permitted by the WTO to calculate NV for purposes of initiation of an investigation. The memorandum further provides that after initiation of the investigation, Chinese exporters, as with any other exporters in investigations, will be given an opportunity to provide information on domestic selling prices and the cost of production of the subject product. This includesall reviews and sunset reviews of existing anti-dumping duties initiated after the implementation of the RoU. Once initiated, the ITAC will verify this information, in order to establish whether sales were made in the ordinary course of trade, and questionnaires given to Chinese exporters will not differ from those given to other countries. All the anti-dumping investigations, including reviews and Sunset Reviews initiated prior to the signing of the RoU, will be finalised in accordance with practices and procedures in operation prior to the date of the signing of this memorandum.

2.8.2 Export selling price

Export selling price is defined by the ADA (1994) as the price at which the product is exported from one country to another. The approaches used to calculate the export selling price are discussed below.

2.8.2.1 Export selling price using actual sales from the exporting country

When calculating dumping during the PoI, investigating authorities use the actual export selling price for the subject product under investigation. The export price information canbe obtained either from the applicant, as *prima facie* evidence for initiation of theinvestigation, or from the verified information of an exporter during the PoI.

2.8.2.2 Constructed export selling price

Article 2.3 of the ADA (1994) provides that where there is no export price or where the export price is unreliable because of the compensatory relationship between the exporter and importer or a third party, the export price may be constructed from the first point of resale to an independent buyer.

Allowances for costs incurred between importation of the product under consideration and resale to the independent buyer are calculated, as well as reasonable profit accrued from the price of the independent buyer. The allowances for costs usually include commission received, packaging costs, selling, general and administrative costs, freight and insurance costs, and all harbour costs, such as clearing and custom duties costs. Depending on the information at the disposal of the investigators during verification, other allowances that may be of significance are sea freight and insurance, as well as any harbour and freight, storage and handling charges in the exporting country. Czako et al. (2003:134) argue that during a dumping verification, it is necessary to determine if export prices made to related parties are reliable, rather than assuming that they are unreliable. There should be a comparison between their

prices and those of independent parties in terms of averages. If the difference between averages to related and unrelated parties is significant, the export prices to related parties are deemed not to be at arm's length, and therefore to be unreliable for calculating an export price.

Table 2.1 shows how a constructed export selling price is calculated. The export price to the first independent buyer was determined as 140. The total allowances for costs, combined with the profit, are deducted from the export price to arrive at an ex-factory export price in the country of origin. This price includes the producer/exporter's price of (100), duty (14) incurred during importation, expenses for freight (5), storage (2.8)and SG&As (14), and a reasonable profit of 4.2%. As required by the ADA (1994), a reasonable profit of 3% was calculated by taking the value of 4.2 as a proportion of 140 and then multiplying it by 100. In order to arrive at the export selling price for the producer/exporter, the export price (100) has to be calculatedbackwards by deducting profit and all the other costs (40) mentioned above. The export selling price for the purposes of below calculation is therefore, 100 minus 40 = 60. Should the importer and exporter be related, it is reasonable to consider allowances as they will reduces the export price, thereby resulting in a positive dumping margin.

Table 2. 1: Calculation of constructed export selling price

Producer/exporter	Related importer	Independent buyer
100	Duty: 14	140
-	Freight: 5	-
-	Storage: 2.8	-
-	SG&A: 14 (10%)	-
-	Profit: 4.2 (3%)	-

Source: Vermulst (2005:16)

2.8.2.3 Calculation of export selling price in Sunset Reviews in the absence of export sales during the investigation period.

The ADA (1994) stipulates that during a Sunset Review investigation, when there

is no export price during the PoI, jurisdictions must determine the export selling price based onthe comparable price of a like product when it is exported to a third country.

2.9 Calculation of anti-dumping measures

When calculating a DM, Article 2.4 of the ADA (1994) requires that investigating authorities make a fair comparison between NV and export price. To achieve this comparison, adjustments such as physical characteristics, quantities and taxation are required to both prices in order to arrive at ex-factory levels.

A DM is calculated during investigations in various ways. First, this is through a comparison of NV and export selling prices for each transaction. Second, this can be established through a comparison between the weighted average NV and the weighted average of prices for all comparable export transactions. Third, this can be determined on the basis of a comparison of a weighted average NV and individual export selling prices. The approaches for calculating ADMs are discussed below.

2.9.1 Comparison of normal value and export selling price for each transaction

Investigating jurisdictions are required in terms of the ADA (1994) to consider this method only when comparing single or homogeneous products in investigations. The transaction-by-transaction method is easier to apply in the sense that the domestic and export transactions that took place on or near the same date must be compared with each other. When using this methodology, the first step is to establish the NV and export price during the investigation period. Stanbrook and Bentley (1996:72) found that this method is the only method that can handle some tactics where dumping is covered by charging different prices, some above the NV and some below it. This also explains why Van Bael and Bellis (2011:129) found that the transaction-by-transaction is the only method that can deal with attempts to cover up dumping by charging different prices.

In Table 2.2 (extracted from United Nations, 2006:110), Column 1 denotes

sequential numbers and refers to transactions that took place during the PoI. Column 2 is the product code number and Column 3 denotes the net export sales quantity and is calculated by deducting the credit quantity from the total export sales quantity. Column 4 indicates the Cost, Insurance and Freight (CIF) value, which is the total cost incurred by the seller, and includes the production, packaging and insurance of goods for shipping, and freight for shipping and unloading the goods. This is only applicable to goods transported via the sea, ocean, and waterway. Column 5 is the total ex-factory export price, which is the cost incurred by the seller up tothe point where the goods are at the disposal of the buyer. Column 6 is the ex-factory export price per unit and is calculated by dividing the total ex-factory export price in Column 5 by the export sales quantity in Column 3. Column 7 is the ex-factory NV,which is the exporter's domestic price after all costs have been deducted from the factory to the buyer. Column 8 is the dumping amount per unit and is calculated by subtracting the ex-factory export price per unit in Column 6 from the ex-factory NV per unit in Column 7. Column 9 is the total dumping amount and is calculated by multiplying the dumping amount per unit by the export sales quantity in Column 3. Column 10 is the dumping percentage and is calculated by dividing the total dumping amount in Column 9 by the CIF value in Column 3, and multiplying it by 100.

Table 2.2: Calculation of anti-dumping measure based on transaction-by-transaction method

1	2	3	4	5	6	7	8	9	10
SN	**Product code number**	**Net export sales quantity**	**CIF value**	**Total ex-factory export price**	**Ex-factory export price per unit**	**Ex-factory normal value per unit**	**Dumping amount per unit**	**Total dumping amount**	**Dumping (%)**
1	1 A-01-100-34-A-W-2-3-1	4 900.00	368 988.35	334 799.16	68.33	68.61	0.28	1 389.84	0.38
2	1 A-01-100-34-A-W-2-3-1	2 900.00	225137.82	210 801.35	72.69	68.61	(4.08)	(11 832.35)	(5.26)
3	1 A-01-100-34-A-W-2-3-1	10 200.00	808 892.45	734 257.86	71.99	68.61	(3.38)	(34 435.86)	(4.26)
4	1 A-01-100-34-A-W-2-3-1	8 400.00	574 564.32	517 618.90	61.62	68.61	6.99	58 705.10	10.22
5	1 A-01-100-34-A-W-2-3-1	12 000.00	912 857.87	827 965.61	69.00	68.61	(0.39)	(4 645.61)	(0.51)
6	1 A-01-100-34-A-W-2-3-1	5 500.00	412 540.92	381 957.40	69.45	68.61	(0.84)	4 602.40)	(1.12)
7	1 A-01-100-34-A-W-2-3-1	6 250.00	470 878.78	431 715.99	69.07	68.61	(0.46)	2 903.49	(0.62)
8	1 A-01-100-34-A-W-2-3-1	8 800.00	584 373.02	526 106.50	59.78	68.61	8.83	77 661.50	13.29
9	1 A-01-100-34-A-W-2-3-1	15 600.00	1 006 335.88	895 326.90	57.39	68.61	11.22	174 989.10	17.39
10	1 A-01-100-34-A-W-2-3-1	8 000.00	600 390.03	555 886.40	69.49	68.61	(0.88)	(7 006.40)	(1.17)
	Totals	**82 550.00**	**5 964 959.41**	**5 416 436.07**	65.61	**68.61**	3.00	**247 319**	4.1

Source: United Nations (2006:110)

From Table 2.2, the DM to be imposed is 4.1%. This was calculated by dividing the total dumping amount (247 319) in Column 9 by the total CIF value (5 964 959.41) in Column 4.

2.9.2 Comparison of a weighted-average normal value and a weighted average export selling price

According to the weighted-average NV and weighted average export selling price, where there are heterogeneous products during the PoI, the DM has to be determined separately for each model. A single margin is then calculated and

applied to the models under investigation. In Table 2.3, Column 1 refers to the variables required to calculate ADMs. Columns 2 to 4 show the different models used to calculate separate anti-dumping measures. The dumping margins were computed by subtracting export prices in Row 4 from NVs in Row 3 for each model. Each dumping margin in Row5 was expressed as a percentage of the export selling price in Row 4. The dumping percentages for each model were calculated by expressing dumping margins as percentages of export selling prices in Row 6. The total export volumes of 9 800 in Column5 were calculated by adding export volumes for each model from Rows 2 to 4.

Table 2. 3: Calculation of anti-dumping measure based on a weighted average normal value and weighted average export selling price

1	2	3	4	5
Variables required to calculate DM	**165/80R13**	**165/80R14**	**165/80R14**	**Total**
Normal value	kr643.45	kr682.90	kr729.78	-
Minus export selling price	kr579.49	kr656.35	kr763.91	-
Dumping margin	kr63.96	kr26.55	(kr34.13)	-
Dumping margin (%): Margin of dumping expressed as a % of export selling price	11.04 - -	4.04 - -	(4.47) - -	- - -
Export volumes	3 300	4 600	1 900	9 800
Weighted average dumping margin (%)*	**3.72**	**1.90**	**(0.87)**	**4.75**

Source: Brink (2008:262)

***Weighted average dumping margin percentage (%) = Export volume for each model divided by total export volume multiplied by dumping margin %**

Kr = Swedish Krona

Stanbrook and Bentley (1996:71) found that this method has the advantage of simplicity, in that it does not deal with negative dumping margins. To calculate the weighted average dumping margin for each model, the export volumes for each model in Rows 2 to 4 were divided by the total export volume in Row 5, and then multiplied by the dumping margin percentages in Rows 2 to 4. The total weighted average DM was, therefore, calculated by adding all the weighted average dumping percentages for each model, in order to arrive at 4.75% (see

Row 7).

2.9.3 Comparison of weighted average normal value and individual export selling prices

Article 2.4.2 of the ADA (1994) stipulates that "when investigating authorities find a patternof export prices which differ significantly amongst different purchasers, regions or time periods and if an explanation is provided as to why such differences cannot be taken intoaccount by the use of the previous, a weighted average NV should be compared with individual export selling prices". In Table 2.4, Column 1 shows the date for each transaction during the PoI. Column 2 to 3 show the weighted average NVs and export selling prices on a transaction-by-transaction basis. Column 4 shows the dumping amount. The dumping amount for each transaction is computed by subtracting export price in Column 3 from NV in Column 2. In the first 2 transactions, the dumping amounts are positive, that is, 75 and 25. The last 2 transactions indicate negative amounts of (25) and (75).

Table 2. 4: Calculation of anti-dumping duty based on weighted average normal value and individual export selling prices

1	2	3	4
Date	**Weighted average normal value**	**Export price (transaction-by-transaction)**	**Dumping amount**
1 January	125	50	75
8 January	125	100	25
15 January	125	150	(25)
21 January	125	200	(75)

Source: United Nations (2006:14)

From Table 2.4, it is evident that the total dumping amount for the first 2 transactions is 100 and this is because the 2 export selling prices are below the weighted average NVs. On the other hand, the total undumped amount for the last 2 transactions is negative(-100 = -25 +(-75)) because the 2 export selling prices are above the weighted average NVs. Some of the WTO members do not allow such offsetting and attribute a zero value to negatively dumped

transactions. This method is known as zeroing. Using the zeroing method, the dumping amount in the table would be 100. To calculate the anti-dumping duty, the first 2 positive dumping amounts in Column 4 are added together and then divided by the total of all 4 export transactions in Column 3. The anti-dumping duty would, therefore, be 100/500x100 = 20% (International Institute for Trade and Development, 2009:26).

2.9.4 Price disadvantage

ADA (1994) defines price disadvantage as the extent to which the price of the imported product (landed cost) is lower than the unsuppressed and undepressed ex-factory selling price of the domestic industry in the importing country. The unsuppressed or undepressed selling price is a price at which the domestic industry would have been able to sell in the absence of a dumped product.

Table 2.5 shows the dumping margin and price disadvantage margin calculated by the Commission in the investigation on wheelbarrows originating or imported from China (ITAC, 2015). Section 17 of the ADR prescribes that the Commission shall consider applying the lesser duty rule if both the corresponding importer and exporter have cooperated fully. In the below table, the preliminary and final duty which was levied against Qingdao Youhe HandTruck Co. Ltd in China is 32.32%. The dumping margin calculated was expressed as a percentage of FoB export price of the importer who responded in the investigation.

Table 2. 5: Price disadvantage

Manufacturer/exporter	Dumping margin as a % of FOB export price	Price disadvantage as a % of FOB export price
Qingdao Youhe HandTruck Co. Ltd	32.32	99.59

Source: ITAC (2015:73)

From Table 2.5, it is clear that applying the lesser rule encourages interested to respond to investigations as they benefit from lower dumping duties. As both

importer and exporter responded to the Commission's, the benefit of a lower duty is applied. In the above investigation, Qingdao Youhe HandTruck Co. Ltd has a dumping penalty of 32.32% (See Tables 2.5 and 2.6 in this chapter.).

2.9.5 Lesser duty rule

When calculating anti-dumping measures, the ADA (1994) prescribes that the amount of the duty should not exceed the dumping margin as long as the duty is sufficient to remove injury. This means that the anti-dumping duty does not have to equal the margin of dumping. The amount of the duty should be sufficient enough to eliminate the injury caused by dumped imports (Bekker, 2004:126, quoted from Feaver and Wilson, 1995:217; India vs EU *et al.*, 2002:23). The lesser duty is applied in investigations only where both the exporter and the importer responded to the allegations of dumping. In its final determination regarding the alleged dumping of wheelbarrows originating in or imported from China, the Commission applied a lesser rule to an exporter (Qingdao Youhe Handtruck Co. Ltd) as it responded in conjunction with the importer (ITAC, 2015: 4 & 73).

2.9.6 Amount of duty

The ADA (1994) has made provisions for the calculation of the duty to charge on trading parties. It requires that the amount of the final measure should be the lower of the price disadvantage or the dumping margin calculated:

2.9.7 Residual anti-dumping measure

Article 7.1 of the ADA (1994) requires that the investigating authorities calculate a separate anti-dumping measure for those exporters who cooperate during anti-dumping investigations, and a residual duty for non-cooperating exporters. Non-cooperating exporters must have higher duties imposed on them than those who do cooperate. In calculating the residual duty, investigation jurisdictions use the

difference between the highest verified domestic selling price information calculated by investigating authorities during verification, and the export selling price to their respective markets.

2.9.8 Provisional anti-dumping measures

Article 7.1 of the ADA (1994) requires that the provisional measures may be applied by investigating authorities under the following circumstances. These include:

(i) “only if the investigation has been initiated by the investigating authority;

(ii) a preliminary determination has been made by an investigating authority on the basisof the dumping and injury experienced by the domestic industry; and

(iii) the anti-dumping duties are necessary to prevent injury caused by the dumped imports”.

Article 7.4 of the ADA(1994) states that “the application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of theauthorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding 6 months When authorities, in the courseof an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be 6 and 9 months, respectively”. These measures may take the form of a “provisional duty or, preferably, a security by cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures” (Article 7.2 of the ADA (1994)). In the investigation into the alleged dumping of Wheelbarrows originating in or imported from China the following provisional anti- dumping duties were imposed by SARS following the recommendation by the ITAC (ITAC, 2015:4 & 64).

Table 2. 6: Provisional /preliminary anti-dumping measures

Tariff sub-heading	Country/Manufacturer	Rate of duty (%)
8716.80.10	China: Manufactured by Qingdao Youhe HandTruck C. Ltd	32.32
	China: Manufactured by Qingdao Wantai Special Handtruck Co. Ltd	39.92
	China (Excluding those manufactured by Qingdao Yongyi Metal Products Co. Ltd, Qingdao Youhe HandtruckCo. Ltd and Qingdao WantaiSpecial Handtruck Co. Ltd	29.82%

Source: ITAC (2015: 4 & 64)

The provisional anti-dumping duties in the investigation were in place for a period of 6 months pending the finalisation of the investigation (ITAC, 2015:4&64). They were imposed to prevent further injury to the domestic industry.

2.9.9 Price undertaking

Price undertaking is an agreement between the exporter and the jurisdiction in the importing country, whereby the former requests the latter to either reduce its export priceor cease to export at dumped prices (Vermulst, 2005:168, quoted from Article 8 of ADA (1994). This type of agreement can only take place when preliminary duties have been imposed against the exporter.

2.9.10 Final anti-dumping measures

Article 9 of the ADA (1994) states that “the final anti-dumping duties must remain in place for a period of five years from the date of imposition of provisional payments, unless a review is initiated before then. It further requires that a dumping investigation must be concluded within 12 months from date of initiation and in no cases should exceed 18 months”. The authorities may only impose duties once all the requirements have been met. The final ADMs can be in the form of *ad valorem* (percentage) duties, specific duties,which can be in the form of a fixed amount per unit or weight, and variable duties, or the difference between the fixed minimum price (the non-dumped imports and non-injurious price) and the actual import price if it is lower (Vermulst, 2005:167).

2.10 Determination of material injury

In determining material injury analysis, Article 3 of the ADA (1994) stipulates 2 requirements that WTO members should meet to establish whether the domestic industry is injured. A determination has to be based on “positive evidence”, and an “objective examination”. First, there should be an examination of the volume of dumped imports andthe effect of the dumped imports on prices in the domestic market for like products. When examining the effect of dumped imports, investigating authorities have to consider whether there has been a significant increase in the dumped imports either in absolute terms or relative to the production or consumption in the importing country (Bhat, 2004:6,quoted from the ADA,1994). When making an analysis of the effect of dumped imports on prices, there should be a determination of price undercutting by way of comparing the importing country’s domestic selling prices with the landed cost of the imports. There should also be an assessment whether the domestic prices are depressed and suppressed by establishing the extent to which the industry is able to recover costs fromselling prices. Second, the ADA (1994) requires that there should be an examination of economic factors and indices having a bearing on the state of the industry. Investigatingjurisdictions must make an evaluation of factors such as actual and potential declines insales, profits, output, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; and actual and potential negative effects on cash flow, inventories, employment, wages, growth, and the ability to raise capital or investments. Not all the factors listed can be conclusive in determining injury to the domestic industry. As long as the volume of dumped imports is more than 3% of the production capacity of the domestic industry, ADMs must be imposed (Bhat, 2004:6; United Nations, 2006:22).

A recommendation by the Commission on Anti-Dumping Practices requires thatduring investigations, injury determination should be analysed over a period of three years. This is known as the injury investigation period (IIP) (Committee on Anti-Dumping Practices, 2000:1). This information is also

required when making a determination of causal link between dumping and injury (United Nations: 2006:21). The choice of period is a crucial element of the injury determination as it determines thedata that will form the basis for the assessment of the impact of dumping (Vermulst, 2005:82, quoted from WTO, 2005:118 , Paragraph. 7.79). Tharakan(2000:9) found that the effect of dumping should be evaluated to ascertain how the condition of that industry would differ from its current state, had it not been for dumping, and then carry out a comparison of the factual situation to determine the extent to which dumped imports affect the domestic industry.

2.10.1 Cumulation of dumped imports from various countries

Article 3.3 of the ADA (1994) states that the investigating authorities may collectively combine and assess the effects of the total volume of imports on the domestic industries from multiple countries in a dumping investigation. This may only be done if:

(i) "only imports from countries that are simultaneously subject to the investigation maybe cumulated;

(ii) the margin of dumping established in relation to the imports from each country is more than *de minimis*. The margin of dumping in an investigation is considered to be *minimis* if it is less than 2% when expressed as a percentage of the export price;

(iii) the volume of imports from each country is not negligible; The volume of imports from a particular country shall be regarded as negligible if they account for less than 3% of the like product in the importing country. In instances where countries individually account for less than 3% of imports of the like product collectively account for more than 7% of imports, the imports are not considered negligible; and

(iv) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product".

Tharakan (2000:10), quoted from Hansen and Prusa, Tharakan et al. (1998a:323), found that cumulation leads to exporters with smaller exports who are not causing injury to be unnecessarily penalised. It encourages domestic importing countries to not only lodge multiple anti-dumping applications, but to submit more applications to their authorities against countries with smaller import market shares. Tharakan (2000:10), quoted from Tharakan et al. (1998b:1053-1055), found that applying cumulation during investigations increases the probability of finding injury, whilst holding the market share constant. This is explained as the super-addictive effect of cumulation and can be considered as harmful to developing countries. This also explains why Gupta and Panagariya (2001:9) argued that when imports from various countries are added together, it is easy to find injury on behalf of the domestic industry. The authors refer to this as the "super-additivity effect" because the probability of finding injury rises with cumulation, and the domestic industry has a greater chance of protection.

2.11 Determination of the causal link between the alleged dumped imports and material

Article 3.5 of the ADA (1994) requires that there should be a demonstration of a causal link between dumped imports and material injury experienced by the domestic industry. In making this determination, the investigating authorities shall consider the "volume andprices of imports not sold at dumped prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry". Vermulst (2005:90-91), quoted from Article 3.5 of ADA (1994), explains that the investigating jurisdictions are also required to examine any known factors other than dumped imports which cause injury. The injury caused by these factors may not be attributed to dumped imports (also known as *non-attribution* requirement). Prior to imposing provisional payments or definitive anti-dumping measures, the investigating authorities have to make a determination

on the link between dumping and injury during investigations. In the absence of causality, they may not levy anti-dumping measures, but rather terminate investigations.

2.12 Determination of a threat of material injury

A domestic industry may believe that although it is not yet suffering material injury, it is threatened with such injury which will occur unless anti-dumping measures are taken. Brink (2002:157) found that where the domestic industry has proven material injury, itdoes not need to provide any information regarding threat of material injury. It is argued that since threat of material injury is based on facts, the possibility of "threat of material injury" resulting into "material injury" unless ADMs are imposed is likely. "The change in circumstances which would create a situation in which dumping would cause material injury must be clearly foreseen and imminent" (Republic of South Africa: 2003a:22). Article 3.7 of the ADA (1994) stipulates that "the determination of threat of material injury shall be based on facts and not merely on allegations, conjectures or remote possibilities. It should consider, *inter alia*, the following factors:

(i) "the significant increase of dumped imports into the domestic market, indicating the likelihood of substantially increased importation;
(ii) the exporter has sufficient freely disposable, or an imminent, substantial increase in the capacity of the exporter;
(iii) whether or not imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase the demand for further imports; and
(iv) inventories of the product being investigated".

A careful examination of the above points bears some economic consequences. Thus, according to Czako et al. (2003:371), quoted from Article 3.7 of the ADA (1994), "the totality of all factors considered must lead to the conclusion that further dumped imports are imminent and that unless protective measures are taken, material injury would occur".

2.13 Determination of material retardation in the establishment of a domestic industry

The ADA (1994) provides no guidance in relation to the material retardation of the domestic industry. However, the determination has to be based on facts and not merely allegations, conjecture or remote possibility. Material retardation takes place when imports materially hinder or retard the establishment of an industry.

2.14 Public interest consideration

Kotsiubska (2011:7), quoted from Committee on Anti-Dumping Practices (2001:1), defines public interest as an "appreciation of all the interested parties in the [Union] taken as a whole by analysing the likely economic impact of the imposition or non-imposition of measures on the economic operators in the [Union]". It is an opportunity for all interested parties, including those that use imported raw materials and intermediate products in their manufacturing process, to comment on the impact of the cost of the anti-dumping duty on their operations. To address the effects of ADMs, countries such as Argentina, Federative Republic of Brazil (Brazil), China, European (EU) and others incorporated the public interest clause in their domestic legislations. This is necessary to establish the effects on domestic producers and other parties affected by the ADMs, and the consequent impact on trade and competition on the product subject to investigation. Czako *et al.* (2003:76) explains that prior to imposing ADMs, other authorities provide interested parties with an opportunity to explain why it is not in the best interest to impose anti-dumping measures. This is to avoid the negative effects of the imposition of the anti-dumping duties. Some authorities consider such arguments from users of the alleged dumped imports, as the imposition might lead to job losses. Even if this is true, the Agreement does not compel Members to consider public interest in their anti-dumping investigations. This makes it more likely for authorities to impose ADMs on behalf of domestic industries, even in the absence of material injury.

Kotsiubska (2011:10) explains that the ADA (1994) requires that the Members'

domestic legislation should include amongst others, procedural rights that allows interested parties to have an opportunity to present and make submissions in full, participate in oral hearings, access to non-confidential information, the right participate in oral hearings and the right to have a disclosure of final findings. It is stated that the rights to participation in investigations are granted only to other interested parties, and their interests are affected by the application of anti-dumping measures.

It is argued that although Article 6.11 of the ADA (1994) lists parties to be included as interested parties during investigations, it also states that "the list does not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties". Article 6.12 of the ADA (1994) further states that "the authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organisations in cases where the product is commonly sold at the retail level with information which is relevant to the investigation regarding dumping, injury and causality".

It is stated that even if other parties can be included as interested parties and offered an opportunity to explain to the investigating authority why it is not in the best interest to impose anti-dumping measures, the process is meaningless and unjust, as it takes place after the imposition of provisional ADMs. "Public hearings provide an important opportunity to test evidence in an adversarial and quasi-judicial setting. Hearings are especially important in injury determinations given the nature of the facts in issue and consideration therefore, be given to including a requirement in Article 6 of the ADA (1994) similar to Article 3 of the *Agreement on Safeguards*, which requires a public hearing or other appropriate means by which interested parties can present evidence and views, including the opportunity to respond to the submissions of other parties" (Negotiating Group on Rules, 2003b:3).

Sibanda (2015: 738-739) found that public interest may influence against or in favour of the imposition, amendment or continuation of an anti-dumping duty. These may occur if:

(i) "it is likely to substantially lessen or prevent, or has substantially

lessened or prevented, competition in the domestic market for goods or services;

(ii) it is likely to substantially lessen or has substantially lessened the competitiveness of domestic producers;

(iii) it is likely to cause significant damage or has caused significant damage to domestic producers that use the product under investigation in the production of other goods or the provision of services;

(iv) it is likely to significantly restrict, or has significantly restricted, consumer access, at competitive prices, to the product under investigation or like product, or to other goods produced or services that use the product under investigation as an input;

(v) it is likely to significantly impact, or has significantly impacted, negatively on the public health, the public safety or the environment".

Although most investigating jurisdictions, including the ITAC, provide any interested parties with an opportunity to submit comments and request oral hearings on any issue during investigations, including "public interest consideration" in anti-dumping investigations, this will have little or no impact at all prior to the imposition of duties. The fact that the anti-dumping policy is only intended to protect domestic industries against injurious imports and does not consider the interests of consumers is concerning. Investigation jurisdictions, including the ITAC, protect domestic industries, even in the absence of injury (Republic of South Africa, 2023a: 2-3).

2.15 Reviews

There are different types of reviews, which are explained by the ADA (1994) following thelevying of the anti-dumping measures. These are discussed in the following sub-sections.

2.15.1 Sunset Review

This is a review of the anti-dumping measure to determine whether its expiry is

likely to lead to the continuation or recurrence of dumping and injury. A DM against an exporter must be in place for a period of 5 years from the date of imposition of provisional payments. The ADA (1994) states that at least 6 months prior to the lapse of the duty, investigating authorities must publish a notice informing the applicant in the original investigation of the expiry of the measures (Republic of South Africa, 2016).

2.15.2 Interim or Administrative Review

This type of review takes place when an exporter requests an importing investigating authority to review the duty within 1 year from its imposition. This happens when it is of the opinion that there are changed circumstances that might require an evaluation of dumping and the level of duty in place. The request by an exporter (Casar DrahtseilwerkSaar Gmbh) to the ITAC to review the anti-dumping measure on Ropes and Cables manufactured in Germany gives light to this analysis. The basis for the review was that there were changed circumstances in that Casar Drahtseilwerk Saar Gmbh was acquiredby WireCo World Group and this brought a change in pricing policy which was strictly enforced pursuant to Notice no. 386 of *Government Gazette* no. 36371 (Republic of South Africa, 2013: 34-39).

2.15.3 New Shipper Review

A New Shipper Review is an application by an exporter to the importing investigating authority, requesting evaluation of the measures in place. This happens when theexporter is of the opinion that it did not export during the original PoI, and was therefore not subject to the ADMs. The purpose is to exclude the products that are exported by thisexporter from payment of the anti-dumping duties. To be excluded from payment of the ADMs, the exporter must be able to prove that it did not export during the PoI (International Trade Centre, 2003: xiv & 165).

2.16 Conclusion

This chapter has explained the concept of dumping, as well as the various types of dumping, and explored how the key measures involved in dumping investigations are calculated. These measures include the definition and calculation of normal value, export selling price, material injury and the calculation of dumping. The relevant technical terminology and provisions of the ADA (1994) were also outlined in this chapter.

It was found that both currency depreciation and appreciation affect anti-dumping applications. However, the analysis in this chapter showed that applications for protection are made because of the dumped imports causing injury to domestic industries, and not because of currency fluctuations. This might be because the ADA (1994) does not explain how parties to investigations should assess depreciation and appreciation when they lodge applications. It is, however, expected that if domestic industries also lodge their applications based on currency fluctuations, the number of anti-dumping applications submitted to jurisdictions for evaluation will most probably increase.

It was also found that the ADA (1994) does not address the destructive effects of anti-dumping measures on the economic welfare of a country. There is a lot of documentation regarding the protection of domestic industries against injurious imports, but very little attention is given to the market distortions that anti-dumping measures cause in the normal business practice. Moreover, the effect that the anti-dumping policy has on the welfare of consumers when ADMs are in place is disturbing. The measures tend to raise prices in the domestic market, thereby limiting consumers of affordable goods supplied by foreign manufacturers. This chapter showed that public interestconsideration is not addressed by the ADA (1994). However, even if it was included in the ADL, this would not have any meaningful effect on consumers and during investigations. The reason for this is that jurisdictions use the ADL to protect domestic industries from competition, even if they do not suffer injury during investigation periods.The evolution and application of anti-dumping policy in South Africa will be discussed in the next chapter.

CHAPTER 3: EVOLUTION OF ANTI-DUMPING LAW

3.1 Introduction

This chapter provides an overview of the history of anti-dumping law from the international perspective and South African perspective. To get a clear understanding of the position of South Africa with regard to anti-dumping investigations, the origin and evolution of anti-dumping laws is worth noting. The various multilateral trade agreements and their influence on anti-dumping investigations are studied here. The issue of whether or not South African anti-dumping legislation is compliant with the WTO rules and regulations is also addressed. Section 3.2 introduces the origin and history of anti-dumping laws before their inclusion in the General Agreement on Tariffs and Trade (GATT) in 1947. Section 3.3 describes the international framework of the anti-dumping provisions under Article VI of the General Agreement on Tariffs and Trade in 1947 (GATT, 1947). Section 3.4 focuses on the history of anti-dumping in South Africa and the Southern African Customs Union (SACU). Section 3.5 explains the legal framework for anti-dumping investigations in South Africa in the post-1994 democratic era. Section 3.6 concludes with observations of some deficiencies in the application of anti-dumping provisions in South Africa and how these might be improved.

3.2 Origin and history of anti-dumping law before the General Agreement onTariffs and Trade of 1947

The first ADL was introduced in Canada as part of the Customs Tariffs Amendment Act of 1897. This was in response to US steel exporters dumping their rails into the Canadian market at significantly lower prices, resulting in injury to the domestic sector. Using a traditional approach, the authorities levied additional anti-dumping duties in proportion to the degree of import price differential (Barceló III, 1991:314).

The anti-dumping legislation was first introduced by the Hon. Sir William S.

Fielding, who argued that:

"...high tariff countries have adopted that method of trade which has now come to be known as slaughtering, or perhaps the word frequently used is dumping; that is to say, that trust or combine, having obtained command and control of its own market and finding that it will have surplus of goods, sets out to obtain command of a neighbouring market, and for the purpose of obtaining control of a neighbouring market will put aside reasonable considerations with regard to the cost or fair price of the goods; the only principle recognised is that the goods must be sold and the market obtained…. This dumping then, is an evil and we propose to deal with it" (Finger, 1991:3-4, quoted from the US Tariff Commission, 1919:22).

The substance of the proposed legislation, which finally became Article XIX of the Canadian Customs Act of 1904, reads as follows:

"Whenever it appears to the satisfaction of the minister of customs, or any officer of customs authorised to collect customs duties, that the export price or actual selling price to the importer in Canada of any imported dutiable article, of a class or kind made or produced in Canada, is less than the fair value thereof, as determined according to the basis of value for duty provided in Customs Act in respect of imported goods subject to *ad valorem* duty, such article shall, in addition to the duty otherwise established, be subject to a special duty of customs equal to the difference such fair market value and such selling price" (Finger, 1991:16, quoted from the US Tariff Commission, 1919:21). After the Canadians, the governments of New Zealand (1905), Australia (1906) and South Africa (1914) implemented legislation to address this phenomenon. In 1921, Great Britain passed its first anti-dumping legislation, followed by the US. Australia and New Zealand, which similarly passed new ADLs in 1921. This prompted Canada to introduce a major revision to its law (Finger, 1991:6-9). The following reasons explain why the time was ripe for anti-dumping laws to prevail:

(i) ***Hostility towards Germany***: "Hostility towards Germany, combined with the popular conviction that German enterprises were particularly vicious perpetrators of predatory dumping, was certainly a factor".

(ii) ***The end of selective tariff revision***: It was no longer possible to restrict tariff modification to particular items due to the politics involved in tariff-making. As soon as thetariff was set for review, it was unable to withstand those who pleaded for high duties (Finger, 1991:9, quoted from Taussig & White, 1931:196).

(iii) ***High tariffs everywhere***: All of the countries at the time, with the exception of Great Britain, had high tariffs. This meant that all exporters, excluding those from Great Britain, sold their goods in foreign markets over similarly high tariff walls and from behindhigh tariff walls. To be competitive, the exporter's price had to be less than the home- market price by the amount of the tariff. This gave an impression that exporters were always willing to undersell producers in domestic importing countries, and that protectionin the form of tariff was necessary to prevent local manufacturers being undersold and driven out of business.

(iv) ***The halo-effect of trust-busting***: Trust-busting was a political air at the end of the19th century and the commencement of the 20th century. This acted as a springboard for laws aimed at addressing the wicked trusts. When a foreign trust is targeted, the trust-busting feeling may be even more potent.

(v) ***A new way to do it***: In 1994, Canada invented a new method of doing it. The mechanics of implementation under the Canadian Law were simple and well-known. Similar valuation techniques were utilised by other high-tariff nations, and many of Canada's innovations in using these procedures as a tool of commercial policy were quickly imitated by other nations. Political will inevitably arises where there is a way.

(vi) ***The influence of the trusts*****:** The possibility existed that the trusts themselves had a say in the manner in which they were regulated. They would rather have anti-dumping regulation than dismantling the trusts or removing protection (Finger, 1991:9).

It is against this background that in 1947, the newly created General Agreement on Tariffs and Trade took up the issue and formulated the first set of international rules prescribing the conditions under which anti-dumping actions could be taken. The rules have been reaffirmed and further developed by the WTO. The existing laws were repealed and replaced, and negotiators reached an agreement on the

need for anti- dumping law (Illy, 2012:8, quoted from Finger, 1991:4).

3.3 International legal framework for anti-dumping provisions under Article VI ofthe General Agreement on Tariffs and Trade of 1947

The GATT 1947 began as a provisional agreement to implement the first set of tariff reductions. The expectation was that an international trade organisation would eventually be the institutional framework for coordinating national trade policies. When the international community could not agree to establish this international trade organisation, the GATT became, by default, the framework for international coordination of trade policies (Finger, 1991: 24). This was done along the lines proposed by the United States working document entitled “A Suggested Charter for an International Trade Organisation of the United Nations” (Barcelló III, 1991:316, quoted from US, Department of State (1946)). The anti-dumping provisions in the document followed the Anti- dumping Act of 1921. Negotiators focused on defining price discrimination, limiting the anti-dumping duty to the margin of dumping, and on guaranteeing that the dumped imports were causing “material injury” (Barceló III, 1991:316, quoted from Brown, 1950:110 & 213; Jackson, 1969:404).

The GATT (1947) defined dumping as occurring when the “*products of one country are introduced into the commerce of another country at less than the normal value of the products*”, and allowed members to implement duties only if the dumping action inquestion directly caused material injury. It did not explain the technical procedures to Members and how to determine dumping and injury. It only required Members to establish injury, but did not provide any criteria for determining this. Similarly, the process forproving that dumping exists was covered by the GATT (1947), but in a very broad sense.The anti-dumping duties were progressively applied when tariff rates were reduced in the wake of the initial GATT agreement, and it became increasingly clear that Article VI was insufficient to control the penalties. This left a wide margin of discretion open to GATTmembers in terms of its implementation. Consequently, in the 1967 Kennedy Round, the Agreement on the Implementation of Article VI, more

commonly known as the World Trade Organisation (WTO) Anti-Dumping Agreement (ADA), was established in order to clarify, expand and regulate the use of Article VI (Lee, 2013:8-9).

3.3.1 Anti-dumping Code of 1967: The Kennedy Round

Following the failure of the original GATT (1947), and distinct interpretations of Article VI GATT in important terms, national administration of anti-dumping laws then constituted a major non-tariff barriers to trade the GATT contracting parties negotiated detailed codes relating to anti-dumping (Snyder, 2001:387, quoted from Vermulst, 1987:510-511). The Kennedy Round led to the implementation of Article IV (also referred to as the “Anti- Dumping Agreement or the Anti-Dumping Code”) in 1967. It was meant to define the application of Article IV of the GATT and to amend it (Snyder, 2001:387, quoted from ADA (1969). In particular, the ADC (1967) describes specific steps in conducting anti-dumping investigation, including the determination of injury, collection of evidence and imposition of anti-dumping duties (Prusa & Skeath, 2002:5).

The are 3 main issues that the negotiators were worried about. First, the Canadian Law did not have an injury test. Second, the possibility of abuse because of inadequate explanation of anti-dumping concepts (material injury, industry and causation). Third, the possibility of misuse due to ambiguities, arbitrary decisions, and administrative procedure delays (Barceló III, 1991:317, quoted from Dam, 1970:174 & 176; Kelly, 1967:298-299).

By conforming to the ADC (1967) and amending its domestic legislation to include an injury test, Canada was able to address its issue in the Kennedy Round (Barceló III, 1991:317, quoted from Grey, 1967:8-9). In order to resolve the other two issues, complex code provisions that ensured notice and procedural fairness as well as established guidelines and criteria for determining price discrimination, material injury, and causation were needed. It was only in Europe that the ADC (1967) was applied wherein the new EEC anti-dumping regulations of 1968 conformed to the code (European Economic Community [EEC]) anti- dumping rule closely followed the codelanguage (Barceló III,

1991:317, quoted from the CEC: 1938, Regulation (EEC) No. 459/68 of the Council of 5 April 1968, O. J. no. L93/1 at recital 1 dated 17 April 1968). However, the US never signed the Kennedy Round Code, and as a result the code had little practical significance. The US, having introduced the subject of non-tariff barriers into the negotiations, was disappointed to discover that the non-tariff barriers most frequently singled out by other countries for priority action werethose maintained by the US, one of which was the US anti-dumping statute (174). The attack on US anti-dumping was clearly an offensive strategy, as it was the best of the European non-tariff obstacles that the US had wished to bring to the negotiating table (Finger, 1991:25-26). During those years, the purpose of the US anti-dumping and "escape clause" procedures was to keep the US market open rather than to restrict foreign access.

In response to pressure from the Kennedy Round Code's protectionist opponents, Congress refused to comply and issued a 1968 statute directing the US Tariff Commission, which is the regulatory body in charge of addressing complaints about anti-dumping and injury, that it was only obligated to comply with the 1921 Act. Although the 1968 Law, in theory, did not preclude the Tariff Commission from construing certain expansive Act language to comply with the more restrictive code requirements, it resulted in the implementation of substantive injury and causality standards that were incongruent with the ADC (1967) (Barceló III, 1991:318, quoted from US Tariff Commission, 1970:12500-12501).

Significant interpretive discretion was granted to the members by the GATT (1947) even after the ADA (1947) regulated procedures and established legal standards. The lack of ability to effectively administer the AD regulations meant AD was essentially merely a choice for tariff increases. It was inevitable that GATT Members will formalise the AD procedures. The US and the EU had established their clarification standards and it was difficult by the time other GATT members were ready to deal with tightening AD regulations and create their own ADLs from the beginning (Prusa, 2005:686). By legally manipulating AD legislation, nations were able to ignore the underlying economic dynamics of international competition in favor of their own national interests. Unfortunately,

the protectionist objectives of the WTO Round negotiations dominated succeeding WTO Round negotiations and prevented revisions to the current WTO/GATT AD legislation. The AD standards were amended making them less susceptible to affirmative action legal protection (Lee, 2013:9).

3.3.2 The Tokyo Round Agreement of 1979

The Tokyo Round Agreement of 1979 brought certain revisions to the code, which helped transform what had been an infrequently used trade statute into the "*workhorse of international trade protection that is Modern Anti-Dumping La*w. Firstly, the definition of "*less than fair-value*" was expanded to include price discrimination and below-cost sales as had been done in the United States several years ago. Secondly, the Tokyo Round Agreement excluded the provision where the dumped imports were shown to be the "*principal cause of material injury*" before ADMs could be imposed. The amendments to the Tokyo Round in the ADC (1967) were significant in paving the way to the filing of anti-dumping applications. It also provided an important and practical overall foundation for investigations. Even the Tokyo Round Agreement bound the 27 GATT member countries(Prusa *et al.,* 2002:5-6).

The Anti-Dumping Code of 1979 [ADC] (1979) replicated most of the ADC (1967) with new changes. The first important change was a reduction of the code's causality standardby replacing the prior Article 3 "principal cause" formula with a simple "causation test". Asecond revision removed the one example of antitrust reasoning from the ADC (1967). The ADC (1979) eliminated any references to "restrictive business practices". Instead, it outlined a set of factors (reduction in output, sales, market share, profits, and so on) that one would find in any safeguard regulation (Barceló III, 1991:318).

3.3.3 The Uruguay Round of 1986 -1994

The Uruguay Round was the 8th round of multilateral trade talks (MTN) and resulted in the adoption and use of ADA (1994). The Uruguay Round also

resulted in three key developments, two of which may be attributed to the EU. The first was the introduction of the Sunset Review Clause (henceforth, the Clause) which was already present in the EU ADL. The Clause prescribes a statutory time limit of 5 years on anti-dumping measures, with the potential for an extension if a review demonstrates that it is essential. This was regarded as a beneficial contribution to international anti-dumping legislation because such a clause did not exist in all countries where ADMs might last indefinitely). Prior to the Clause, US anti-dumping measures had no time limit unless the party who was found to be dumping could demonstrate that they were no longer dumping by applying for an administrative review, which was regarded as an onerous and biased process (Lee, 2013:9-10, quoted from Nelson and Vandenbussche, 2005:10). The second change emanating from the Uruguay Round was the cumulation practice, which was already in place in the EU and the US. Notwithstanding opposition from trade economists, practitioners, and defendants, who highlighted the unambiguous bias that comes from cumulating import volumes from targeted countries to demonstrate injury, the WTO approved cumulation for all anti-dumping purposes (Lee, 2013:10, quoted from Prusa, 2001:686). The third and possibly most significant development in paving the way for AD spread was the incorporation of the ADA (1994) into the GATT Agreement. This bound all WTO members (Lee, 2013:10).

3.3.4 GATT and the WTO since 1994

In 1993, the GATT was updated (GATT 1994) to include new obligations imposed upon its signatories. The WTO ADA (1994) requires signatories to impose anti-dumping duties on imports if two conditions are satisfied. First, the dumped product must be "introduced into the commerce of the importing country at less than their 'normal' or 'fair' value'". Second, ADMs must be imposed it dumping must "causes 'material injury' to the domestic firm". The ADA (1994) requires that the ADMs must not be higher than the dumping margin (The difference between the normal value and import price). The imposition of the ADMs are permitted where there is proof of dumping and injury in a formal

investigation which is initiated by an application by or on behalf of the domestic industry (Theuringer & Weiβ, 2001:2).

On January 1, 1995, the European Community and the 76 current GATT members joined the WTO as founding members. The remaining 51 GATT members re-joined the WTO inthe following 2 years (the last being Democratic Republic of Congo in 1997). Since the creation, 33 new non-GATT members have joined and 22 are currently negotiating their membership. The WTO has a total of 159 member nations, with Laos and Tajikistan joining as of 2018 (ADA, 1994). Syria, Lebanon, and the Social Federal Republic of Yugoslavia (SFR), 3 of the original GATT members, have not re-joined the WTO. Since the SFR Yugoslavia, which was renamed Serbia and Montenegro and split into two after membership negotiations, it is not acknowledged as a direct successor state to the SFRY because its application is regarded as being unique (non-GATT). On 4 May 2010, the General Council of the WTO agreed to establish a working party to examine the request of Syria for WTO membership.

On December 31, 1995, the contracting parties that established the WTO officially terminated all provisions of the "GATT 1947" agreement. While Serbia was in the final stage of discussions and anticipated to become one of the newest members of the WTO in 2012 or the near future, Montenegro became a member in 2012. Although the GATT consists of a set of rules agreed upon by nations, the WTO is an institutional body. The WTO then expanded its scope from traded goods to include trade within the service sector and intellectual property rights. Although it was designed to serve multilateral agreements during several rounds of GATT negotiations (particularly the Tokyo Round), multilateral agreements created selective trading and caused fragmentation among members (ADA, 1994).

3.4 History of anti-dumping in South Africa and the Southern African CustomsUnion

Considering how active South Africa is with regard to the use of anti-dumping as a protectionist measure following tariff liberalisation, it is imperative to focus on

the history, as well as how the post-1994 democratic era enabled the renegotiation of the customs union to take place. The focus will also be on the legal framework used for anti-dumping investigations during this period.

The South African Anti-Dumping Law (SAADL) has a long history. South Africa is amongthe first countries in the world to use trade remedies and became the fourth country to pass anti-dumping laws in 2014, after Canada, Australia and New Zealand. Only 7 yearslater, it imposed its anti-dumping duty and continued to initiate no fewer than 883 anti- dumping investigations prior to 1995, when the new dispensation of the WTO came into force (Brink, 2012:2, quoted from Brink, 2004:54-58 & 741). The anti-dumping measures were administered by the then Customs Department, which eventually became the SARS (Joubert, 2005:1, quoted from International Trade Centre, 2003). Sections 55 to 57A of the Customs and Excise Act of 1964 established the procedures for conducting anti-dumping investigations and administering anti-dumping measures. The implementation shortcomings identified in the Customs and Excise Act led to the formation of the Board on Trade and Industries (BTI) in September 1923 (Joubert, 2005:1, quoted from International Trade Centre, 2003).

In 1977, the BTI recommended that all anti-dumping duties which were in place in South Africa should be withdrawn as from 1 January 1978. It was argued that because the measures have been in place for a while their removal would not pose any threat to domestic industries, and any disruptive competition would be addressed through formula duties (Joubert, 2005:2, quoted from International Trade Centre, 2003:2). In the years leading to the recommendation, fewer anti-dumping duties were imposed. This was alsobecause the domestic industries were protected by high tariff barriers. Trade sanctions imposed against South Africa led to the government considering protection on behalf of domestic industries. Import surcharges were used as a form of protection and reduced the need for the application of anti-dumping measures (Joubert, 2005:2, quoted from Barral *et al*., 2004:49).

The Board on Trade and Industries Act (BTIA) was replaced by the Board on Tariffs and Trade (BTT) Act in 1986. To support the BTT, the Department of Trade and Industries established the Directorate of Dumping Investigations (DDI) in

1992 to carry out anti- dumping and countervailing investigations on the BTT's behalf (Joubert, 2005:2, quoted from Republic of South Africa, 1992a; 1992b). Botswana, Lesotho, Namibia and Eswatini-Swaziland (BLNES countries) are members of SACU, together with South Africa. All the countries signed a new SACU Agreement in 2002, which became operational in 2004. Negotiations for this agreement came into effectafter South Africa's democratic elections. The purpose was to give the BLNES countries an opportunity to be involved in the decision-making process in the customs union. The SACU Agreement had significant implications for anti-dumping within the region because it altered how tariff determinations, such as those pertaining to anti-dumping, were made. In addition, it required each member state to develop its own legislation on trade remedies and establish national bodies to administer remedies within their respective countries (Joubert, 2005:4).

In terms of the SACU Agreement, South Africa is the only country authorised to determine customs duties, as well as anti-dumping investigation, countervailing and safeguard measures on behalf of the customs union. The domestic industries will request the BTT to conduct investigations within SACU. Subsequent to conducting these investigations, the BTT will make recommendations to the Minister of Trade and Industry (now referred to as the "Minister of the Department of Trade Industry and Competition" ("DTIC)", and the Minister will then request the Minister of Finance to impose anti-dumping measures. The ITAC was founded on 1 June 2003 by the ITA Act (Act 71 of 2002). In terms of Article14 of the 2002 SACU Agreement, it replaced the BTT and acts as the national body of South Africa in terms of Article 14 of the 2002 SACU Agreement. As the tariff body for thewhole of SACU, the ITAC is responsible for functions such as trade remedy investigations, evaluation of applications for the amendment of customs duties, duty and tax concessions, and import and export controls. The Council of Ministers, Secretariat, Tariff Board, Tribunal, Customs Union Commission and a number of Technical Committees will be part of SACU under the new Agreement. As stated above, the ITAC will conduct investigations for the whole of SACU and make recommendations to the SACU Tariff Board (Joubert, 2005:4).

3.5 South African legal framework for anti-dumping investigations

Anti-dumping investigations in South Africa are conducted in terms of ADA (1994), the Customs and Excise Act 91 of 1964, the ITAC Act No. 71 of 2002 and the ADR [2003] (Ndlovu, 2012:7, quoted from ADA (1994); Republic of South Africa, 1964, 2002 & 2003a). The alignment of the ITA Act and the ADR with WTO requirements was a significant step for the ITAC. Dumping, NV and export selling price are among the terms defined by the ITA Act. The ITA Act also explains how anti-dumping investigations should be conducted and how confidential information should be dealt with. Since South Africa is a member of the SACU, all anti-dumping investigations are conducted by the ITAC, which now assumes a SACU-wide ambit. Therefore, any local industry which is being harmed or threatened with harm can now refer to the specific industry in the SACU Region (Ndlovu, 2012:10).

The use of trade remedies in South Africa coincides with the democratic transition that began in the early 1990s. South Africa initiated approximately 157 anti-dumping investigations and imposed 106 ADMs between 1 January 1995 and 30 June 2002. This makes South Africa the 5th largest user of anti-dumping actions after the US, EU, Argentina and India (Joubert, 2005:2, quoted from WTO, 2003a:34). According to Brink (2012:3), quoted from Republic of South Africa (1996), the South African Constitution provides a foundation for all laws in South Africa and these laws must comply with the Constitution. In terms of the anti-dumping investigations, "it is stated that those provisions that guarantee everyone access to "any information held by the state" guarantee the right to reasonable and procedurally fair administrative action; require that reasons must be given in each instance where the party's rights have been adversely affected by an administrative action; and require courts of law to interpret national legislation in line withInternational Law". Ndlovu (2012:8-9), quoted from Republic of South Africa, 1996), noted the following constitutional provisions:

(i) "An international agreement binds the Republic of South Africa only after it has been approved by a resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement of a

technical, administrative or executive nature.

(ii) International agreements of a technical, administrative or executive nature, or agreements that do not require either ratification or accession, entered into by the national executive, bind the Republic without approval by the National Assembly or the National Council of Provinces. The only requirement is that they must be tabled in the National Assembly and National Council of Provinces within a reasonable time.

(iii) An international agreement becomes a law in the Republic when is enacted by the National Legislation. However, a self-executing provision of an agreement that has been approved by Parliament is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament.

(iv) The Republic of South Africa is bound by the international arrangements which were binding on the Republic on 4 February 1997, and the Customary International Law is law in the Republic, unless it is inconsistent with the South African Constitution or an Act of Parliament.

(vi) When interpreting any legislation, South African courts must prefer any reasonable interpretation of the legislation which is consistent with international law over any alternative interpretation that is inconsistent with International Law".

The Promotion of Access to Information Act (PAIA) and the Promotion of Administrative Justice Act (PAJA) are two other legislations that have an effect on anti-dumping investigations. The PAIA provides "the basic principles of access to information held by the state and by individuals, including that a person is entitled to all information held by the state, unless the information relates to financial, commercial, scientific or technical information…of a third party, disclosure of which would be likely to cause harm to the commercial or financial interests of that third party, or confidentially submitted information that could prejudice the party that submitted such information. The PAJA, in turn, providesfor fair administrative action, including the rules of natural justice, i.e. the *audi alteram partem* and *nemo index in propria* rules" (Brink, 2012 3-4, quoted from

Republic of SouthAfrica, 2000a; 2000b).

Some of the pertinent cases of AD investigations in the South African context are discussed. These include: *Chairman, Board on Tariffs and Trade vs Brenco, ProgressOffice Machines vs South African Revenue Service, and International Trade Administration Commission of South Africa (ITAC) vs Scaw South Africa (Pty) Ltd.*

In ***Chairman, Board on Tariffs and Trade vs Brenco***, the respondent was successful in overturning the BTT's ruling on anti-dumping duties imposed on roller bearings retroactively, and in having all monies paid with respect to the duties returned to them. The Supreme Court of Appeal held the following:

"It is stated that where an Act of Parliament confers an administrative power, there is presumption that it will be exercised in a manner that is fair in all circumstances. Fairness will very often require that a person who is adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken, with a view to procuring its modification, or both" (Chairman, Board on Tariffs and Trade v Brenco Inc [2001] ZASCA 67).

Prior to the imposition of the anti-dumping measures, it was found that the Board on Tariffs and Trade, predecessor to the ITAC, did not comply with the rules of natural justice. It was decided that the following should serve as the guiding question in this situation: "Was sufficient information given to respondents in time to defend themselves?" Procedural fairness would have prevailed if there was an affirmative response in the anti-dumping context. Without legislation, South Africa will need to rely on international agreements and law for direction (Ndlovu, 2012:9, quoted from Chairman, Board on Tariffs and Trade v Brenco Inc [2001] ZASCA 67), Paragraph 19).

In *Progress Office Machines vs South African Revenue Service,* the appellant, Progress Office Machines, a South African importer of A4 copy paper imported four consignments of the product for sale in the domestic market through the Durban Port andpaid the required customs duty in September 2004. SARS imposed preliminary anti- dumping measures against the subject product in 1998 because there was an anti- dumping investigation in place. Definitive anti-

dumping measures were imposed on 28 May 1999, with retrospective effect to 27 November 1998, on preliminary anti-dumping duties (Ndlovu, 2012 quoted from Republic of South Africa, 1999).

Subsequent to taking delivery of the goods, the anti-dumping duties were not collected together with customs already paid in September 2004. In October 2004, SARS, througha letter to the appellant requested that it effect payment of R1 565 569.60 for ADMs due on consignments already cleared in September 2004. In May 2003, the ITAC subsequently gave notice of the imminent lapse of these duties pursuant to Notice no. GN 1560 of Government Gazette no. 24893, indicating that "unless a request was made by the SACU industry indicating whether the expiry of the anti-dumping duties would likely lead to the continuation or recurrence of dumping and injury, the definitive anti-dumping measures would expire" (Ndlovu, 2012:22, quoted from Republic of South Africa, 2003b).

The lapse of the anti- dumping measures coincided with the initiation of the Sunset Review investigation in 2003 (Ndlovu, 2012:22, quoted from (532/06) [2007] ZASCA 118; [2007] SCA 118 (RSA); [2007] 4 All SA 1358 (SCA) ; 2008 (2) …; also see Republic of South Africa, 2003c). The information required for initiation of the Sunset Review was submitted by Mondi Limited and Sappi (Ltd) (Pty). The appellant argued that it was not liable for payment of the anti-dumping duties that lapsed in 2003, thatis, 5 years from the date of their first imposition, as required by domestic law (Ndlovu, 2012: 22-23, quoted from ADA (1994); ITAC Act 71 of 2002; Section 53.1 of the ADR (2003).

The South Gauteng High Court agreed with the ITAC's proposal that the anti-dumping duties should be paid. Aggrieved by the judgement made by the South Gauteng High Court, the appellant appealed the decision with the Supreme Court of Appeal of South Africa (SCA) in Bloemfontein, where the requirement to pay the anti-dumping duties was established. The requirement to pay the anti-dumping duties was supposed tohave been set in 1998 and 1999 when the preliminary and final anti-dumping measures were imposed. The period was supposed to run from the date of the imposition of provisional measures in 1998 until November 2003, and by the time the Sunset Review was initiated, the anti-

dumping duties would have expired and the life span of the duties could not be extended by the Sunset Review investigation. Since the anti-dumping measures lapsed in 2003, the SCA made a judgement that the anti-dumping duties imposed in respect of A4 paper imported from Indonesia, ceased to exist as from 27 November 2003. The appeal was successful and it was decided that the appellant was exempted from payment of anti-dumping duties (Ndlovu, 2012:23-24), quoted from Progress Office Machines CC v South African Revenue Services and Others (532/06) [2007] ZASCA 118; [2007] SCA 118 (RSA); [2007] 4 All SA 1358 (SCA) ; 2008 (2) SA 13 (SCA), Paragraphs 179-180).

In ***International Trade Administration Commission of South Africa (ITAC) vs Scaw South Africa (Pty) Ltd,*** the Constitutional Court of South Africa delivered its judgement on 9 March 2010. The facts of the case were as follows:

In 2002, Scaw South Africa (Pty) Ltd, the largest manufacturer of steel products, including rolled steel and alloy casting, requested the BTT to conduct an investigation into the alleged dumping of stranded wire, ropes and iron and steel cables originating in or imported from various countries, including Bridon International Limited (Bridon UK), the biggest manufacturer of steel and wire ropes in the UK. Following the investigation and based on the recommendation of the BTT to the Minister of the DTIC and Minister of Finance, SARS imposed anti-dumping duties on products originating in or imported from Bridon UK was calculated to be 42.1% (Ndlovu, 2012:29, quoted from ITAC v Scaw CCT59/09) [2010] ZACC 6, Paragraph 17).

In August 2006, Bridon UK requested the ITAC to initiate a changed circumstance review. Subsequent to the review, it was found in the ITAC's report that although Bridon UK did not continue to dump the subject product, it could not be established whether or not the subject product was dumped, as there were no exports to the SACU market. This meant that the existing anti-dumping duties had to remain in place (Ndlovu, 2012:29, quoted from ITAC v Scaw CCT 59/09) [2010] ZACC 6, Paragraph18). After the 5- year period,the ITAC informed the Scaw South Africa (Pty) Ltd ("Scaw South Africa"), pursuant to a notice in the Gazette, that "any definitive anti-dumping/countervailing duty should be terminated on a date not later than five years from the date of imposition,

unless the authorities determined, in a review initiated before that date on their own initiative, or upon a duly substantiated request made by or on behalf of the domestic industry, that the expiration of the duty would be likely to lead to the continuation or recurrence of dumping and injury or subsidised exports and injury". Scaw South Africa indicated its interest in participating in the investigation, and finally submitted all the information, in order to enable the ITAC to determine that if the duties were to expire; this would lead to the continuation or recurrence of dumping and injury to the domestic manufacturer. Upon receipt of the relevant information from Scaw South Africa, the ITAC conducted the Sunset Review investigation. The determination was that although there was a possibility that dumping from other manufacturers and producers in the UK would occur, there was no proof that dumping of the subject product by Bridon UK would take place. During the investigation, the ITAC had to determine whether to remove the anti-dumping duty applicable to Bridon UK. This is because it was found that steel ropes produced by Bridon UK were stored in bonded warehouses and sold to foreign vessels. This meant that the question of their continued dumping could not be established. The ITAC made a determination that the removal of the existing anti-dumping duties could not result in Bridon UK dumping the subject product into the SACU market (Ndlovu, 2012: 29-30, quoted from ITAC v Scaw CCT 59/09) [2010] ZACC 6, Paragraphs 22-23).

On 14 October 2008, the ITAC made a decision to recommend to the Minister that the existing anti-dumping duty on imports of the product by Bridon UK should be terminated. Scaw South Africa then interdicted the ITAC in the Gauteng High Court from proceeding with its recommendation to the Minister of the DTIC. Believing that the Minister would accept ITAC's recommendation, 6 days later, Scaw South Africa further interdicted the Minister of the DTIC and the Minister of Finance (Ndlovu, 2012: 30, quoted from (CCT 59/09) [2010] ZACC 6, Paragraphs 14-24).

The purpose of the interdict was to prevent and interdict the ITAC from forwarding recommendations to the Minister of the DTIC to terminate the relevant ADMs, as well as from accepting the ITAC's recommendations and

forwarding the recommendations to the Minister of Finance. The order sought further to tie the hands of the Minister of Finance, in that if he had already accepted the recommendation by the Minister, he was prevented from implementing the recommendation. In January 2005, theNorth Gauteng High Court granted the interim relief. Aggrieved by the judgement, the ITAC sought leave to appeal which was subsequently refused (Ndlovu, 2012: 30,quoted from ITAC v SCAW (CCT 59/09) [2010] ZACC 6, Paragraphs 226-229). Leave to appeal was refused by the North Gauteng High Court and a subsequent appeal againstthe refusal of leave to appeal was taken to the Supreme Court of Appeal of South Africa.

In respect of the merits of the appeal in the Constitutional Court of South Africa, it was found that in terms of the regulations, the anti- dumping duties would lapse following the expiry of the 5-year period, and that by initiating a sunset or judicial review investigation, it would not extend the lifespan of an anti- dumping duty beyond that period. It was also found that even though it was competent for the North Gauteng High Court to grant the interim interdict, it was unjust because the judgement had the effect of preventing the anti-dumping duty from expiring pending the finalisation of Scaw South Africa' review application on the case International Trade Administration Commission v Scaw South Africa (Ndlovu, 2012:33, quoted from ITAC v Scaw (CCT 59/09) [2010] ZACC 6, Paragraphs 75, 87). The Constitutional Court of South Africa found that the North Gauteng High Court held that decisions regarding the setting or lifting of antidumping duties are clearly within the domain of the executive, and that the interdict prevented the Ministers involved from performing their legislative functions. It was also argued that it was inappropriate for the North Gauteng High Court to grant the interdict, because it improperly breached the doctrine of separation of powers. The Constitutional Court of South Africa also found that the effect of the interdict granted by the High Court of South Africa meant that the timeline for the anti-dumping duty in place would be extended. It therefore came to the conclusion that when the High Court extended the existing anti-dumping duty, it ventured into the constitutional terrain of the national executive, and such action was tantamount to a violation of the separation ofpowers doctrine

(Ndlovu, 2012:34, quoted from (CCT 59/09) [2010] ZACC 6, Paragraphs 265-266).

3.6 Conclusion

This chapter has found that anti-dumping investigations in South Africa are being conducted according to international and domestic legislations. An overview of the history of anti-dumping law from an international and South African perspective was provided. The various trade agreements that resulted in the use of trade remedies in South Africa were also discussed. Given the fact that South Africa is also one of the founding members of the WTO, one would have expected significant modifications and considerations, considering its experience in conducting trade remedy investigations.

First, the circumstances that prevailed in *Chairman, Board on Tariffs and Trade v Brenco* raise questions concerning the integrity of the ITAC as a well-known institution in the SACU region, where it conducts trade remedies investigations. By not affording interested parties an opportunity to defend themselves during litigations, the ITAC is not complying with the provisions of international law. The ITA Act and domestic legislation empower the ITAC to provide interested parties with information during investigations. The experiences of other jurisdictions dealing with anti-dumping investigations could also be helpful to the ITAC.

Second, it is apparent, in the matter between *the ITAC and Scaw South Africa (Pty) Ltd*, that the domestic industry can abuse anti-dumping law. By preventing the ITAC and Ministers of the DTIC and Finance from terminating anti-dumping measures against Bridon UK, it is evident that Scaw South Africa (Pty) Ltd enjoys the profits from charging high prices in the domestic market. The interests of consumers are therefore not taken into account.

Third, in the matter between *Progress Office Machines v South African Revenue Service,* it is surprising that the ITAC was unable to consider the fact that the appellant was not supposed to pay the anti-dumping measures requested by SARS. The ITA Act no. 71 of 2002, the ADR (2003) and ADA (1994) regulate the lifespan of anti-dumping measures and when they should be reviewed. The

judgment of the Supreme of Court of Appeal was correct in confirming that the appellant was not liable for payment of any anti-dumping duties that expired in 1993. This is because the ADA (1994) stipulates that anti-dumping measures must remain in place for 5 years from the date of provisional payments. This shows that institutions around the world are also capable of abusing anti-dumping laws. The next chapter provides a comparative analysis of selected investigating authorities in terms of their performance of currency conversions during anti-dumping investigations.

CHAPTER 4: CURRENCY CONVERSION AND ANTI-DUMPING: A COMPARATIVE ANALYSIS OF SELECTED INVESTIGATING AUTHORITIES

4.1 Introduction

There are conflicting arguments about the effect of exchange rate changes on the determination of anti-dumping measures. Floating exchange rates have proven to be far more volatile than had been anticipated. This has complicated the determination of anti- dumping duties by the investigating authorities concerned. The provision of Article 2.4.1 of the ADA (1994) provides guidance to different investigating jurisdictions on how exchange rate distortions should be assessed during calculation of anti-dumping measures. However, investigating authorities disagree with each other in the way in whichexchange rate fluctuations are assessed during calculation of dumping measures. The question whether this provision is sufficiently well-defined and able to help lessen trade disputes arising amongst members of the WTO, or if there is a need to improve it will be answered in this chapter.

This chapter presents a comparative analysis of how currency fluctuations are dealt with during anti-dumping investigations. Section 4.2 will first evaluate the provision of Article 2.4.1 of the ADA (1994). Within this section, Sub-section 4.2.1 will examine how the ITAC deals with exchange rate variations during the determination of anti-dumping duties, while Sub-section 4.2.2 to Sub-section 4.2.6 will further elaborate on how other investigating authorities analyse and interpret the application of this provision. Section 4.3 draws some preliminary conclusions.

4.2 Currency conversion during anti-dumping investigations: Article 2.4.1 of the WTO ADA (1994)

Article 2.4.1 of the ADA (1994) states that “when the comparison requires a conversion of currencies, such conversion should be made using the rate of

exchange on the date ofsale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale should be used. It also states that fluctuations in exchange rates should be ignored in an investigation, and the authorities should allow exporters at least 60 days to adjust their export prices, to reflect any sustained movements in exchange rates during the period of investigation (PoI)". Although the ADA (1994) governs the conduct of investigations when there are exchange rate variations, it is unsatisfactory. First, if the PoI for assessing dumping is twelve months, and if exchange rate fluctuations for the period are ignored, this results in various calculations of ADMs, thereby either reducing or widening the measures in favour or to the detriment of the applicants in the investigations (See Chapter 5, Table 5.3 in the text and Tables 5.7 to 5.17 in the appendices; Table 5.6 in the text and Tables 5.18 to 5.28 in the appendices.). Second, if exporters are allowed 60 days to adjust their exportprices in order to reflect sustained movements in exchange rates during the PoI, the provision is not clear regarding how investigating authorities should assess sustained movements in exchange rates and how and when the 60-days period shouldbe calculated. Czako *et al.* (2003:146) found that applying this rule is difficult because authorities must define "fluctuations" and "sustained movements" in exchange rates. It is also argued that it is challenging to apply this provision because jurisdictions are obliged to establish a link between fluctuations in exchange rates, adjustments of export price, and currency conversions by the investigating authorities.

Bhala (1995:98) stated that it is not easy for exporters to decide on when sustained movements in exchange rates are taking place because every change in exchange rates can be perceived as sustained, and they can merely change their prices in line with the 60-day lag rule. The applicant in the investigation can opt to select exchange rates that maximise the dumping margin. This situation is likely to occur because there is no clear guidance in Article 2.4.1 of the ADA (1994) in terms of how sustained movements should be evaluated. Hudson et al. (2011:74), quoted from Vermulst (2005:49), found that Article 2.4.1 of the ADA (1994) does not give any specific guidance as to the quantification

of such rate, but leaves it to the authorities to make a determination. During the Negotiation Group on Rules (2003b:2), it was argued that Article 2.4.1 of the ADA (1994) is considered as an essential component for the determination of dumping. Investigating authorities are unable to address currency movements during investigations because of the provision's lack of information. It is stated that authorities can benefit from the provision if it is clarified and read appropriately to avoid ambiguity. Conahan (1986:22-23) found that exchange rate fluctuations can play a significant role in determining whether dumping has occurred, and may influence the decision regarding whether injury during anti-dumping and countervailing investigations was caused by imports. Kim (2000:14) argued that when there is an appreciation in the exporter's foreign currency, the NV and dumping margin will rise. In order to reduce the dumping margin, the exporter would have to change its export or domestic selling price. On the other hand, if the currency depreciates, the NV declines in relation to the export price, and the dumping margin decreases. This explains why Commerce has rules in which it invokes currency conversion during the determination of ADMs (See Sub-section 4.2.2.1 of this Chapter.). This also demonstrates why it is argued in Sub-sections 5.5 to 5.6 in Chapter 5 that exchange rate fluctuations impact on the determination of ADMs.

4.2.1 Currency conversion during anti-dumping investigations: International Trade Administration of South Africa.

Although anti-dumping investigations in the SACU are conducted by the ITAC, they are regulated by the ITA Act and the ADR. The ADA (1994) simply serves as an interpretative aid to domestic legislation. In all its investigations, the ITAC considers 12-month average exchange rates to calculate dumping (Republic of South Africa, 2003a:8). Although Article 2.4.1 of the ADA (1994) directs investigating authorities to use various ways of assessing exchange rate variations to determine dumping, because its provision is vague, the ITAC has the discretion to use any other exchange rate, including 12-months average rates.

4.2.2 Currency conversion during anti-dumping investigations: The United States

4.2.2.1 Rate of exchange on the date of sale

According to Kim (2000:16), the basis for US Anti-Dumping Law is set out in Title VIIof the Tariff Act of 1930, as amended, codified in Title 19 of the US Code, Section 1673 to 1677 (See International Trade Commission on Imposition of Anti-Dumping Duties, Title_19_1671-1677.). The reason for the amendment was to comply with theprovisions of the ADA (1994). The only difference between the ADA (1994) and the amended US Anti-Dumping Law (USADL) is that during currency conversion, the latter uses exchange rates on the date of the US$ sales to convert prices denominated in the exporter's currency. Commerce also has a special currency conversion rule. The rule permits Commerce to use any exchange rate other than the date of sale.The purpose is to avoid penalising a foreign exporter when there are exchange rate movements which are beyond the exporter's control, thereby creating an inaccurate dumping margin (Powell *et al.*, 1990:194, quoted from US Department of Commerce, 1997: 19 C,F.R. § 353.60(b) (1989; Melamine Chemicals, Inc., Appellee, v the United States, Appellant, Fed. Reg 45. no. 29,619 (1980), aff'd, Melamine Chemicals, Inc., Appellee, v the United States, Appellant, 732 F.2d 924 (Fed, Cir 1984); US Department of Commerce, 1981: Final Anti-dumping determination of sales at not less than fair value on Certain Iron Metal Casting from India, 46 Fed. Reg. 39869, 2 August 1981).

Furthermore, Kim (2000:10) stated that during an investigation, to convert either the export price or the domestic selling price for purpose of price comparison, jurisdictions need to choose the exchange rate on the date of sale of the subject product under consideration. He argued that when the NV and export selling price are both at ex-factory level, and in respect of sales made at the same time, it would notmake a difference when the exchange rate on the date of sale of the export price or NV is used for comparative purposes. It is also argued that in some cases, the NV and export sales are not very closely

matched in terms of sales volume and dates. Even if the date of sale of the subject product can be converted using either the export price ordomestic selling price for the purpose of price comparison, the fact that the USADL requires foreign exporters to convert their prices into US$ will always apply.

On the contrary, Bhala (1995:99) regarded the provision used by the US as being unfair. The question arises as to why foreign exporters have to convert their prices into US$ during anti-dumping investigations when there are exchange rate changes, whereas US exporters must uphold their prices in US$ when there is a depreciation. It is also argued that by maintaining their price levels in US$, this enables US exporters to increase their share in foreign markets, instead of increasing their prices to maximise profits. It should, however, be noted that the fact that the USADL requires exporters to convert export prices into US$ is insignificant because the provision of Article 2.4.1 of the ADA (1994) is vague. Besides, Johnson (1992:6) found that foreign companies and US importers use fixed exchange rate contracts. The selling price in the exporter's home currency will fluctuate according to the current exchange rates, but production costs remain the same. Also, Johnson (1992:6), quoted from US States Congress (1986:35), found that this could result in inaccurate dumping calculations, because during the period when foreign and US exporters enter into a contract, the foreign currency may have changed dramatically by the time the products are actually delivered. Although this creates unfairness, the author is of the view that as long as the selling price and exchange rate information fall within the PoI and affect the sale of the subject product under consideration; it can be regarded as reasonable information for calculating ADMs.

McGee *et al*. (1995: 274), quoted from Hazlitt (1984:155-157), stated that ever since the breakdown of Bretton Woods system, exchange rates have been floating rather than fixed. The authors argued that the manner in which Commerce evaluates exchange rate changes causes dumping to occur where there is none. They cite a hypothetical scenario in which the British Pound (£) is equal to US$1.50 at the time when the contract is entered into, while the price of the product in question is £1 in Britain and US$1.50 in the US. In such

a case, it can be determined that nodumping occurred because the dollar price for the product was similar in both countries. If the exchange rate shifts so that £1 equals US$1.75, dumping in theUS will be deemed to have occurred, since the product now sells in Britain for the equivalent of US$1.75, compared to only US$1.50 in the US. Even if there was no intent to dump, a foreign exporter can still be found liable for dumping if the exchange rate shifted in the wrong direction.

There are 2 situations in which Commerce invokes currency conversion during anti- dumping investigations. The first is when the value of the foreign currency appreciated rather than depreciated relative to the US$ during the PoI. The second is when a foreign currency is experiencing a temporary fluctuation, that is, uncertain shifts back and forth occur during the PoI. The authors pointed out that Commerce does not invoke this special rule when the value of the foreign currency is depreciating relative to the US$. The reason is that appreciating currency can result in inaccurate dumping margins. In contrast, when the value of the foreign currency is depreciating relative to the US$, it does not result in dumping margins (Powel *et al*., 1990:194-195, quoted from US Department of Commerce, 1997: 19 C. F. R. 353.60(b) (1989); US Department of Commerce, 1986: Porcelain on Cooking Ware from Mexico, 51 Fed. Reg. at 36,435; US Department of Commerce, 1981: Certain Iron Casting from India, 46 Fed. Reg. 39,869; US Department of Commerce, 1984: Pads for Woodwind Instrument Keys from Italy, 49 Fed. Reg. 28,295, 28297; revised on other grounds, Luciano Pisoni Fabbrica Accessori Instrumenti Musicali and Enzo Pizzi, Inc., Plaintiffs v the United States 640 F. Supp. 255, 260 (Ct. Int'l Trade 1986); Palmeter, 1988:73).

Dickey (2013:67-68) argued that a depreciation in US$ results in dumping margins against exporters, especially if the decline is too swift to permit reasonable price adjustments. Conversely, when the US$ appreciates, it tends to erase dumping marginsfor the exporters. For an exporter or importer, the extent to which the US$ depreciates determines how much the return that the company receives in its home market currency for US$ will decrease, and to what extent the dumping margin production costs will increase, because of the

required exchange rate adjustments of the home market currency. In such instances, an affected exporter or importer could possibly wind up with dumping margins, sales below cost and losses on its sales, all of which are attributable to the exchange rate decline of the US$. The following are the relevant cases on the assessment of exchange rates during anti- dumping investigations by Commerce.

In the matter regarding ***Melamine Chemicals, Inc., Appellee, v. the United States, Appellant***, the USCIT"), the United States Court of Appeals, Federal Circuit delivered judgements in 1984. The details of the case were as follows:

In 1979, a dumping investigation was initiated on imports of Melamine in Crystal Form from the Netherlands. Treasury Department made a final determination that during the PoI, Melamine did not dump the subject product in the US market. Since ITA instead of Treasury Department conducted dumping investigations, it amended the determination and concluded that Melamine did dump the product in the US market. Melamine Chemicals, Inc. challenged the use of exchange rates from the quarter prior to the imposition of the anti-dumping duty during the investigation in the United States Court of Appeals. The contention was that Section 372 of Title 31 of the United States Code (USC), which is currently codified as Title 31 of the USC 5151 (1982), mandated the application of exchange rates for the quarter in which the goods were exported (Cornell Law School, 1982). ITA argued that it applied exchange rates in the previous quarter because there were major exchange rate fluctuations during the PoI, and that when the exporter was making an export price decision, it was impossible for it to predict the next exchange rate fluctuations.

Using the exchange rates in the previous quarter in which the export sales were made, a DM of 2.8% was calculated. The USCIT ruled that ITA erred in its decision to use previous quarter's exchange rates instead of exchange rates for the quarter in which the goods were exported. When calculating dumping using exchange rates for the quarter in which the merchandise was exported, no anti-dumping duty could be found (Kennedy, 1986:28-29, quoted from Melamine Chemicals, Inc., Appellee v, the United States, Appellant, 732 F.2d 924d at 925-926 (Fed, Cir 1984); US Department of Commerce: 1997 (see 19 C. F. R.

353.60(b) (1989); Melamine Chemicals, Inc., v the United States, Appellant, Amendment of final determination, Fed. Reg 45. no. 29,619; 29, 620 (1980)).

In the anti-dumping investigation on ***Porcelain-on-Steel Cooking Ware from Mexico v United States***, the Federal Reserve and the Department of Treasury certified and published 2 exchange rates for Mexico, namely the official or government-controlled exchange rates and the free exchange rates. The Mexican law requires that during investigations, export selling prices must be calculated using official exchange rates and not free exchange rates. In calculating dumping, Commerce converted the officialexchange rates from Mexican Peso into US$ to calculate export prices. This is because the official exchange rates were considered as actual exchange rates used by Mexican exporters (US Department of Commerce, 1986: Porcelain-on-Steel Cooking Ware from Mexico, 51 Fed. Reg. at 36,435). It is argued that since Article 2.4.1 of the ADA (1994) is not clear on which exchange rates to use when making a fair comparison between NV and export price, the investigating authorities have a discretion to choose types of exchange rates to consider to calculate ADMs during the PoI.

In Luciano Pisoni Fabbrica Accessori Instrumenti Musicali and Enzo Pizzi, Inc., Plaintiffs v the United States, Defendant, the USCIT delivered its judgement on 12 June 1986. The details of the case were as follows.

The Plaintiffs, an Italian producer of Woodwind Instrument Pads in Italy and its US importer, challenged the final determination by Commerce on Pads for Woodwind Instrument Keys from Italy at less than fair value. In the investigation, Commerce found that there were no abrupt changes in the exchange rate during the PoI, but rather a steady appreciation of the US$ relative to the exporter's home market currency, namely the Lira. In challenging the determination, the Plaintiff stated that during the PoI, Commerce should have used a reasonable currency conversion method for its domestic sales, which does not result in a dumping margin.

It was also argued that Commerce had a duty to do this for 2 reasons. First, the aim of the ADLs is to address unfair trade practices and not to punish exporters who sell their products at prices below those sold by US producers.

Second, it was stated that the regulation applied by Commerce requires that price differences resulting from currency fluctuations should be disregarded. The Plaintiffs also stated that manufacturers, exporters, and importers would be expected to act in time for purposesof the investigation, in order to consider price differences resulting from sustained changes in prevailing exchange rates. Where prices under consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared as a sole result of such exchange rate fluctuations will be taken into account in fair value investigations (Luciano Pisoni Fabbrica Accessori Instrumenti Musicali Enzo Pizzi, Inc., Plaintiffs v the United States, Defendant, 640 F. Supp 255(Ct. Int'l Trade 1986).

Furthering the challenging the decision, the Plaintiffs relied on the judgement in *Melamine Chemicals Inc. v United States,* where the decision was made by the USCIT that the dumping margin should be calculated using exchange rates for the quarter in which the exporter set its prices, and not the previous quarter in the investigation (See Sub-section 4.2.2.1 of this Chapter.). The USCIT ruled that the ITA erred in calculating the dumping margin using quarterly rates outside the investigation period of dumping. Calculating dumping using exchange rates in which the exporter set its prices resulted in a penalty of 2.18%. In this case, the USCIT argued that if Commerce calculated the ADM using quarterly exchange rates and found no dumping, regardless of the presence of exchange rate fluctuations, the USADL would be violated (West, 1991: 112, quoted from Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v United States, 640 F. Supp 255 (Ct. Int'l Trade 1986)).

4.2.2.2 Rate of exchange in forward markets

The literature offers a specific rule on the rate of exchange in forward markets when the sale of a foreign currency is directly linked to the export sale. Kim (2000:16) stated that in terms of the USADL, when a sale of foreign currency in the forward market is directly linked to the export sale, the exchange rate specified with respect to such currency in the forward market is used to convert

the foreign currency.

4.2.2.3 Fluctuations in exchange rates during the investigating period of dumping

According to Kim (2000:17-18), quoted from United States Import Administration (1996), the amended USADL provides that the authority should ignore fluctuations in exchange rates. The Tariff Act as amended and the regulations of Department of Commerce as set forth in Title 19 of the Code of Federal Regulations ("CFR") do not provide the required details to define fluctuations. Instead, the US Policy Guidelines define an exchange rate model that explains fluctuations. It is argued that the Policy Guidelines explain the benchmark exchange rate that differentiates normal exchange rates from fluctuating exchange rates. The benchmark exchange rate is considered to be a moving average of the daily exchange rate for eight weeks immediately before the date of the actual exchange rate to be classified. The actual daily exchange rate is classified as fluctuating if it falls outside a 2.25% band of the benchmark exchange rate. In contrast, when the exchange rate is within the range, the daily rate is regarded as normal. The official rate for the day is whenthe daily exchange rate is categorised as normal. The benchmark rate is considered as the official rate when the daily actual exchange rate is categorised as fluctuating.

4.2.2.4 Allowing exporters 60 days to reflect sustained movements in exchange rates

The amended USADL states that "when there is sustained movement in exchange rates relative to the US$, exporters must be allowed 60 days to reflect sustained movements in their export prices". Although the USADL does not explain what sustained movements in exchange rates are, it recognises an appreciation in the value of the foreign currency relative to the US$ as a sustained movement in foreign currency. For a sustained movement in exchange rates to take place, "the weekly average actual exchange rates must exceed the average

benchmark rates by 5% for 8 consecutive weeks. The depreciation of foreign currency is not recognised as a sustained movement. Whenever the foreign currency depreciates against the US$, a separate adjustment is not required,but the standard model approved to ignore exchange rate fluctuations remains valid" (Kim, 2000:18, Section 4.2 of this chapter).

From the above, it appears that the US interpretation and application of the currency conversion rules may in other instances result in a bias towards higher dumping margins and anti-dumping duties on foreign exporters. Clearly, it would be most desirable if a generally agreed and consistent procedure for dealing with the effects of exchange rateson such dumping determinations could be arrived at.

4.2.3 Currency conversion during anti-dumping investigations: European Union

Van Bael and Bellis (2011:122) explained that Article 2(10)(j) of the EU Anti-Dumping Regulation (EUADR) has a number of rules that pertain to currency conversion and havenothing to do with adjustments. The rules are aligned with Article 2.4.1 of the ADA (1994)and are explained in this Section. Van Bael and Bellis (2011:122-123) stated that currency conversion is not related to adjustments but rather to a fair comparison between NV and export sellingprice during the investigation period. The authors argue that "Article 2.4.1 of the ADA(1994) has been interpreted by the WTO Panel - US Stainless Steel as establishing the principle that currency conversion are permitted only where they are requiredin order to effect comparison between the export price and the normal value, andthat, consequently, currency conversion which are not required for instance, when theprices being compared are already in the same currency, are not permissible" (WTO,2000:11, Paragraphs 6.11- 6.12). The authors also argue that the scope of Article 2.4.1of the ADA (1994) is related to currency conversions with export prices and not anyconversion which can result in the calculation of specific adjustments to either the normal value or export price. They referred to "situations in which the WTO Panel in EC — Tubes and Fittings considered that there could be situations in which differences

affecting price comparability might lead to an adjustment under Article 2.4 might not correspond precisely with the date of the export sale (Credit and warranty expenses),and where conversion of currency data as at the date of export sale might thereforedistort a fair comparison''. It is argued that the WTO Panel continued by stating that it is only once an investigating authority has made all necessary adjustments that it progresses as necessary toward the "comparison" referred to in Article 2.4.1" (WTO: 2003b:60, Paragraphs 7.198-7.199).

It should be noted that although the authors cited the investigations, they did not disclosethe specificities of these investigations. To understand how the determinations in the investigations by the EU were made, the details of some of the investigations cited by the authors are explained (See references for all the other details on investigations).

4.2.3.1 Rate of exchange on the date of sale

Van Bael and Bellis (2011:123) stated that the basic rule is that "when a price comparison requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, which is normally the date of the invoice. The date of the contract, purchase order or order confirmation may be used only if this establishes material terms of sale". The authors used the following investigations as examples to explain how the rate of exchange on the date of sales was handled:

(i) *Certain Malleable Cast Iron Tube or Pipe Fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand* (CEU: 2000, Council Regulation (EC) no. 1784/2000 of 11 August 2000, O. J. no. L 208/8, at recital 54 dated 18 August 2000);

In the investigation, the exporter argued that the rate of exchange on the date of paymentof the invoice, rather than on the date of the invoice, should have been considered. In challenging and not acceding to the request, the Council of the European Union (CEU) explained that the exchange rate on the date of payment could not be used because Article 2(10)(j) of the EUADR provides that currency

conversions should be made using the rate of exchange on the date of sale, which is considered to be the date of invoice. It was argued that the date of the purchase order, contract, or order confirmation could alsobe used, but only if they correctly reflect material terms of the sale.

(ii) *Hardboard originating in Bulgaria, Estonia, Latvia, Lithuania, Poland, Russia*(CEU: 1999, Council Regulation (EC) no. 194/1999 of 25 January 1999, O. J. no. L 22/16, at recital 25);

In the investigation, the Latvian exporting producer argued that based on a comparison of the amount in lats that the company would have obtained using the exchange rate in effect at the time of the completion of the relevant contracts with their customers, and the amount that was actually obtained, an allowance could be claimed for currency conversion. It was argued that the premise that the date of contract is the date of sale ledto the rejection of this claim. The CEU also rejected the claim on the basis that the contracts did not reflect the material terms of sale, which were also reflected by the invoice date.

(iii) *Stainless Steel Fasteners and Parts Thereof originating in the People's Republic of China, India, the Republic of Korea, Malaysia, Taiwan and Thailand* (CEU: 1998,Council Regulation (EC) No 393/98 of 16 February 1998, O. J. no. L50/1, at recital 39).

During the investigation, a Malaysian exporting producer requested that an exchange rate that was in effect on the date of payment to be used, as well as an allowance for currencyconversion on export sales. This request was denied on the basis that in accordance withArticle 2(10)(j) of the Basic Regulation, the exchange rate can be either that on the date of the invoice, the date of the contract, the date of the purchase order or the date of the order confirmation, but not that on the date of payment (See also *Silico-Manganese originating in the People's Republic of China and Kazakhstan* (CEU: 2007, Council Regulation (EC) no. 1420/2007 of 4 December 2007, O. J. no. L 317/5, at recital 77; *Polyethelene Terephthalate Film originating in India and the Republic of Korea* (CEC: 2001, Council Regulation (EC) no. 367/2001 of 23 February 2001, O. J. no. L 55/16, at recital 48).

4.2.3.2 Monthly average exchange rates and daily exchange rates

Van Bael and Bellis (2011:123-24) stated that the EU generally uses monthly average exchange rates, unless there is a devaluation, in which case it may use daily exchange rates. The authors cited the investigation on *Steel Ropes and Cables originating in the People's Republic of China, Hungary, India, Mexico, Poland, South Africa and Ukraine* (CEU: 1999, Commission Regulation (EC) no. 1796/1999 of 12 August 1999, O. J. no. L 217/1, at recital 30) as an example of the application of average exchange rates during the PoI.

In the investigation, the Polish exporter objected to the use of average exchange rates to convert the export price into local currency. It was argued that the exchange rates that were used should have been applied. In making the determination, it was stated that theArticle 2(10)(j) requires that monthly average exchange rates be used. Using both methods, it was found that the differences were negligible and that negative ones, resulting in an insignificant final anti-dumping margin, offset any positive differences. This means that none of the methods were tested. The determination was made to use monthly average exchange rates (also see *Nachi-Fujikoshi Corporation, Tokyo, Japan v the Council of the European Communities, case 255/84 E.C.R. 1861*).

Regarding the use of daily exchange rates where the currency was experiencing devaluation during the PoI, this study cites the investigation on *Certain Malleable Cast Iron Tube or Pipe Fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand* (CEU: 2000, Council Regulation (EC) no. 1784/2000 of 11 August 2000, O. J. no. L 208/8, at recital 52).

In the investigation, the Brazilian exporting producer argued that daily exchange rates rather than monthly average exchange rates should have been used. Considering the devaluation of the Brazilian Real in 1999 and the effect of this on dumping calculations, the daily exchange rates were used for calculating final anti-dumping measures. The exporter also claimed the CEC should have used the rate of exchange at the date of payment rather than the date of the invoice. It was argued that according to Article 2(10)(j)of the fundamental Regulation, the

date of the sale is deemed to be the date of the invoice. The date of the purchase order, contract, or order confirmation could also be used, but only if they correctly reflected the material terms of the sale. The claim was denied on thebasis that the date of the payment could not be used.

4.2.3.3 Currency appreciation and depreciation

In describing the process by which the EU assesses currency appreciation and depreciation in the course of anti-dumping investigations, Van Bael and Bellis (2011:124) made reference to the following investigations as examples:

(i) *Cathode-Ray-Colour Television Picture Tubes originating in the People's Republicof China, the Republic of Korea, Malaysia and Thailand* (CEC: 2006, Commission Decision of 15 November 2006 (2006/781/EC), O. J. no. L 316/18, at recital 50).

In the investigation, the exporting producers in China and Korea requested adjustments for currency conversions in terms of Article 2(10)(j) of the Basic Regulation. TheCommission of the European Communities (CEC) argued that since the Chinese Yen (CNY) and Korean Won (KRW) depreciated against the Euro (€) during the investigation period, an adjustment for the export sales to the Community denominated in € should be made. In contrast to what was claimed, a determination was made with reference tothe fact that during the course of the investigation, both CNY and KRW appreciated against the €. The request was denied because it was found to be unnecessary.

(ii) *Certain Unbleached Cotton Fabrics originating in the People's Republic of China, Egypt, India, Indonesia, Pakistan and Turkey* (CEC: 1998, Commission Regulation (EC) no. 773/98 of 7 April 1998, O. J. no. L 111/19, at recital 100).

In the investigation, an exporter requested for an allowance to be made for currency conversion in accordance with Article 2(10)(j) of the Basic Regulation. This is because ofthe high inflation rate in Turkey and the stable currency depreciation. It was argued that depreciation was already considered by making adjustments, calculating normal value ona monthly basis and using monthly

average exchange rates. The claim was therefore foran adjustment to currency conversion, which was denied. Article 2.4.1 of the ADA (1994) is said to give authorities the discretion to consider currency fluctuations individually because it does not offer adequate guidelines. The wayin which the determination was deliberated in this investigation shows that exporters are,in most cases, being unfairly penalised and domestic producers are benefitting unnecessarily at the expense of consumers.

4.2.3.4 Rate of exchange in forward markets

Van Bael and Bellis (2011) stated that "Article 2 (10)(j) introduced exceptions to the rule described above. When a sale in the forward market is directly linked to the export sale involved, the rate of exchange on the forward market shall be used". However, the EU has historically been reluctant to utilise exchange rates other than the official spot exchange rate, thereby ignoring the use of forward contracts or hedging operations. In Macrory et al. (1991:117, cited *Synthetic Fibres of Polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia*), (CEC: 1988, Commission Regulation (EC) no. 1696/88 of 14 June 1988, O. J. no. L 151/47, at recital 17), it was noted that the EU did not accept requests for adjustments to the export prices charged by the Taiwanese producers in order to allow for the hedging of exchange rates. It was argued that Regulation (EEC) no 2176/84 does not allow for such adjustments. It was also stated that the hedging of exchange rates was regarded as a financial strategy that is not linked to actual commercial transactions.

Stanbrook and Bentley (1993:68) clarified that a favourable exchange rate may be obtained if foreign currency is sold on the foreign exchange market. However, the issue is whether the exporter should profit from a more favorable exchange rate. It is argued that the exporter will not be permitted to benefit from forward contracts in which it purchases and sells foreign currency for investment purposes, or for any purpose unrelated to a particular export sale. The authors also submitted that where the foreign currency received for each export

transaction is sold on the forward markets, and each forward contract is liquidated as and when the export transaction is paid for, the exchangerate under the forward contract should be used. In these circumstances, the export price will need to be reduced by deducting the commission and other expenses related to the forward arrangement.

4.2.3.5 Fluctuations in exchange rates during the dumping period of investigation

Van Bael and Bellis (2011:124) explain that "another principle laid down in Article (2)(10) (j) is that fluctuations in exchange rates should be ignored and exporters should be granted 60 days to reflect sustained movements in exchange rates during the period ofinvestigation". The authors stated that it is uncommon for exporters to be allowed 60 days to reflect sustained movements in exchange rates during the periods of investigation. Nevertheless, the adjustment was granted in *Citric Acid from China originating in the People's Republic of China* (CEU: 2008, Council Regulation (EC) no. 1193/2008 of 1 December 2008, O. J. no. L 323/1, at recital 30) (also see *Polyethelene Terephthalate Film originating from India and Korea* (CEC: 2001, Council Regulation (EC) no. 367/2001 of 23 February 2001, O. J. no. L 55/16, at recital 60); *Polyethylene Terephthalate Film originating in India* and the *Republic of Korea* (CEU: 2001, Council Regulation (EC) no. 1676/2001 of 13 August 2001, O. J. no. L 227/1, at recital 32); *Polysulphide Polymers from the USA*, (CEU: 1998, Council Regulation (EC) No. 1965/98 of 9 September 1998, O. J. L 255/1 at recital 12). However, in the investigation on *Certain Footwear with Uppers of Leather originating in Vietnam and Peoples Republic of* China (CEU: 2009, Council Implementing Regulation (EU) no. 1294/2009 of 22 December 2009, O. J. no. L 352/1, at recital 125), the adjustment was not granted.

In the investigation, the interested parties argued that the US$/€ exchange rate fluctuations had an effect on the calculation of dumping margins, and this warranted an adjustment. In challenging the request, the EU argued that under Article 2(10)(j) of the Basic Regulation, such adjustment can only be allowed if

there a sustained movement in exchange rates during the investigation period. It was also mentioned that where exchanges rates fluctuate freely, no sustained movement could be identified, and therefore, no adjustment could be granted (See *Certain Candles, Tapers and the Like* originating in the People's Republic of China (CEU: 2009, Council Regulation (EC) No. 393/2009 of 11 May 2009, O. J. no. L 119/1, at recital 64; S*ynthetic Staple Fibres of Polyester originating in Australia, Indonesia and Thailand* (CEU: 2000, CommissionRegulation (EC) no. 1522/2000 of 10 July 2000, O. J. no. L 175/10, at recital 74).).

4.3.3.6 Allowing exporters 60 days to reflect sustained movements in exchange rates

The EUADR states that authorities should allow exporters at least 60 days to adjust their exports prices, in order to reflect sustained movements in exchange rates during the period of investigation (Van Bael & Bellis, 2011:124). It is, however, difficult for exporters to adjust their exports prices to reflect sustained movements in exchange rates in the absence of a defined law. To substantiate why a period of 60 days to reflect sustained movements in exchange rates could not be considered, the authors cited the investigation on *Certain Seamless Pipes and Tubes, of Iron or Steel originating in Croatia, Romania, Russia and Ukraine* (CEU: 2006, Council Regulation (EC) no. 954/2006 of 27 June 2006, O. J. no. 175/4 at recital 73).

In the investigation, the exporting producer argued that it should have been granted a period of 60 days to reflect sustained movements in the exchange rates, as required by the provision of Article 2(10)(j) of the basic Regulation. In challenging the request, the EU stated that because there was no evidence of sustained movement in the exchange rates, but only fluctuations of a small amplitude, the request could not be acceded to. The conversion of currencies was, therefore, based on the date of the invoice, as provided for in Article 2(10)(j) of the basic Regulation (see also *Certain Iron or Steel Ropes and Cables originating in the Czech Republic, Russia, Thailand and Turkey* (CEC: 2001, Commission Regulation (EC) No. 230/2001 of 2 February 2001, O. J. L 34/4,

at recitals 85-86); *Polyethylene Terephthalate Film originating in India and Korea* (CEC, 2001, Council Regulation (EC) No 367/2001 of 23 February 2001, O. J. No. L 55/16, at recital 48); *Certain Unbleached Cotton Fabrics originating in the People's Republic of China, Egypt, India, Indonesia, Pakistan and Turkey* (CEC: 1998, *Commission Regulation (EEC) no. 773/98 of 7 April 1998, Official Journal of the European Communities no. L 111/19, at recital 100; Urea and Ammonium Nitrate Solutions originating in Poland* (CEU: 2002, Council Regulation (EC) no. 1841/2002 of 14 October 2002 amending Regulation (EC) no. 900/2001, O. J. no. L 279/3, at recital 15).

Kim (2000: 20) pointed out that the EU's method of determining official exchange rates does not allow exporters 60 days to adjust export prices to reflect the sustained movement in exchange rates during the period of investigation. An exporter who exports at the beginning of the month would therefore be unfairly penalised for sustained foreign currency appreciation later in the month. The exporter would then be subject to the daily average exchange rate during the month, without the benefit of a grace period. Compared to the US method, which adopts the smoothed daily exchange rate prior to sustained movement as the official rate, the EU's method increases the dumping margin when there is a sustained appreciation of the exporting country's currency.

Stanbrook and Bentley (1993:68) stated that by allowing exporters 60 days to adjust export prices to reflect the sustained movement in exchange rate during the period of investigation, it means that when a sustained movement in exchange rates occurs, the exporter may maintain his prices for 60 days and convert them for anti-dumping purposes at the prevailing rate. The practice of allowing exporters to revise their export prices to reflect sustained movements in exchange rates during investigations is complicated. This is because exporters are not able to ascertain which movements in exchange rates are considered as sustained. From the above analysis and the arguments made by the EU and exporters, it is evident that EUADL benefits domestic industries and that exporters are unfairly penalised. The different interpretations of currency conversion during investigations highlights the need to revise the ADA (1994).

4.2.4 Currency conversion during anti-dumping investigations: Arab Republic of Egypt

Anti-dumping investigations in Egypt are regulated by Law No. 161 of 1998. Although the Egyptian Anti-Dumping Law (EADL) conforms to the ADA (1994), the authority believes that it is necessary for Article 2.4.1 of the ADA (1994) to be operationalised in order to minimise the impact of currency movements during the determination of anti-dumping measures. It is argued that to ensure conformity with Article 2.4.1 of the ADA (1994), members must agree on specific definitions (Negotiating Group on Rules, 2006a:1-2). The following paragraphs explain the current EADL with regard to the application of exchange rates during anti-dumping investigations, as well as the proposed amendments:

4.2.4.1 Rate of exchange on the date of sale

In terms of the EADL, “when a comparison requires a conversion of currency, such conversion must be made using exchange rate on the date of sale of the product in the investigation. The date of sale is normally the date of the invoice, contract, purchase orderor order confirmation which ever establishes the material terms of sale” (Negotiating Group on Rules, 2006a:2).

4.2.4.2 Rate of exchange in forward markets

According to the EADL, “when the sale of foreign currency in the forward market is directlylinked to the export sale involved, the authority must use the rate of exchange in the forward market” (Negotiating Group on Rules, 2006a:2). This principle makes it easy to determine the rate of exchange between currencies.

4.2.4.3 Fluctuations and sustained movements in exchange rates during the investigation period

Article 2.4.1 of the ADA (1994) requires that fluctuations should be ignored during

investigations and that exporters be granted 60 days to reflect sustained movements in exchange rates. It is argued that it is difficult for exporters and the investigating authority to define exchange rate variations and sustained movements in exchange rates. The Egyptian authority noted that since the provision refers to the 60-days period for exporters to adjust their prices to reflect sustained movements in exchange rates, it proposed that fluctuations could be defined as “minor deviations from the moving average of the daily exchange rate for the previous 60 days”. It is also stated that the authority only considers sustained movements when the exchange rate significantly surpasses the moving average of the daily exchange rates for the preceding period. Members can only apply similar standards when there are appropriate definitions of exchange rate variations (Negotiating Group on Rules,2006a:1).

4.2.4.4 Allowing exporters 60 days to reflect sustained movements in exchange rates

According to the authorities, the 60-days period, as contained in the ADA (1994), should be used to determine when fluctuations and sustained movements are taking place. It should also be seen as a way of differentiating between short-term and long-term trends. The investigating authority considers the 60-days period as insufficient for exporters to reflect on sustained movements in exchange rates, and prefers the 80-days period as it will allow them to respond to questionnaires within the deadline pursuant to Article 6.1.1. of the ADA (1994). It is also argued that in order not to delay the investigation process, exporters that wish to submit revised export prices reflecting sustained movements in exchange rates may do so after the submission of their questionnaire responses (Negotiating Group on Rules, 2006a:1-2). Furthermore, “Article 6.1.1 of the ADA (1994) states that exporters or foreign producers receiving questionnaires used in an anti- dumping investigation shall be given at least 30 days for reply. Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable. It also states that as a general rule, the time

limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting member or, in the case of a separate customs territory member of the WTO, an official representative of the exporting territory". Since ADA (1994) allows 37 days for exporters to respond to questionnaires after initiation and 14 days for extensions, granting exporters 80 days to revise their export prices in order to reflect sustained movements in exchange rates will prolong the investigations. The 80-days period will also lengthen the time for the investigating jurisdiction to make preliminary and final determinations against exporters, thereby causing more harm to domestic industries.

4.2.5 Currency conversion during anti-dumping investigations: New Zealand

Anti-dumping investigations in New Zealand are regulated by the Trade (Anti-Dumping and Countervailing Duties) Public Act 1988, No. 158 (Act No. 158 of 1988), as amended, on 29 November 2017 by Section 5(1)(a) of the Trade (Anti-dumping and Countervailing Duties Amendment Act 2017, No. 21). The New Zealand Anti-Dumping Law (NZADL) conforms to the rules and implementation of the ADA (1994). The authority noted that when a comparison between the NV and export selling price is required during currency conversion, the conversion should be made using the rate of exchange on the date of sale, except when the sale of foreign currency is directly linked to the export sale. The investigating jurisdiction further noted that the Agreement requires that during anti-dumping investigations, authorities must ignore currency fluctuations and allow exporters at least 60 days to reflect sustained movements in exchange rates. Given that Article 2.4.1 of the Agreement is not transparent about the manner in which exchange rate fluctuations must be evaluated during dumping determinations, the authority is of the view that interacting with other authorities could assist in achieving best practices (Committee on Anti-Dumping Practices, 2008:1-3). The following paragraphs explain the current NZADL with regard to

the application of exchange rates during anti-dumping investigations, as well as the proposed amendments.

4.2.5.1 Rate of exchange on the date of sale

In terms of the NZADL, where comparison requires a conversion of currencies, it applies the interbank exchange rate obtained on the Oanda website (http://www.oanda.com/convert/classic) on the date of sale, unless there is a forward exchange contract (Committee on Anti-Dumping Practices, 2008:1). During investigations, the authority applies the transaction-to-transaction methodology, and the investigators must establish the date of sale for each transaction, either during verification, or if a verification visit has not been possible, on the basis of the facts that are available. This is normally the date of the invoice related to the sale, which has been supplied by the importer or customs official (Committee on Anti-Dumping Practices, 2008:1). It is argued that when export sales to New Zealand are made, they are effectedin US$ and not in Malaysian Rinngit (MYR). This confirms why Bhala (1995:99) stated that it is unfair for the US authority to expect foreign exporters to convert their prices into US$, while US exporters must maintain their price levels in US$. Although the provision is biased, as stated in Sub-section 4.2.2.4 of this chapter, the fact that the interpretation of the currency conversion rule is difficult means that exporters will have to continue to convert their prices into US$ unless a consistent approach is adopted.

4.2.5.2 Rate of exchange in forward markets

It is argued that in terms of the NZAL, the date of sale should be used, unless there is a forward contract for a particular sale. In the event that exports to New Zealand are small in comparison to other exports, the exporter would not enter into a forward exchange contract. This means that funds are subject to prevailing market spot rates at the time of receipt (Committee on Anti-Dumping Practices, 2008:2).

4.2.5.3 Fluctuations in exchange rates during the dumping investigation period

According to the NZADL, there are no definitions which explain fluctuations and sustained movements in exchange rates during the PoI. It is argued that it would be better for the authority to benefit from discussions with other authorities. They also argued that the requirement to ignore variations in exchange rates is in line with the requirements of Article 2.4.1 of the ADA (1994). This means that the actual exchange rate on the date of sale is applied, unless there is a forward exchange contract. It is further argued that using average exchange rates does not mean that the authority smoothes out variations in exchange rates, which would involve taking exchange rate fluctuations into account, rather than ignoring them (Committee on Anti-Dumping Practices, 2008:1).

4.2.5.4 Allowing exporters 60 days to reflect sustained movements in exchange rates

In cases where exporters are allowed at least 60 days to adjust the export prices to reflect the sustained movement in exchange rates during the period of investigation, the investigating authority views this as a way of providing exporters with the opportunity to adjust their export prices to the currency in which such sales are made, rather than removing the requirement to convert currencies on the date of sale (Committee on Anti- Dumping Practices, 2008:3). The NZADL does not define sustained movement in exchange rates during the PoI. In assessing sustained movements during investigations,it opts to benefit from the views of other investigating authorities (Committee on Anti- Dumping Practices, 2008:3).

4.2.6 Currency conversion during anti-dumping investigations: Federative Republic of Brazil

Anti-dumping investigations in Brazil are conducted in accordance with the

Brazilian Anti-Dumping Regulation Decree (BADRD) no. 8.058 of July 2013. As with other authorities, the BADRD conforms to the rules and implementation of the ADA (1994).

4.2.6.1 Rate of exchange on the date of sale

In terms of the BADRD, “when the comparison provided for in Article 22 requires a conversion of currencies, such conversion should be done using the official rate of exchange, as published by the Central Bank of Brazil, on the date of sale. The date of sale shall be the date of the contract, or the purchase order, or of the acceptance of the order or issuance of the invoice, in a way that whichever document establishes the material conditions of the transaction shall be used” (Committee on Anti-Dumping Practices, 2013:9).

4.2.6.2 Rate of exchange in forward markets

The BADRD states that “when a sale of foreign currency in forward market is directly linked to the export sale under investigation, the rate of exchange in the forward sale shall be used. If the official exchange rate on the date of sale is outside a fluctuation band of plus or minus 2% of the average of the official daily exchange rates for the preceding 60 days, which is the “reference exchange rate”, the official daily average exchange rate for the preceding 60 days shall be used” (Committee on Anti- Dumping Practices, 2013:9).

4.2.6.3 Fluctuations in exchange rates during the period of investigation

The BADRD is silent with regard to what constitutes fluctuations in exchange rates. This is because the investigating authorities and exporters do not have the necessary knowledge to evaluate exchange rate fluctuations during the determination of anti- dumping measures. (Committee on Anti-Dumping Practices, 2013:9). The lack of necessary expertise to assess exchange rate

changes will result in exporters submitting inaccurate export price information, thus leading to the calculation of incorrect dumping margins by the authorities.

4.2.6.4 Allowing exporters 60 days to reflect sustained movements in exchange rates

In terms of the BADRD, where fluctuations in exchange rates are to be ignored, as set out in the ADA (1994), exporters are allowed at least 60 days to adjust their export prices to reflect sustained movements in exchange rates during the period of investigation. Thesustained movement in exchange rates is deemed to have occurred when the weekly average of the official daily exchange rate is at least 5% greater or less than the weekly average of the reference exchange rates for 8 consecutive weeks. Upon determination of the sustained movement in exchange rates, the reference exchange rate of the last day prior to the identification of such movement should be utilised for a period of 60 days (Committee on Anti-Dumping Practices, 2013:9).

4.3 Conclusion

This chapter has examined the role currency variations play in anti-dumping investigations. First, it sought to demonstrate that currency fluctuations play a significant role in anti-dumping investigations. This was confirmed by pertinent cases discussed in the chapter. Second, it was found that although each investigating jurisdiction, including the ITAC, has its own domestic laws, the ADA (1994) provides limited explanatoryguidelines for anti- dumping investigations. Third, it was found that even if the ADA (1994) provides guidance on how to assess exchange rate variations during dumping investigations, various inconsistencies and a lack of clarity explain why the ADA (1994) needs to be standardised. Fourth, it was found that the arguments during investigations explain why exporters are being unfairly penalised and domestic producers are always lobbying for protection of their interests. The next chapter provides more detail in the form of empirical case studies on the effect of exchange rate

fluctuations on the determination of anti-dumping measures.

CHAPTER 5: EMPIRICAL CASE STUDIES OF THE EFFECTS OF THE EXCHANGE RATES ON THE DETERMINATION OF ANTI-DUMPING DUTIES

5.1 Introduction

This chapter presents 2 case studies of applications to the International Trade Administration Commission of South Africa (ITAC) by the Southern African Customs Union (SACU) domestic manufacturers for protection against competing imported goods.The first case study is an anti-dumping application against imports of wheelbarrows from China. The second case study is a Sunset Review application for determining whether the withdrawal of the anti-dumping duty will lead to continuation or recurrence of dumping and material injury on imports of unframed glass mirrors from Indonesia. The different methodologies used in calculating dumping in each case resulted in different anti-dumping duties being calculated. However, the key insight in each of these 2 case studies is the sensitivity of these measures to the way in which the exchange rate is included in the calculations. The anti-dumping margins and duties are shown to be influenced considerably by changes in the exchange rates during the investigation period. Section 5.2 and Section 5.3 briefly review the ITAC's investigation process for new anti-dumping and Sunset Review applications, respectively. Section 5.4 explains how anti-dumping measures are calculated for anti-dumping and Sunset Review applications. Section 5.5 and Section 5.6 follow with more specific data and calculations done for each of the aforementioned case studies. Section 5.7 concludes the chapter.

5.2. Investigation process for new anti-dumping applications

In anti-dumping applications, the SACU industry submits information on its own initiative based on the allegations of dumping, material injury, causal link between the imported dumped product and the material injury that it suffered. It also submits the threat of material injury and material retardation of the establishment

of the domestic industry. The applications should comprise both “confidential” and “non-confidential” versions as this is also a requirement in terms of Article 6.5.1 of the ADA (1994), that “if an applicationis based in part on confidential material, it must contain a non-confidential version of the confidential material together with an explanation of why it is considered as confidential. The non-confidential application should be in such a way that it permits a reasonable understanding of the substance of the information submitted in confidence, and provide reasons for confidentiality in each case. Where information is not susceptible to non- confidential summary, the SACU industry should indicate this and provide an affidavit outlining the reasons why the information is not susceptible to summarisation” (Republic of South Africa, 2003a:11; ITAC, 2003:1-2).

Subsequent to the receipt of applications, the investigators evaluate all the information, and the ITAC issues deficiency letters, which require industries to update their dumping calculations and material injury information. During their evaluation, it is a requirement that the investigators ascertain with the South African Revenue Service (SARS) whether tariff classifications and product descriptions contained in the applications are correct. The investigators also need to ensure that they request SARS to provide import statisticsand bills of entries (BoEs). The import data is mainly required to calculate the export selling price for the 12-month dumping investigation period (see Tables 5.1 & 5.15). The information in the BoEs explains declaration by importers and exporters regarding quantities and values of goods that have landed in the SACU market. It is then compared to the import data in order to validate their accuracy (Republic of South Africa, 2003a:7- 8).

During evaluation of the anti-dumping applications, there are 2 investigation periods that are considered by the ITAC prior for assessment, namely the dumping and the material injury investigation periods. The ADA (1994) does not specify any PoI for authorities to consider during investigations. It also does not have any guidelines in place for jurisdictions to determine the period of investigation. The decision on the PoI rests with the authorities, as long as the information relates to the product subject to investigation and is within the PoI.

However, the Committee on Anti-Dumping Practices came up with a way to assist authorities to determine the period of investigation (Czako *et al.,* 2003:36, quoted from Committee on Anti-Dumping Practices, 2000:1). The South African Anti-Dumping Regulations (ADR), which are in line with the ADA (1994), state that "The investigation period for dumping is the period which is assessed whether dumping took place. This period shall normally be 12 months, and may be more, but in no case less than 6 months, and shall normally be a period ending not more than 6 months before the initiation of the investigation. The ADR also states that "The period of injury is the period which is assessed whether the SACU industry experienced material injury. This period shall normally cover a period of 3 years plus information available on the current financialyear at the date the application was submitted, but may be determined by the Commission as a different period provided that period is sufficient to allow for fair investigation" (Republic of South Africa, 2003a:8).

To calculate dumping, the ITAC, in most of its investigations, considers 12-monthsdata from the non-confidential applications submitted by the domestic industry. On the other hand, to evaluate material injury, it assesses the current state of the domestic industry and compares this to the state of the industry, usually 3 years before the application could be submitted. Clearly defining information on import data from SARS, dumping and injury periods is significant, as this must be reflected in the *Government Gazette* in case the ITAC initiates an investigation (Republic of South Africa, 2014a:64; Republic of South Africa, 2017:224).

After receiving the revised applications, investigators conduct on-site verification of the injury information contained in the applications. The purpose of conducting on-site verifications is to ascertain the accuracy of information submitted in the applications prior to initiating investigations, and to avoid terminating these investigations dueto lack of injury information. This is preceded by verification reports, where the SACU manufacturers need to confirm the validity of the contents of the verified information (Republic of South Africa, 2003a:24, Sections 18.1 to 18.2).

If all the requirements of the applications have been met, the ITAC investigators

compile merit submissions for consideration by the Commission in its monthly meeting. The merit submissions comprise of all the information that was submitted by the SACU industries in the applications and confirmed by the investigators during verifications. Prior to assessment by the Commission, the investigators provide industries with notification in terms of Section 33 of the ITA Act, which states that all information submitted to the ITAC will be treated as confidential for purposes of the investigation. The governments of the exporting countries are also issued with Article 5.5 letters which confirm that the Commission has received applications from the domestic industries, and that investigations could be initiated. The said letters also prohibit governments from publicising the application prior to the initiation of investigations by the ITAC (Article 5.5 of the ADA, 1994). If the ITAC finds that there is no *prima facie* evidence of dumping, material injury and a causal link between dumping and material injury, it will reject the applications and/or request the ITAC investigators to seek further information from the domestic industries. If the ITAC finds that there is *prima facie proof* of the stated information, it will initiate anti-dumping investigations (Republic of South Africa, 2003a:28, Section 28.2).

5.2.1 Requirements of ITAC to meet prior to initiating anti-dumping investigations

In order for the ITAC to initiate anti-dumping investigations, the following conditions must be met. These include:

(i) The identity of the applicant;
(ii) A detailed description of the product under investigation, including tariff sub-heading applicable to the subject product;
(iii) The countries under investigation;
(iv) The basis of the allegation of dumping; and
(v) A summary of the factors on which the allegation of injury is based (Republic of South Africa, 2014a; Republic of South Africa, 2017; Czako *et al*., 2003:24; International Trade Centre, 2003:23).

5.2.2 Notification of the initiation of new anti-dumping investigations and the subsequent process

Following notice of investigation in the *Government Gazette*, the ITAC notifies all known importers, exporters and the governments of the exporting countries of initiation. It does this by way of sending them the SACU industries' non-confidential applications, copies of the *Government Gazette*, as well as the Commission's importer and exporter questionnaires to complete. The purpose of sending the questionnaires is to afford them an opportunity to respond to the domestic industries' allegations contained in the non- confidential applications. They are granted 37 days to submit properly documented responses, but this may be more if extensions are requested prior to the expiry of the period. Extensions of 7 to 14 days are granted, depending on the reasons submitted to the ITAC. Interested parties who are not directly identified are given 40 days to respond to the applicant's allegations, as required by Section 29.4 of the ADR (Republic of SouthAfrica, 2003a:29). The governments of the exporting countries can, however, not request extensions on behalf of their exporters, as it is presumed that by notifying them, the exporters also have the relevant information (Republic of South Africa, 2003a:29, Section 29.4).

If there are "no responses" from interested parties, the investigators prepare preliminary determination submissions that should be presented to the Commission. The submissions are based on the available information, which is that submitted by applicants to the ITAC. During the preliminary determination assessments, the Commission makes a recommendation to request SARS to impose preliminary anti-dumping duties for a period of 6 months. This is necessary to prevent further injury to the domestic industries.The investigators also prepare preliminary determination reports for all interested parties to comment on (Republic of South Africa, 2003a: 30, Section 33.1). Following this process, the investigators further prepare final determination submissions that should also be presented to the ITAC. The submissions contain all the available facts, including comments on the preliminary determination from interested parties, should there be any. After considering all this information, the ITAC

makes a final determination that recommends the Minister of the DTIC to request SARS to impose final ADMs for five years (Republic of South Africa, 2003a:32-33, Section 38.1 to 38.2). This is followed by the final determination reports to interested parties and contain all information considered by the Commission and the calculated ADMs imposed against the exporters, and countries (Brink, 2008:267, quoted from www.itac.org.za/pages/services/trade-remedies/investigation-reports?page=11@ipp=5$#).

If “there are responses” to the allegations from interested parties, the investigators review them, and if there are any deficiencies, the ITAC issues deficiency letters. The interestedparties are requested to respond within 7 days from the date of receipt of the said letters. Upon receipt of the requested information, the investigators review them and if satisfied that all deficiencies have been addressed, they first notify importers of their intention to verify import transactions relating to bills of lading, suppliers’ invoices highlighting sales values and payment terms, packaging lists, costing details and payment remittances. Following the verification, investigators issue importers with verification reports, and a request to confirm the contents within 7 days of receipt.

The investigators, in consultation with the Senior Manager and Chief Commissioner, also provide exporters with an intention to verify, amongst other things, export selling prices to SACU, the domestic selling prices in their export markets and the adjustments made to each of the respective sales. The verification also includes factoryvisits to ascertain that the products in the investigation are manufactured in the exporting country and whether it is similar to that produced in the SACU market. It is also meant to confirm the manufacturing processes of the products in the investigation, how sales and expenses flow into the financial statements, and the cost elements for the subject products. The investigators also examine manufacturing, income and expenditure statements, management accounts and balance sheets. After scrutinising all of the above, the investigators prepare exporters’verification reports based on all verified information, including the calculation of domestic and export sales transactions, and exporters are required to confirm the contents of the verified information within 7 days (Brink, 2008:266).

Following this process, the investigators calculate dumping margins and prepare preliminary determination submissions, which are discussed in the ITAC's meetings. If some of the exporters or manufacturers failed to respond to the allegations in the investigation, the investigators calculate separate ADMs. These are the ADMs calculated against all other manufacturers/exporters who were not willing to comment and submit responses. In calculating the ADMs, the ITAC usually considers the highest verified ex- factory domestic selling price of the exporter who responded, and the ex-factory export selling price to SACU. If it is found, when calculating the export selling price to SACU, that the data is unreliable, as there could be other products that are not part of the investigation, the lowest verified ex-factory export selling price for an exporter who responded in the investigation is used (ITAC, 2015:39).

Based on the findings of the investigation, the investigators advise the ITAC to request the Commissioner of SARS to impose provisional/preliminary measures for a period of 6months, as this is necessary to prevent further injury to the domestic industries (Brink, 2008:266, quoted from Section 33.2 of the ADR). The investigators also prepare preliminary determination reports for comment by interested parties, and they are granted 14 days to respond. Subsequent to the receipt of comments to the preliminary reports, the investigators further prepare final determination submissions for discussion in the ITAC's meetings. The final determination is in the form of a recommendation to the Minister of the DTIC, who has to make a final decision. If the affirmative recommendation is accepted, the Minister of Finance directs SARS to impose definitive ADMs to the amount recommended by the ITAC (Brink, 2008: 267).

Subsequent to the ITAC's meetings, the investigators prepare final determination reports,with all verified information and calculated ADMs to be imposed against all exporters and their respective countries (Brink, 267, quoted from www.itac.org.za/pages/services/trade-remedies/investigation-reports?page=11@ipp=5$#). The reports are then forwarded to all interested parties, including governments of the exporting countries. The reason why this process takes place is that all interested parties should be notified that the investigations were finalised and that anti-dumping duties were levied. The final

anti-dumping measures remain in place for 5 years pending the date of their review (Republicof South Africa, 2003a:33, Sections 38.1 to 38.2).

5.3 Investigation process for Sunset Review applications

Article 11.3 of the ADA (1994), which requires that “any definitive anti-dumping duty shall be terminated on a date not later than 5 years from the date of imposition, unless investigating authorities determine in a review initiated before that date on their own initiative or upon a duly substantiated request made by the domestic industry that the expiry of the duty would likely lead to the continuation or recurrence of dumping and injury”.

Prior to the ITAC initiating Sunset Review investigations, it first has to notify the SACU domestic industry, through publication in the *Government Gazette* of the imminent lapse of anti-dumping duties that were in place for 5 years (Republic of South Africa: 2017; Republic of South Africa, 2003a: 37, Section 54.1). If there is no responses from the SACU industry or it indicates that the duties are no longer required, the duties will lapse 5 years from their imposition. If the industry indicates that it will request a Sunset Review, it has to submit a proper application at least 6 months prior to the lapse of duties (Republic of South Africa, 2003a:38, Section 54.4).

Once the domestic industry has submitted the information, the investigators evaluate all the information, and the ITAC issues deficiency letters which require them to update the dumping and material injury information, as well as estimated financial data, should the duties be revoked (Brink, 2008: 266 in Section 31.1). When assessing Sunset Review information, the ITAC requires an applicant to not only to submit information on NVs and export prices, but also has to submit injury information for 3 years prior to submitting an application for a review, and estimates should the anti-dumping duties be withdrawn (Brink, 2012:41, quoted from Brink, 2004:1048-1050). The injury information should be for a period of 4 years.

The process that is applicable to sunset reviews from receipt of applications until assessment by the ITAC is similar to that in dumping investigations (See Section

5.2 of this chapter.). The only difference between the 2 is that in a sunset review application, the investigating authority is required to assess an additional 4th year for estimates in instances where the duty expires. If it is found that there is *prima facie* proof following merit consideration by the ITAC that the expiry of the duties would likely lead to the continuation or recurrence of dumping and the continuation or recurrence of injury, it informs interested parties, including the trade representatives of the countries concerned and initiates Sunset Review investigations in the *Government Gazette* in accordance with the ADR (Republic of South Africa, 2003a: 37, Section 54; Brink, 2012:41, quoted from Section 55.1 of the ADR).

5.3.1 Requirements of ITAC to meet prior to initiating Sunset Review investigations

Sunset Review investigations are initiated upon the fulfilment of certain conditions. For the ITAC to initiate Sunset Review investigations, the following conditions must be met:

(i) the industry standing of the domestic industry: This is to enable the ITAC to determine if the application for the sunset review is made “by or on behalf of the domestic industries” in terms of Section 7 of the ADR and is therefore eligible for initiation;

(ii) like product in the application: This information is required in order to confirm that the SACU product being investigated and the imported product are like products, as required in terms of Section 1 of the ADR;

(iii) continuation or recurrence of dumping: The dumping information is necessary in orderto assist the ITAC to establish whether there will be a likelihood of the continuation or recurrence of dumping from the exporting countries, should the anti-dumping dutybe revoked; and

(iv) continuation or recurrence of material injury: The material injury information is required in order to assist the Commission to establish whether there will be a likelihood of the continuation or recurrence of material injury to the domestic industries, should the anti-dumping duty be withdrawn (ITAC,

2017:4-25).

5.3.2 Notification of initiation of Sunset Review investigations and the subsequent process

The purpose of notifying interested parties of initiation of investigations in the Government Gazette is to request them to respond to the domestic industry's allegations of the continuation and recurrence of dumping, and the continuation or recurrence of material injury, as well as the financial estimates should the duties be withdrawn. In order to receive comments on the allegations, the ITAC forwards importers and exporters Sunset Review questionnaires to them for completion. The time line applicable to interested parties in Sunset Reviews for submitting their responses is similar to that in anti-dumping investigations (See Sub-section 5.2.2.).

As with anti-dumping investigations, the investigators also prepare "final determination submissions before essential facts" to be discussed in the ITAC's meetings. If there are no responses from interested parties, the investigators make a recommendation to the ITAC to consider using the best available information submitted by the domestic industry.Following the meeting, interested parties are issued with essential facts letters that request them to comment on the ITAC's intention to make a final determination and recommendation to the Minister of the DTIC that the expiry of the duties would likely lead to the continuation or recurrence of dumping and the continuation or recurrence of material injury. They are given 14 days to comment on the letters. Should there be "no further responses" to the letters, investigators prepare "final determination submissions after essential facts" to be discussed in the ITAC's meeting. The purpose of the meeting is to make a final determination whether the expiry of the duties would likely lead to the continuation or recurrence of dumping or continuation or recurrence of material injury. Final recommendations by ITAC may result in a decrease, increase or maintaining the existing anti-dumping duties for an additional period of 5 years. Based on the findings, the ITAC notifies the Minister of the DTIC of the recommendation, and requests SARS toimplement its

final decision (Republic of South Africa, 2003a: 39, Section 59; Brink, 2008:267). If, however, the Commission "receives responses to the allegations, the anti-dumping investigation steps applicable to importers and exporters who respond in dumping investigations apply (See Sub-section 5.2.2.). Following this process, the investigators calculate dumping margins and prepare final submissions before and after essential facts, which are discussed in the Commission meetings. Depending on the margin of dumping calculated, final recommendations by the ITAC may result in a decrease, increase or withdrawal of the measures. However, those exporters who were not subjected to duties in the initial investigation, as they were not found to be dumping the product on the SACU market, are excluded from participating in the Sunset Review, as there would not be any existing duties that could be reviewed against them. Based on the findings, ITAC notifies the Minister of the DTIC of the recommendation, and requests SARS to implement its final decision. Interested parties are then issued with final determination reports (Republic of South Africa, 2003a:39, Section 59; Brink, 2008:267).

5.4 Determination of dumping for anti-dumping and Sunset Review applications

When calculating dumping measures during anti-dumping and Sunset Review investigations, a fair comparison must be made between NV and export selling price to the importing country. In order to allow for this comparison, the ADR places a burden on investigating jurisdictions to consider adjustments to both the domestic and export selling prices to account for differences in the product subjected to the investigation. The adjustments usually include differences in the conditions of sale, taxation, levels of trade,quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability (Republic of South Africa, 2003a:15-21).

5.4.1 Calculation of normal value

Normal value is defined in the ITA Act as a “comparable price paid or payable in the ordinary course of trade for like products intended for consumption in the exporting country”. Various approaches are applied by the ITAC when calculating domestic prices in investigations. Selecting a specific approach depends on the information that is available to the ITAC during investigations. When calculating the domestic selling price in the exporter’s market, the ITAC first considers sales in the domestic market of the exporting country, which ought to be supplemented by evidence of price quotations of the like product, international publications, or any other reasonable proof that can be used for calculating the price (Republic of South Africa, 2003a:15).

When there are no sales of the like product in the domestic market, the ITAC uses a constructed method. In this case, the domestic selling price is calculated by adding the exporter’s total cost of the product subject to investigation, selling, general and administrative costs (SG&A), as well as a reasonable profit, which could be the profit percentage of the company in total or that of another manufacturer in the investigation. The constructed domestic selling price methodology was applied by the ITAC when initiating the Sunset Review investigation of anti-dumping duties on Frozen Bone Portions of Fowls of the Species *Gallus Domesticus*, originating in or imported fromthe USA pursuant to Notice no. 405 of 2011 in *Government Gazette* no. 34377 (Republic of South Africa, 2011:66).

The basis for using the constructed NV was that sales made in the USA for the subject product were not made in the ordinary course of trade. If the ITAC is unable to determine the normal value based on these 2 approaches, it uses the price at which the manufacturer exports the same product to other export markets. The third country is selected for the following reasons.

(i) “the volumes of the selected country should be comparable to the volumes exported to the SACU market;

(ii) export customers in that country should be comparable to export customers in the SACU. If the company is a wholesaler, the country that

is selected should be where exports are only to wholesalers; and that

(iii) the country exported to should have a domestic manufacturing industry for that product" (ITAC, 2016).

When calculating domestic selling prices where there is government intervention, the practice of the ITAC has been to select appropriate third or surrogate countries with market economy conditions, and consider these prices, instead of domestic selling prices in China. Since China was granted market economy status in 2002 in terms of the Record of Understanding (RoU) by the South African Government, the ITAC is, in terms of this memorandum, allowed to consider alternative methods permitted by the WTO when thereare no domestic selling prices in China. This means that when calculating the NV in China, the ITAC will use the actual domestic sales in China or the cost for the exporter or industry subject to investigation. This information is accepted, provided the exporteris able to prove that market economic conditions prevail. Should it be proved that market conditions do not prevail, the ITAC disregards prices and costs submitted by the exporter or industry but rather select appropriate third countries with market economy conditions to determine NV in China (ITAC, 2006).

5.4.2 Calculation of the export selling price

Section 32 (1)(a) of the ITA Act defines export selling price as the price payable for goods sold on the importer's market after taking deductions such as sea freight, taxes, delivery and other costs into account. It is the practice of the ITAC to use import statistics obtained from SARS as a basis for calculating export prices when initiating investigations. This is because it is regarded as the only reliable for calculating export price. If it is found that the export price is considered unreliable due to the exporter and importer being related, or where there is a compensatory agreement between the 2, the ITAC must construct theexport price from the first point of resale to the first independent buyer in the SACU. The ITAC deducts all costs incurred by the exporter and importer, including a reasonable profit. To calculate a reasonable profit, the total costs of the producer or exporter

are deducted, including the total cost of the importer, total profit realised by both the exporter/producer and importer. The profit is then allocated in the same ratio the costs incurred by the producer/exporter and importer. Should the ITAC establish thatthe exported product is not resold in the same condition that it was imported into the SACU market, the export price may be calculated on any reasonable basis (Brink, 2012:15, quoted from ITAC, 2003a:19, Section 32(5) of the ITA Act).

5.4.3 Calculation of anti-dumping measures

The calculation of dumping measures by the ITAC during investigations entails the following. These are:

(i) the determination of NV in the country of export; the determination of the export price to the SACU;

(ii) the calculation of adjustments to both the NV in the country of export and the export price to the SACU, in order to draw a fair comparison between the 2 prices;

(iii) the subtraction of the ex-factory export price from the ex-factory NV in order toarrive at the dumping margin; and

(iv) the expression of the anti-dumping margin as a percentage of the export sellingprice (International Trade Centre, 2003:49).

5.5 Case Study 1: Analysis of a new anti-dumping investigation into the alleged dumping of Wheelbarrows originating in or imported from China

This is an anti-dumping application that was submitted to the ITAC in February 2014 by Usher Inventions, trading as Lasher Tools (Pty) Ltd, the only producer of the subject product in the SACU. The basis for the application was that wheelbarrows originating in or imported from China, classifiable under tariff sub-heading 8716.80.10, were being sold in the SACU market at dumped prices, thereby resulting in material injury and establishinga causal link between dumping

and material injury suffered by the SACU industry(Republic of South Africa, 2014a:63-64).

Following scrutiny of the information, the ITAC initiated a dumping investigation as there was *prima facie* proof of dumping, material injury, and a causal link between dumping and injury. The investigation was initiated pursuant to Notice no. 449 of 2014, in *Government Gazette* no. 37740 (Republic of South Africa, 2014a). The investigation period of dumping was for the period 1 February 2013 to 31 January 2014, and the material injury investigation period was for the period 1 February 2010 to 31 January 2014. The data on import statistics used in the investigation was obtained from SARS, as it is considered by the ITAC as the only reliable source of information (See Table 5.1.). Although the investigation was initiated based on dumping, material injury and the causal link between dumping and injury, only the dumping calculations will be taken into account, as the purpose of the study is to assess the effects of exchange rate fluctuations on the determination of ADMs in South Africa. Column 1 refers to the months in which the imports of wheelbarrows took place. Columns2 to 3 contain data on the volumes and values of imports of wheelbarrows. Column 4 is the R/kg of Wheelbarrows during the PoI. This was computed by dividing import volumesin Column 2 by import values in Column 3. Columns 5 to 6 contain average monthly exchange rates of US$/Rand (R) and R/US$.

Table 5. 1: Import and exchange rate data for period 1 February 2013 - January 2014

1	2	3	4	5	6
Month	**Import volumes (kg)***	**Import values (R)***	**R/kg***	**US$/R (Average monthly exchange rates)****	**R/US$ (Average monthly exchange rates****
February 2013	42 482	2 530 585	59.57	8.88505	0.11255
March 2013	18 738	1 825 707	97.43	9.18003	0.10895
April 2013	42 650	1 857 328	43.55	9.1192	0.10967
May 2013	65 264	2 258 909	34.61	9.29251	0.10772
June 2013	37 199	2 165 670	58.22	10.03564	0.09966
July 2013	31 503	3 823 480	121.37	9.93837	0.10064
August 2013	39 915	2 822 600	70.71	10.05805	0.09946
September 2013	36 920	3 108 969	84.21	10.00829	0.09995
October 2013	75 140	5 036 627	67.02	9.91494	0.10087
November 2013	76 294	4 763 188	62.43	10.20198	0.09803
December 2013	43 845	4 098 249	93.47	10.36521	0.09648
January 2014	48 402	3 427 255	70.81	10.83595	0.09231
Total	**558 352**	**37 718 567**	**-**	**117.83522**	**1.22629**
Average	-	-	**67.55**	**9.82**	**0.1021**
-	-	-	**(adjusting the**	**-**	**-**
-	-	-	**selling price**	**-**	**-**
			by 5%		
-	-	-	**for transport**	**-**	**-**
-	-	-	**differences =**	**-**	**-**
			R64.17)	**-**	**-**

Source: * SARS (2014)

Source: ** Oanda Corporation (2014)

Kg = kilograms

5.5.1 Calculation of the domestic selling price for China

The South African Anti-Dumping Law (SAADL) provides 3 ways in which a domestic selling price can be calculated in the country of origin. However, in instances where the SACU industry is unable to obtain the actual price in the exporting country, either 2 of the remaining methods discussed in Sub-section 5.4.1 can be used to calculate the domestic selling price. As Lasher Tools was

unable to obtain the actual selling price in China, the domestic selling price in the application was based on a price quotation from Zimbabwe. This is because South Africa and Zimbabwe are both developing countries, with well-established wheelbarrow industries, and export the product subject to the investigation to other foreign markets. The other reason why a price quotation from Zimbabwe was accepted by the ITAC for initiation of the investigation is that the subject product that is manufactured in Zimbabwe is similar to that manufactured in China and exported to SACU. The domestic selling price based on a price quotationfor China was therefore, estimated as US$39.66/kg. Using an average exchange rate of US$1=R9.82 over the 12-months investigation period, the domestic selling price for China was calculated as R389.46/kg (See Column 5 in Table 5.1 and Table 5.2.). By ignoring all the other exchange rates and using monthly average exchange rates of US$1= R8.88505 at the beginning of the investigation period, the domestic selling price for China was calculated as R352.38/kg (See Column 5 in Table 5.1 and Table 5.3.). By ignoring changes in the exchange rates and using the ruling exchange rates in each month of the investigation period, the domestic selling prices for China were calculated (See Column 1 in Table 5.1 and Tables 5.7 to 5.17 in the appendices.).

5.5.2 Calculation of export selling price for China

In determining the export selling price for China, the free on board (FoB) average price of R67.55 was used. It was calculated from SARS import data for the period February 2013to January 2014. Adjusting the selling price by 5% for transport differences, the ex-factory export selling price was determined to be R64.17/kg (See Column 4 in Table 5.1.). Using the average exchange rate of R1=US$0.1021 over the 12-month investigation period, the dollar export selling price to the SACU was calculated to be US$6.55/kg (See Column 6 in Tables 5.1 and 5.2.). By ignoring all the other variations and using the monthly average exchange rates of R1=US$0.011255 at the beginning of the investigation period, the export selling price for China was calculated as

US$7.22/kg (See Column 6 in Tables 5.1 and 5.3.). Similarly, by ignoring changes in the exchange rates and using the ruling exchange rates in each month of the investigation period, the export selling prices for China were calculated (See Column 6 in Table 5.1 and Tables 5.7 to 5.17 in the appendices.).

5.5.3 Calculation of anti-dumping measures for China

By comparing the domestic selling prices for China (US$39.66/kg and R389.46/kg) with export selling prices (US$6.55/kg and R64.17/kg), the dumping margins were calculated in Table 5.2 as US$33.11/kg and R325.29/kg. Expressing the dumping margins as percentages of export selling prices, the following ADMs were calculated using theITAC method:

Table 5.2: Calculation of anti-dumping measures for China using 12-month average exchange rates (ITAC method)

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in China (US$)			39.66	-
Converted to Rands = US$39.66 x 9.82 = R389.46			-	389.46
Export selling price to South Africa			-	67.55
Less adjustment of 5% for transport cost			-	3.38
Ex-factory export selling price			-	64.17
Converted to US$ = R64.17 x 0.1021 = US$6.55			6.55	-
Dumping margin: Domestic selling price less ex-factory export selling price			33.11	325.29
Dumping margin as a percentage (%) of ex-factory export selling price	505.50	506.92	-	-

Source: Non-confidential anti-dumping application submitted to ITAC by Usher Inventions, trading as Lasher Tools (Pty) Ltd (2014): Annexure D9

From Table 5.2, it is clear that the determination of anti-dumping measures was influenced by the US$/R and R/US$ exchange rates over the investigation period of dumping. As stated in Section 1.5 of Chapter 1, even if the ITAC tries to smooth out currency movements by using the average exchange rates over a 12-month period, the anti-dumping margins calculated in Table 5.2 are significantly high. Similarly, the exchange rates at the beginning of the

investigation period were used to calculate the following ADMs for China. These are presented in Table 5.3.

Table 5.3: Calculation of dumping measures for China: Ignoring fluctuations in exchange rate ruling at the beginning of the investigation period (February 2013)

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in China (US$)			39.66	-
Converted to Rands = US$39.66 x 8.88505 = R352.38			-	352.38
Export selling price to South Africa			-	67.55
Less adjustment of 5% for transport cost			-	3.38
Ex-factory export selling price			-	64.17
Converted to US$ = R64.17 x 0.11255 = US$7.22			7.22	-
Dumping margin: Domestic selling price less ex-factory export selling price			32.44	288.21
Dumping margin as a percentage (%) of the export selling price	449.30	449.14	-	-

Source: Non-confidential anti-dumping application submitted to ITAC by Usher Inventions, trading as Lasher Tools (Pty) Ltd (2014): Annexure D9

From Table 5.3, it is clear that ignoring all the other variations in exchange rates and using exchange rates at the beginning of the investigation period makes a difference to the anti-dumping measures calculated by the ITAC. The calculations gave rise to lower anti-dumping margins. Although the Agreement stipulates that fluctuations in exchange rates should be ignored during the dumping period, it is not easy for an exporter to determine which exchange rates should be ignored, given the volatility of the US$/R and R/US$ during the PoI. From Table 5.7 to 5.17 in the appendices, it is also evident that ignoring variations in exchange rates and using exchange rates ruling in each month of the investigation period makes a significant difference to the size of the dumping margins. What this case study shows is that the determination of the anti-dumping measures by the ITAC was largely affected by sustained depreciation of the SA Rand against the US$ over the 12-months investigation period (February 2013 to January 2014). Such fortuitous changes in exchange rates are beyond the control of the exporter and a case can be made that the imposition of harsh anti-dumping duties in such instances is unfair. Even though the exporter may be given time to adjust his prices in responseto sustained movements in exchange rates, it is often impractical to do so.

5.6 Case Study 2: Analysis of the Sunset Review investigation of Unframed Glass Mirrors originating in or imported from Indonesia

This is a review of the anti-dumping duty of 6.1% that was levied by SARS following a recommendation by the ITAC in 2012 against Indonesian exporters of Unframed Glass Mirrors, classifiable under tariff-subheading 7009.91. The anti-dumping measure had been in place for a period of ten years following dumping investigation concluded by the ITAC in 2006.

Article 53.1 of the ADA (1994) requires that "any definitive anti-dumping duty shall be terminated on a date not later than 5 years from the date of imposition, unless the authorities determine, in a review initiated before that date on their own initiative orupon a duly substantiated request made by or on behalf of the domestic industry, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury". On this basis, the ITAC, on 24 June 2016, requested PFG Building Glass, a Division of PG Group (Pty) Ltd, the only manufacturer of Unframed Glass Mirrors in the SACU, pursuant to Notice no. 365 of 2016, which appears in *Government Gazette* no. 40088, to indicate whether the expiry of the anti-dumping duty would likely lead to the continuation or recurrence of dumping and material injury (Republic of South Africa, 2016). Following receipt of the information, the ITAC established, upon analysis of the data, thatthere was a *prima facie* proof to initiate a Sunset Review investigation. The investigation was initiated through Notice no. 130 of 2017 in *Government Gazette* no. 40621 (Republic of South Africa, 2017). The information contained in the case study relates to what the ITAC considered as *prima facie* evidence of the continuation or recurrence of dumping and injury. For calculation of dumping, data for the period July 2015 to June 2016 were used. For the examination of material injury, information for the period July 2013 toJune 2016 was considered. Estimates for 2017 in case the duty was revoked were also calculated to determine the impact on the domestic industry. The import data used by the ITAC in the investigation was obtained from SARS, as it is considered as the only reliable source of information (See Table 5.14.). Although the Sunset Review investigation was initiated based on dumping, material injury

and causal link between dumped imports and injury, and estimates in case the duty is withdrawn, only the dumping calculations will be taken into account as the purpose of the study is to evaluate the link between exchange rate changes and the determination of ADMs. Column 1 refers to the months in which the imports of unframed glass mirrors took place.Columns 2 to 3 contain data on the volumes and values of imports of unframed glass mirrors. Column 4 is the R/kg of Unframed Glass Mirrors during the PoI. This was computed by dividing import volumes in Column 2 by import values in Column 3. Columns 5 to 6 contain average monthly exchange rates of US$/R and R/US$.

Table 5. 4: Import and exchange rate data for the period 1 July 2015 - June 2016

1	2	3	4	5	6
12 month dumping period	**Import volumes (kg)***	**Import values (R)***	**R/kg***	**US$/R (Monthly averageexchange rates)****	**R/US$ (Monthly average exchange rates)****
Jul 15	2 724.47	33 750	12.39	12.443	0.080373
Aug 15	21 479	174 596	8.13	12.898	0.077554
Sep 15	21 479	196 815	9.16	13.633	0.073376
Oct 15	0	0	0	13.499	0.074079
Nov 15	8.06	177	21.96	14.124	0.070814
Dec 15	0	0	0	15.011	0.066675
Jan 16	52.31	11 293	215.89	16.277	0.061485
Feb 16	0	0	0	15.801	0.061506
Mar 16	0	0	0	14.637	0.064837
Apr 16	0	0	0	14.637	0.068345
May 16	0	0	0	15.263	0.065586
Jun 16	21 479	225 240	10.49	15.821	0.066072
Total	**67 221.8**	**641 871**	-	**174.044**	**0.830702**
Average exchange rates	-	-	**9.55**	**14.50367**	**0.069225**

Source: * SARS (2016)

Source: ** Fx-rate (2016)

5.6.1 Calculation of the domestic selling price for Indonesia

The domestic selling price for Indonesia was calculated based on a price quotation for Unframed Glass Mirrors acquired by PFG Building Glass from a

research company in Indonesia. It was determined to be US$0.92/kg. Using the market average exchange rate of US$1= R14.50367 over the 12-month investigation period, the domestic selling price for Indonesia was calculated as R13.34/kg (See Column 5 in Table 5.4 and Table 5.5.). Ignoring all the other changes in exchange rates and using monthly average exchange rate of US$1= R12.443 at the beginning of the investigation period, the domestic selling price for Indonesia was calculated as R11.45/kg (See Column 5 in Table 5.5 and Table 5.6.). Ignoring changes in exchange rates and using the exchange rates ruling in each month of the investigation period, the domestic selling prices for Indonesia were calculated (See Column 5 in Table 5.4 and Tables 18 to 28 in the appendices.).

5.6.2 Calculation of export selling price for Indonesia

In determining the export selling price for Indonesia, the FoB average price of R9.55/kg was used. It was calculated from SARS import data for the period July 2015 to June 2016(See Column in Table 5.15 and Table 5.16.). Using the average exchange rates overthe 12-months investigation period of R1= US$0.069225, the export selling price for Indonesia was calculated to be US$0.66/kg (See Column 6 in Table 5.4 and Table 5.5.). Ignoring all the other variations and using the monthly average exchange rates of R1= US$0.080373 at the beginning of the period of the investigation period, the export selling price for Indonesia was calculated asUS$0.77/kg (See Column 6 in Table 5.4 and Table 5.6.). Ignoring changes in the exchange rate by using the exchange rates ruling in each month of the investigation period, the export selling prices for Indonesia were calculated (See Column 6 in Table 5.4 and Tables 5.18 to 28 in the appendices.).

5.6.3 Calculation of dumping measures for Indonesia

By comparing the domestic selling price (US$0.92/kg and R13.44/kg) with the export selling prices (US$0.66/kg and R9.55/kg), the dumping margins for

Indonesia were calculated as US$0.26/kg and R3.79/kg. Expressing the dumping margins as percentages of export selling prices, the following ADMs were calculated using the ITAC method.

Table 5. 5: Calculation of anti-dumping measures for Indonesia using 12-month average exchange rates (ITAC method)

Variables needed to calculate anti-dumping measures			**US$/kg**	**R/kg**
Domestic selling price in Indonesia			0.92	
Converted to R/kg = US$0.92/kg x R14.50366667= R13.34/kg			-	13.34
Export selling price to South Africa			-	9.55
Converted to US$ = R9.55/kg x US$0.069225 = US$0.66/kg			0.66	-
Dumping margin: Domestic selling price less export selling price			0.26	3.79
Dumping margin as a percentage (%) of ex-factory export selling price	39.39	39.69	-	-

Source: Non-confidential Sunset Review application submitted by to ITAC by PFG Building Glass,a division of PG Group (Pty) Limited (2016): Annexure D9

From Table 5.5, it is clear that the calculation of anti-dumping measures was influenced by US$/R and R/US$ exchange rates during the investigation period of dumping (July 2015 to June 2016). Even if ITAC smooths out currency movements by applying 12- months average exchange rates during the PoI in this case, the sizeof the ADMs is still large. In the below table, by using exchange rates at the beginning of the investigation period, the following ADMs were calculated:

Table 5. 6: Calculation of anti-dumping measures - Ignoring changes in exchange rates and using exchange rate ruling at the beginning of the investigation period (July 2015)

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in Indonesia			0.92	-
Converted to R/kg = US$0.92/kg x R12.443= R11.45/kg			-	11.45
Export selling price to South Africa			-	9.55
Converted to US$/kg = R9.55/kg x 0.080373 = US$0.77/kg			0.77	-
Dumping margin: Domestic selling price less export selling price			0.15	1.90
Dumping margin as a percentage (%) of ex-factory export selling price	19.48	19.90	-	-

Source: Non-confidential Sunset Review application submitted by to ITAC by PFG Building Glass,a division of PG Group (Pty) Limited (2015): Annexure D9

From Tables 5.5 and 5.6, it is evident that using 12-months average exchange rates and exchange rates at the beginning of the investigation period have a material difference on the size of the anti-dumping measures. As in the case of Table 5.3, it is also difficult for an exporter to determine which exchange rates to ignore, given the volatility of the US$/R and R/US$. Furthermore, it is challenging for exporters and authorities to determine sustained movements in exchange rates when all of the exchange rates during the 12-months investigation period are volatile during the PoI. It is also clear from Table 5.18 to 5.28 in the appendices that changes in exchange rates over the investigation period make a material difference in the calculation of anti-dumping measures. The calculations resulted in different anti-dumping measures.

As with China, the case study for Indonesia indicates that the calculation of anti-dumping duties by the ITAC was largely affected by sustained depreciation of the SA rand against the US$ over the twelve-month investigation period (July 2015 to June 2016). As stated in Sub-section 5.5.3 of this chapter, even though the exporter may be given time to adjust its prices in response to sustained movements in exchange rates, it is often impractical to do so.

Furthermore, the determination of the different anti-dumping measures using the different approaches and information in Chapter 2, Table 2.2 to Table 2.4, explain that there is a relationship between exchange rate changes and the calculation of ADMs. This is because to calculate ADMs, the ADA (1994) requires that "there must be a comparison between NV and export selling price and such a comparison be made using a conversion of currency between 2 prices in either the exporter or importer' currency. To calculate the dumping percentages in the tables, there was a conversion of currency between 2 prices in either the exporter or importer' currency. This also confirms that exchange rate changes influence the determination of ADMs and the protection afforded to domestic industries or penalties imposed against exporters and countries.

5.7 Conclusion

The analysis in the chapter has found that exchange rate changes play a significant role in anti-dumping investigations. Although Article 2.4.1 of the Anti-Dumping Law (ADA (1994) provides guidance on how to use exchange rates during the determination of ADMs, the different calculations for the 2 case studies confirm studies confirm that investigating authorities have been, and still are, initiating investigations using incorrect exchangerate information. If the Agreement clearly explains which exchange rates should be ignored during the volatile period and what constitutes sustained movements in exchange rates during the dumping period of investigation, the ADMs calculated would not have been different in the 2 case studies. This also explains why exporters, when responding to applicants' allegations, argue that the ADMs are always incorrectly calculated by domestic industries. As each and every jurisdiction applies the exchange methodology to its own advantage during investigations, the different ADMs calculated explain why there are so many litigations resulting from the misuse of exchange ratesduring the determination of anti-dumping measures.

Furthermore, large trend change in the exchange rate may materially change the determination of the ADMs. The effects of changes in the exchange rate to

imports prices take time and it is unreasonable to expect exporters to react quickly enough in this regard. Thus, significant trend changes in the exchange rates over the investigation period may end up unfairly penalising the exporter in the form of higher dumping margins than would otherwise have been the case. This has been demonstrated in a basic way in this chapter by simply taking the exchange rate ruling in the first month of the investigation period and thus ignoring subsequent fluctuations and changes in the exchange rate by using the exchange rates ruling in each month of the investigation period.

The following chapter concludes the study and provides some recommendations on how to deal with the vexatious problem of exchange rate fluctuations in anti-dumping investigations and determinations. It also identifies research areas which should be incorporated into Article 2.4.1 of the ADA (1994).

CHAPTER 6: GENERAL CONCLUSION

6.1 Concluding remarks

The study has examined the effects of exchange rate fluctuations on the determination of anti-dumping measures in South Africa, since fluctuations in exchange rate changes and ADMs have not yet been explored in the South African context. ADMs are designed to protect domestic industries against unfair competition by foreign exporters. There are various reasons why an exporter dumps a product in the importing domestic market. It dumps the product, among other things, in order to become a dominant leader and eliminate competition in the importing domestic country. It does this by, for instance, acquiring the market share and undercutting, depressing and suppressing domestic prices. Another reason is that an exporter has excess stock and wants to get rid of the inventory in its domestic market (See Section 2.2 in Chapter 2.).

Bekker (2004:237) found that many of the ADMs imposed by authorities do not achieve their purpose of protecting domestic industries against unfair competition and end upshielding them from fair competition. As a result, domestic producers frequently abuse the ADL. This is the reason why it is stated in Section 1.1 of Chapter 1 that domestic importing industries claim injury against foreign exporters from competitively priced imports without providing insufficient evidence to authorities. Investigating authorities tend to believe that by imposing ADMs against low-priced imports, competition will be reduced, and domestic industries will become sustainable. However, the imposition of ADMs affects the welfare of consumers as participants in the economy.

As explained in Chapter 2 (See Section 2.5.), ADMs increase the producer surplus and government tax revenue at the expense of the consumers, resulting in an efficiency deadweight net welfare loss for the economy. The gain in producer surplusis concentrated in particular industries, whereas the loss in consumer surplus is spread across all consumers of the imported good in question. For this reason, domestic producers are vociferous in protecting their interests, while individual consumers have less incentive to expend resources to

organise and represent themselves in this regard. Free trade will benefit all participants in the economy. This is because it promotes fairness and efficiency and stimulates competition. Imposing ADMs against the dumped imports will temporarily benefit producers, but will also have negative consequences for the economic growth and welfare of the economy (Bekker, 2004:237, quoted from Salvatore, 2001:261). Free trade enables a country to specialise in and export those goods, which gives it a comparative advantage. A rise in the terms of trade increases a nation's welfare, while a decline reduces its welfare (See Section 2.6 in Chapter 2.).

This study found that the ADA (1994) does not consider public interest consideration when imposing ADMs. Although interested parties are afforded an opportunity to provide information relevant to the investigation, as required in Article 6.12 of the ADA (1994), their submissions do not have influence prior to the imposition of ADMs. Public interest consideration will provide interested parties with an opportunity to explain the effects of the anti-dumping measures on consumers. Bekker (2004:239), quoted from Hoekman and Mavroidis (1996:31) and Tharakan *et al.* (1998:1050-1053), found that the purpose of anti-dumping law would be achieved if public interest could be enforced. Since investigating authorities are imposing ADMs to protect uncompetitive domestic industries, the call for public interest to be included in domestic legislations will be resisted by the beneficiaries of this protectionism (See Section 2.15 in Chapter 2.).

The historical evolution of anti-dumping law in the context of international trade, tariffs and NTBs, both globally and in South Africa (as the main member of the SACU) was explained. The main provisions of the ADA (1994) were described and explained in this Chapter, as well as the role of the WTO in administering and adjudicating trade disputes. The different ways in which investigating jurisdictions evaluate currency movements to calculate ADMs during investigations were explained (See Sub-sections 4.2.1 to 4.2.6 in Chapter 4.). Litigations between jurisdictions and parties to investigations demonstrate why it is necessary to use correct exchange rate information to calculate ADMs. For instance, in the matter between the *Melamine Chemicals Inc., Appellee, v. the*

United States, Appellant, the manner in which exchange rates fluctuations were assessed during the PoI was contentious. The other case is that of *Luciano Pissoni Fabbrica Accessori Instrumenti Musicali and Enzo Pizzi, Inc., Plaintiffs v the United States, Defendant,* which highlights the importance of using correct exchange rate information to calculate ADMs (See Sub-section 4.2.2.1.). This shows that exchange rate fluctuations affect the determination of ADMs, hence the need to revise Article 2.4.1of the ADA (1994).

The study also found that there is a pass-through of exchange rates to import prices. The relationship between import prices and exchange rate variations is ambiguous. This is because the volatility in exchange rates makes it difficult to establish whether they are fully or partially reflected in the import price during PoIs. However, this is not a matter of concern for an exporter who is dumping its product in the importing domestic country. This is because it knows it has an elastic demand curve and it will be able to acquire a market share in the importing country.

When imposing ADMs, it is necessary for authorities to perform currency conversions between the NV and export selling price by including exchange rates for the period underinvestigation. To establish the relationship between exchange rate changes and the calculation of the ADMs, this study conducted 2 empirical case study analyses. Qualitative/descriptive and quantitative analyses were also used. The literature review in this study was based on secondary internet sources, journal articles, books, and theses. To calculate the ADMs, the ITAC used NVs, export selling prices, and exchange rate datasubmitted by domestic industries. In order to determine the accuracy of import and exchange rate data, the ITAC obtained similar information from SARS (2014, 2016), the OANDA Corporation (2014) and Fx-rate (2016). The information is reliable because it was used by the ITAC as *prima facie* evidence to initiate the 2 investigations. Furthermore, the information is dependable, as it was also forwarded to importers and exporters for their comment, including governments of exporting countries involved in investigations. The information is also dependable because it was published in *the Government Gazette* (Republic ofSouth Africa, 2014a; 2017). Furthermore, the information is authentic because it was submitted to

the WTO and included in the WTO's semi-annual reports (Committee on Anti-Dumping Practices, 2016:2; 2018:3). The ADMs were calculated by means of the following: taking the 12-months average exchange rates, as done by the ITAC; taking the average exchange rates in the first month of the investigation period and applying this rate to the rest of the investigation; and by ignoring exchange rate variations and using the ruling exchange rates in each month of the investigation period. Thedifferent ADMs calculated in Chapter 5 (See Tables 5.2 and 5.3 in the text and Tables 5.7 to 5.17 in the appendices.). Tables 5.5 and 5.6 in the text and Tables 5.18 to 5.28 in the appendices illustrate that exchange rate fluctuations affect the determination of ADMs. However, the way in which Article 2.4.1 of the ADA (1994) is constructed is very complex, in that it doesnot provide authorities with a leeway to calculate ADMs fairly against exporters and countries (Sub-sections 4.2.1 to 4.2.6 in Chapter 4.). It also raises the question as to whether the ADMs imposed against exporters and countries since the implementation of the ADA (1994) are true and correct in the absence of a well-defined ADL.

The ADA (1994) is still in place, but it is not well-defined. The following reasons explain why it is not well-defined. First, the ADA (1994) stipulates that "when the comparison requires a conversion of currencies, such conversion shall be made using the "exchange rate on the date of sale", provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, "the rate of exchange inthe forward sale shall be used". However, it does not indicate which exchange rate on the date of sale should be used. It is also a requirement that the exchange rate onthe forward market shall be used. However, authorities like the ITAC and the EU still choose to use average exchange rates during the PoI. This confirms the finding of Dickey (2013:72) that "where companies protect themselves by taking forward positions to avoid being currency speculators, no recognition is given to such forward positions in the context of anti-dumping administration". During the PoI, it is easier for investigating authorities, when performing verifications, to ascertain the typeof exchange rate information which relates to the sale under consideration when hedging of currency is used by exporters and importers. By using this information,

authorities will be able to calculate accurate ADMs, as the correct exchange rate information will be used.

Second, the ADA (1994) requires that exporters should be afforded 60 days to reflect sustained movements in exchange rates. It is difficult for exporters and investigating jurisdictions to determine what sustained movements are during the calculation of dumping and how and when the 60-days period should be calculated. This deters investigating jurisdictions from calculating accurate ADMs because of the limitationposed by the ADL. The discrepancies in the ADA (1994) are demonstrated by the litigations, disagreements, and varying interpretations by authorities (See Sub-sections 4.2.2. to 4.2.6 in Chapter 4.).

Third, it is also worth noting that the ADA (1994) does not explain the "depreciation" and "appreciation" of currency during anti-dumping investigations. The reason why the US invokes currency conversion during anti-dumping determinations to its own advantage explains the lack of proper interpretation of Article 2.4.1 of the ADA (1994) (See Luciano Pisoni Fabbrica Accessori Instrumenti Musicali Enzo Pizzi, Inc., Plaintiffs v the United States, Defendant, 640 F. Supp 255 (Ct. Int'l Trade 1986) in Sub-section 4.2.2.1 in Chapter 4.). Likewise, the EU's methodology for evaluating currency appreciation and depreciation demonstrates inadequate explanation of the Agreement (See *Cathode-Ray-Colour Television Picture Tubes originating in the People's Republic of China, the Republic of Korea, Malaysia and Thaila*nd (CEC: 2006, CommissionDecision of 15 November 2006 (2006/781/EC), O. J. no. L 316/18, at recital 50; *Certain Unbleached Cotton Fabrics originating in the People's Republic of China, Egypt, India, Indonesia, Pakistan and Turkey* (CEC: 1998, Commission Regulation (EC) no. 773/98 of 7 April 1998, O. J. no. L 111/19, at recital 100.).

6.2 Recommendations

To avoid misinterpretations of the law and minimise litigations by investigating authorities resulting from the incorrect calculation of ADMs, a review of the currency conversion clause of the ADA (1994) needs to be done. As a result, the

following points should be taken into consideration.

First, the ADA (1994) stipulates that “when the comparison requires a conversion of currencies, such conversion should be made using the exchange rate on the date of sale”. The problem during anti-dumping investigation periods is not how authorities perform currency conversion between NV and export price during investigations, but rather the choice of the exchange rate that should be used on the date of sale. This should be explained in the ADA (1994) in order to minimise the unjust calculation of the ADMs. Second, apart from the fact that the ADA (1994) states that the “exchange rate in the forward sale should be used”, the Agreement should emphasise that such exchange ratesneed to be considered during the calculation of the ADMs. As stated by Macrory *et al*. (1991:117, quoted from Commission Regulation (EEC) no. 1695/88, 1988:41), “it is not uncommon for producers/exporters to hedge exchange rates. The EU has refused to take hedging into account, based on the notion that as a financial practice, it does not relate directly to commercial transactions and is too prone to manipulation”. Using such information during investigations will also assist the authorities to establish the correct value of the currency, as the exchange rate is known.

Third, the ADA (1994) states that “fluctuations in exchange rates during the PoI should be ignored”. During investigations, it is difficult for exporters and authorities to determinewhich fluctuations in exchange rates should be ignored. The various ADMs that were calculated in Table 5.3 in the text and Tables 5.7 to 5.17 in the appendices. Table 5.6 in the text and Tables 5.18 to 5.28 in the appendices confirm why it is necessary for WTO policy makers to clarify which exchange rates should be ignored during the PoI. If daily or quarterly exchange rates are to be ignored, this should be stated in the ADA (1994). The fact that the EU, including the ITAC, considers the average exchange rates during the PoIs is unfair for exporters and importers. They will always initiate investigations based on exorbitant ADMs and make positive determinations during investigations to protect their domestic industries. This happens because the ADA (1994) does not provide adequate guidance.

Fourth, the ADA (1994) states that “exporters should be allowed 60 days to reflect

sustained movements in exchange rates". During dumping investigations, it is challenging for exporters and authorities to determine what sustained movements in exchange rates entail. The ADA (1994) should provide an explanation of sustained movements in exchange rates and specify how exporters and jurisdictions should assess such movements. The determination of the 60-days period to reflect sustained movements in exchange rates should also be explained.

Fifth, currency depreciation and appreciation determine the levels of ADMs which are calculated by authorities for initiation purposes (See Tables 5.2 and 5.3 in the text and Tables 5.7 to 5.17 in the appendices and Tables 5.5 and 5.6 in the text and Tables 5.18 to 5.28 in the appendices.). The ADA (1994) should explain how currency depreciation and appreciation can be analysed by authorities on receipt of anti-dumping applications from domestic industries.

Sixth, the use of other currency options such as spot exchange rates should be considered in the determination of ADMs. It will be easier and fairer for investigating authorities to perform a currency conversion between the NV and export selling price because the correct exchange rate will be used. This will prevent the improper calculationof ADMs by authorities.

Seventh, it is known that imports benefit consumers in the importing country. The downstream manufacturers and industrial users who use the dumped imports in their production processes also benefit from lower-priced imports. Prior to imposing the ADMs,authorities must consider the welfare effects of ADMs, and this should be emphasised by the ADA (1994).

Eight, although Article 6.12 of the ADA (1994) affords parties an opportunity to provide information relevant to the investigation and determination of dumping, the public interest clause should be enforced by the ADL. Although it is accepted that ADMs are meant to protect domestic industries from unfair competition, other parties, such as consumers and users of the imported product, Governments of the alleged countries, as well as exporters and producers, should be able to participate in public interest hearings. The parties deserve an opportunity to explain why it is not in their best interests for jurisdictions to impose ADMs. This also explains why it is argued in the submission by Canada to the WTO

(Negotiating Group on Rules, 2003:7) that “key issues, which are often referred to as public interest issues, may include the possibility of supply shortages, increasing prices to industrial users and consumers, and competition policy concerns. Efforts to improve the ADA (1994) should include an examination of the unintended effects of anti-dumping action and efforts to strengthen existing provisions of the Agreement so as to fully consider the consequences of anti-dumping duties for broader economic, trade and competition policy concerns”.

6.3 Further areas of research

To draw a fair comparison between the NV and export selling price, the correct exchange rates should be used during the calculation of ADMs. In order to avoid the miscalculation of ADMs and litigations, it is proposed that further research should consider export prices calculated from the use of other hedging methods such as spot exchange rates by partiesto the investigation. Such research will enable investigating jurisdictions to accurately calculate and compare the NV and export price, as correct exchange rates will be known and used. As long as the exchange rate information falls within the investigation period of dumping and refers to the sale of the subject product under investigation, this information should be adequate to calculate accurate ADMs. Although it will be difficult for jurisdictions to implement such exchange rates, as they are susceptible to use and manipulate exchange rates to their advantage, this will promote fairness when imposing the ADMs and reduce litigations. To limit the cost of using spot and forward exchange rates with institutions, exporters and importers can always absorb their mark-ups over marginal costs. As they are always keen to know their competitors’ domestic prices and customers during the dumping process, and the fact that the demand for their products iselastic, exporters can also absorb the effects of exchange rate changes in their profit margins.

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APPENDICES

Table 5.7: Calculation of anti-dumping measures for China: Ignoring fluctuations in exchange rates and using exchange rate ruling for March 2013

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in China (US$)			39.66	-
Converted to Rands = US$39.66 x 9.18003 = R364.08			-	364.08
Export selling price to South Africa			-	67.55
Less adjustment of 5% for transport cost			-	3.38
Ex-factory export price			-	64.17
Converted to US$ = R64.17 x 0.10895 = US$6.99			6.99	-
Dumping margin: Domestic selling price less ex-factory export selling price			32.67	299.91
Dumping margin as a percentage (%) of ex-factory export selling price	467.38	467.37	-	-

Source: Non-confidential anti-dumping application submitted to ITAC by Usher Inventions, trading as Lasher Tools (Pty) Ltd (2014): Annexure D9

Table 5.8: Calculation of anti-dumping measures for China: Ignoring fluctuations in exchange rates andusing exchange rate ruling for April 2013

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in China (US$)			39.66	-
Converted to Rands = US$39.66 x 9.11292 = R361.67			-	361.67
Export selling price to South Africa			-	67.55
Less adjustment of 5% for transport cost			-	3.38
Ex-factory export price (Rands)			-	64.17
Converted to US$ = R64.17 x 0.10967 = US$7.03			7.03	-
Dumping margin: Domestic selling price less ex-factory export selling price			32.63	297.50
Dumping margin as a percentage (%) of ex-factory export selling price	464.15	463.61	-	-

Source: Non-confidential anti-dumping application submitted to ITAC by Usher Inventions, trading as Lasher Tools (Pty) Ltd (2014): Annexure D9

Table 5.9: Calculation of anti-dumping measures for China: Ignoring fluctuations in exchange rates and using exchange rate ruling for May 2013

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in China (US$)			39.66	-
Converted to Rands = US$39.66 x 9.29251 = R368.54			-	368.54
Export selling price to South Africa			-	67.55
Less adjustment of 5% for transport cost			-	3.38
Ex-factory export price (Rands)			-	64.17
Converted to US$ = R64.17 x 0.10772 = US$6.91			6.91	-
Dumping margin: Domestic selling price less ex-factory export selling price			32.75	304.37
Dumping margin as a percentage (%) of ex-factory export selling price	473.52	474.32	-	-

Source: Non-confidential anti-dumping application submitted to ITAC by Usher Inventions, tradingas Lasher Tools (Pty) Ltd (2014): Annexure D9

Table 5.10: Calculation of anti-dumping measures for China: Ignoring fluctuations in exchange rates and using exchange rate ruling for June 2013

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in China (US$)			39.66	-
Converted to Rands = US$39.66 x 10.03564 = R398.01			-	398.01
Export selling price to South Africa			-	67.55
Less adjustment of 5% for transport cost			-	3.38
Ex-factory export price (Rands)			-	64.17
Converted to US$ = R64.17 x 0..09966 = US$6.40			6.40	-
Dumping margin: Domestic selling price less ex-factory export selling price			33.26	333.84
Dumping margin as a percentage (%) of ex-factory export selling price	519.69	520.24	-	-

Source: Non-confidential anti-dumping application submitted to ITAC by Usher Inventions, trading as Lasher Tools (Pty) Ltd (2014): Annexure D9

Table 5.11: Calculation of anti-dumping measures for China: Ignoring fluctuations in exchange rates and using exchange rate ruling for July 2013

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in China (US$)			39.66	-
Converted to Rands = US$39.66 x 9.93837 = R394.16			-	394.16
Export selling price to South Africa			-	67.55
Less adjustment of 5% for transport cost			-	3.38
Ex-factory export price (Rands)			-	64.17
Converted to US$ = R64.17 x 0.010064 = US$6.46			6.46	-
Dumping margin: Domestic selling price less ex-factory export selling price			33.20	329.99
Dumping margin as a percentage (%) of ex-factory export selling price	513.93	514.24	-	-

Source: Non-confidential anti-dumping application submitted to ITAC by Usher Inventions, trading as Lasher Tools (Pty) Ltd (2014): Annexure D9

Table 5.12: Calculation of anti-dumping measures for China: Ignoring fluctuations in exchange rates and using exchange rate ruling for August 2013

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in China (US$)			39.66	-
Converted to Rands = US$39.66 x 10.05805 = R398.91			-	398.90
Export selling price to South Africa			-	67.55
Less adjustment of 5% for transport cost			-	3.38
Ex-factory export price (Rands)			-	64.17
Converted to US$ = R64.17 x 0.09946= US$6.38			6.38	-
Dumping margin: Domestic selling price less ex-factory export selling price			33.28	334.73
Dumping margin as a percentage (%) of ex-factory export selling price	521.63	521.63	-	-

Source: Non-confidential anti-dumping application submitted to ITAC by Usher Inventions, trading as Lasher Tools (Pty) Ltd (2014): Annexure D9

Table 5.13: Calculation of anti-dumping measures for China: Ignoring fluctuations in exchange rates and using exchange rate ruling for September 2013

Variables needed to calculate dumping measures			US$/kg	R/kg
Domestic selling price in China (US$)			39.66	-
Converted to Rands = US$39.66 x 10.00829 = R396.92			-	396.92
Export selling price to South Africa			-	67.55
Less adjustment of 5% for transport cost			-	3.38
Ex-factory export price (Rands)			-	64.17
Converted to US$ = R64.17 x 0.09995 = US$ 6.41			6.41	-
Dumping margin: Domestic selling price less ex-factory export selling price			33.25	332.76
Dumping margin as a percentage (%) of ex-factoryexport selling price	518.71	518.56	-	-

Source: Non-confidential anti-dumping application submitted to ITAC by Usher Inventions, trading as Lasher Tools (Pty) Ltd (2014): Annexure D9

Table 5.14: Calculation of anti-dumping measures for China: Ignoring fluctuations in exchange rates and using exchange rate ruling for October 2013

Variables needed to calculate dumping measures			US$/kg	R/kg
Domestic selling price in China (US$)			39.66	-
Converted to Rands = US$39.66 x 9.91494 = R393.23			-	393.23
Export selling price to South Africa			-	67.55
Less adjustment of 5% for transport cost			-	3.38
Ex-factory export price (Rands)			-	64.17
Converted to US$ = R64.17 x 0.10087 = US$ 6.47			6.47	-
Dumping margin: Domestic selling price less ex-factory export selling price			33.19	329.06
Dumping margin as a percentage (%) of ex-factory export selling price	512.98	512.79	-	-

Source: Non-confidential Anti-dumping application submitted to ITAC by Usher Inventions, tradingas Lasher Tools (Pty) Ltd (2014): Annexure D9

Table 5.15: Calculation of anti-dumping measures for China: Ignoring fluctuations in exchange rates and using exchange rate ruling for November 2013

Variables needed to calculate dumping measures			US$/kg	R/kg
Domestic selling price in China (US$)			39.66	-
Converted to Rands = US$39.66 x 10.20198 = R404.61			-	404.61
Export selling price to South Africa			-	67.55
Less adjustment of 5% for transport cost			-	3.38
Ex-factory export price (R)			-	64.17
Converted to US$ = R64.17 x 0.09803 = US$6.29			6.29	-
Dumping margin: Domestic selling price less ex-factory export selling price			33.37	340.44
Dumping margin as a percentage (%) of ex-factory export selling price	530.52	530.53	-	-

Source: Non-confidential Anti-dumping application submitted to ITAC by Usher Inventions, trading as Lasher Tools (Pty) Ltd (2014): Annexure D9

Table 5.16: Calculation of anti-dumping measures for China: Ignoring fluctuations in exchange rates and using exchange rate ruling for December 2013

Variables needed to calculate dumping measures			US$/kg	R/kg
Domestic selling price in China (US$)			39.66	
Converted to R = US$39.66 x 10.36521 = R411.08			-	411.08
Export selling price to South Africa			-	67.55
Less adjustment of 5% for transport cost			-	3.38
Ex-factory export price (Rands)			-	64.17
Converted to US$ = R64.17 x 0.09648 = US$6.18			6.18	340.44
Dumping margin: Domestic selling price less ex-factory export selling price			33.48	346.91
Dumping margin as a percentage (%) of ex-factory export selling price	541.75	540.61	-	-

Source: Non-confidential anti-dumping application submitted to ITAC by Usher Inteventions, tradingas Lasher Tools (Pty) Ltd (2014): Annexure D9

Table 5.17: Calculation of anti-dumping measures for China: Ignoring fluctuations in exchange rates and using exchange rate ruling for January 2014

Variables needed to calculate dumping measures			US$/kg	R/kg
Domestic selling price in China (US$)			39.66	-
Converted to Rands = US$39.66 x 10.83595 = R429.75			-	429.75
Export selling price to South Africa			-	67.55
Less adjustment of 5% for transport cost			-	3.38
Ex-factory export selling price			-	64.17
Converted to US$ = R64.17 x 0.09231 = US$5.92			5.92	
Dumping margin: Domestic selling price less ex- factory export selling price			33.74	365.58
Dumping margin as a percentage (%) of ex-factory export selling price	569.93	569.71	-	-

Source: Non-confidential anti-dumping application submitted to ITAC by Usher Inventions, trading as Lasher Tools (Pty) Ltd (2014): Annexure D9

Table 5.18: Calculation of anti-dumping measures for Indonesia: Ignoring changes in exchange rates and using exchange rate ruling for August 2015

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in Indonesia			0.92	-
Converted to R/kg = US$0.92/kg x R12.898= R11.87/kg			-	11.87
Export selling price to South Africa			-	9.55
Converted to US$/kg = R9.55/kg x 077554 = US$0.74/kg			0.74	-
Dumping margin: Domestic selling price less export selling price			0.18	2.32
Dumping margin as a percentage (%) of export selling price	24.32	24. 29	-	-

Source: Non-confidential Sunset Review application submitted to ITAC by PFG Building Glass, a division of PG Group (Pty) Limited (2015): Annexure D9

Table 5.19: Calculation of anti-dumping measures for Indonesia: Ignoring changes in exchange rates and using exchange rate ruling for September 2015

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in Indonesia			0.92	-
Converted to R/kg = US$0.92/kg x 13.633 = R12.54/kg			-	12.54
Export selling price to South Africa			-	9.55
Converted to US$/kg = R9.55/kg x 0.073376 = US$0.70/kg			0.70	-
Dumping margin: Domestic selling price less export selling price			0.22	2.99
Dumping margin as a percentage (%) of export selling price	31.43	31.30	-	-

Source: Non-confidential Sunset Review application submitted to ITAC by PFG Building Glass, a division of PG Group (Pty) Limited (2015): Annexure D9

Table 5.20: Calculation of anti-dumping measures for Indonesia: Ignoring changes in exchange rates and using exchange rate ruling for October 2015

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in Indonesia			0.92	-
Converted to R/kg = US$0.92/kg x 13.499 = R12.42/kg			-	12.42
Export selling price to South Africa			-	9.55
Converted to US$/kg = R9.55/kg x 0.074079 = US0.71$kg			0.71	-
Dumping margin: Domestic selling price less export selling price			0.21	2.87
Dumping margin as a percentage (%) of export selling price	29.58	30.05	-	-

Source: Non-confidential Sunset Review application submitted to ITAC by PFG Building Glass, a division of PG Group (Pty) Limited (2015): Annexure D9

Table 5.21: Calculation of anti-dumping measures for Indonesia: Ignoring changes in exchange rates and using exchange rate ruling for November 2015

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in Indonesia			0.92	-
Converted to R/kg = US$0.92/kg x 14.124 = R12.99/kg			-	12.99
Export selling price to South Africa			-	9.55
Converted to US$/kg = R9.55/kg x 0.070814 = US$0.67/kg			0.67	-
Dumping margin: Domestic selling price less export selling price			0.25	3.44
Dumping margin as a percentage (%) of export selling price	37.31	36.02	-	-

Source: Non-confidential Sunset Review application submitted to ITAC by PFG Building Glass, adivision of PG Group (Pty) Limited (2015): Annexure D9

Table 5.22: Calculation of anti-dumping measures for Indonesia: Ignoring changes in exchange rates and using exchange rate ruling for December 2015

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in Indonesia			0.92	-
Converted to R/kg = US$0.92/kg x 15.011 = R13.81/kg			-	13.81
Export selling price to South Africa			-	9.55
Converted to US$/kg = R9.55/kg x 0.066675 = US$0.64/kg			0.64	-
Dumping margin: Domestic selling price less export selling price			0.28	4.26
Dumping margin as a percentage (%) of export selling price	43.75	44.61	-	-

Source: Non-confidential Sunset Review application submitted to ITAC by PFG Building Glass, adivision of PG Group (Pty) Limited (2015): Annexure D9

Table 5.23: Calculation of anti-dumping measures for Indonesia: Ignoring changes in exchange rates andusing exchange rate ruling for January 2016

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in Indonesia			0.92	-
Converted to R/kg = US$0.92/kg x 16.277 = R14.97/kg			00	14.97
Export selling price to South Africa			-	9.55
Converted to US$/kg = R9.55/kg x 0.061485 = US$0.59/kg			0.59	-
Dumping margin: Domestic selling price less export selling price			0.33	5.42
Dumping margin as a percentage (%) of export selling price	55.93	56.75	-	-

Source: Non-confidential Sunset Review application submitted to ITAC by PFG Building Glass, adivision of PG Group (Pty) Limited (2015): Annexure D9

Table 5.24: Calculation of anti-dumping measures for Indonesia: Ignoring changes in exchange rates and using exchange rate ruling for February 2016

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in Indonesia			0.92	-
Converted to R/kg = US$0.92/kg x 15.801 = R14.54/kg				14.54
Export selling price to South Africa			-	9.55
Converted to US$/kg = R9.55/kg x 0.061506 = US$0.59/kg			0.59	-
Dumping margin: Domestic selling price less export selling price			0.33	14.99
Dumping margin as a percentage (%) of export selling price	55.93	52.25	-	-

Source: Non-confidential Sunset Review application submitted to ITAC by PFG Building Glass, adivision of PG Group (Pty) Limited (2015): Annexure D9

Table 5.25: Calculation of anti-dumping measures for Indonesia: Ignoring changes in exchange rates and using exchange rate ruling for March 2016

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in Indonesia			0.92	-
Converted to R/kg = US$0.92/kg x 14.637 = R13.47/kg			-	13.47
Export selling price to South Africa			-	9.55
Converted to US$/kg = R9.55/kg x 0.064837 = US$0.62/kg			0.62	-
Dumping margin: Domestic selling price less export selling price			0.30	3.92
Dumping margin as a percentage (%) of export selling price	48.38	41.05	-	-

Source: Non-confidential Sunset Review application submitted to ITAC by PFG Building Glass, adivision of PG Group (Pty) Limited (2015): Annexure D9

Table 5.26: Calculation of anti-dumping measures for Indonesia: Ignoring changes in exchange rates and using exchange rate ruling for April 2016

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in Indonesia			0.92	-
Converted to R/kg = US$0.92/kg x 14.637 = R13.46/kg			-	13.46
Export selling price to South Africa			-	9.55
Converted to US$/kg = R9.55/kg x 0.068345 = US$0.65/kg			0.65	-
Dumping margin: Domestic selling price less export selling price			0.27	3.91
Dumping margin as a percentage (%) of export selling price	41.54	40.84	-	-

Source: Non-confidential Sunset Review application submitted to ITAC by PFG Building Glass, adivision of PG Group (Pty) Limited (2015): Annexure D9

Table 5.27: Calculation of anti-dumping measures for Indonesia: Ignoring changes in exchange rates andusing exchange rate ruling for May 2016

Variables needed to calculate anti-dumping measures			US$/kg	R/kg
Domestic selling price in Indonesia			0.92	-
Converted to R/kg = US$0.92/kg x 15.263 = R14.04/kg			-	14.04
Export selling price to South Africa			-	9.55
Converted to US$/kg = R9.55/kg x 0.065586 = US$0.63/kg			0.63	-
Dumping margin: Domestic selling price less export selling price			0.29	4.49
Dumping margin as a percentage (%) of export selling price	46.03	47.02	-	-

Source: Non-confidential Sunset Review application submitted to ITAC by PFG Building Glass, a division of PG Group (Pty) Limited (2015): Annexure D9

Table 5.28: Calculation of anti-dumping measures for Indonesia: Ignoring changes in exchange rates and using exchange rate ruling for June 2016

Variables needed to calculate anti-dumping measures			**US$/kg**	**R/kg**
Domestic selling price in Indonesia			0.92	-
Converted to R/kg = US$0.92/kg x 15.821 = R14.56/kg			-	14.56
Export selling price to South Africa			-	9.55
Converted to US$/kg = R9.55/kg x 0.066072 = US$0.63/kg			0.63	-
Dumping margin: Domestic selling price less export selling price			0.29	5.01
Dumping margin as a percentage (%) of export selling price	46.03	52.46	-	-

Source: Non-confidential Sunset Review application submitted to ITAC by PFG Building Glass, adivision of PG Group (Pty) Limited (2015): Annexure D9

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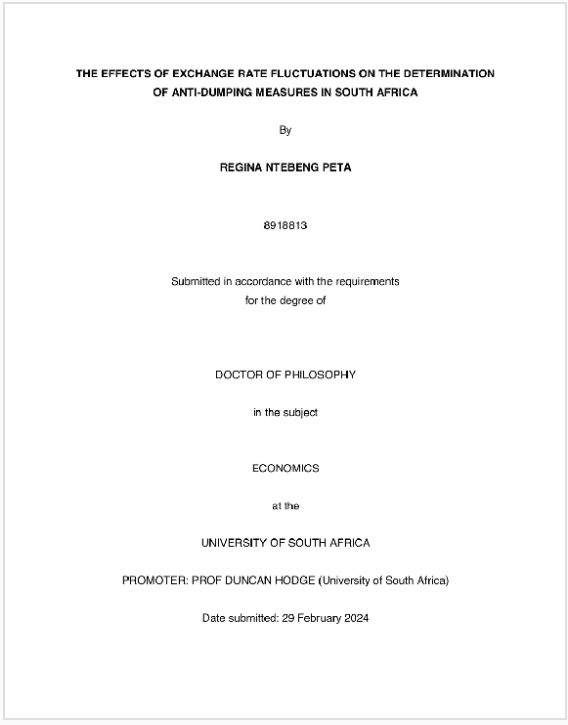

THE EFFECTS OF EXCHANGE RATE FLUCTUATIONS ON THE DETERMINATION OF ANTI-DUMPING MEASURES IN SOUTH AFRICA

By

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