

CHAPTER 4

The Legal Aspects of Dumping: A Focus on the Substantive Issues

4.1 Introduction

It was at the beginning of the twentieth century that legislation designed specifically to counteract dumping practices was implemented by the major trading nations of the time. As shown in chapter 2, Canada was the first country to introduce legislation aimed at combating dumping in 1904.¹ Governments which were generally free trade proponents were enabled through the adoption of antidumping legislation to avoid bringing about a general increase in tariffs but at the same time provide a way of controlling imports which were negatively affecting their domestic industries.² In the absence of a multilateral trade treaty, each state adopted different antidumping policies and practices. Some even went further to enact special legislation designed to block imports from countries that achieved increased competitiveness during the inter-war years as a result of depreciating their currency - a practice generally described as “exchange dumping”.³ All these initiatives by states were taken as measures aimed at providing domestic markets with some form of protection from unfair trade practices.

It is generally accepted in the multilateral trading system that if dumping takes place, it could result in unfair trade as the domestic industry of the importing country might suffer harm as a result of the practice.⁴ In instances where injury is established, the authorities of the importing country may take action against the practice. Such action should, however, be in accordance with the rules provided by the WTO in as far as retaliating against the dumping practice is concerned. The prescribed retaliatory action is in the form of antidumping duties and these can only be imposed if there is a clear and indisputable case of dumping and such dumping is accompanied by injury to a domestic industry in the importing country.

¹ Stanbrook and Bentely *Dumping and Subsidies: The Law and Procedures Governing the Imposition of Anti-dumping and Countervailing Duties in the European Community* (1996) 2.

² *Ibid.*

³ *Ibid.*

⁴ Czako et al *A Handbook on Antidumping Investigations* (2003) 1.

Given the long history of national and international concern with dumping, it is not surprising that when the GATT was negotiated in 1947, special provision was made for cases of dumping.⁵ Article VI of the GATT allows GATT Contracting Parties to make use of antidumping duties in order to offset the margin of dumping on dumped products. The Parties can, pursuant to GATT Article VI, make use of antidumping duties as far as they can clearly show that such dumping is or threatens to cause material injury to competing domestic industries.⁶ As time passed, however, some GATT members began to feel that certain members were applying antidumping duties in such a way as to raise a new barrier to trade.⁷ Some were of the opinion that some procedures, such as delay and dumping margin calculations, to name but a few, were causing distortions and restrictions on international trade flows.⁸ Thus, because of these uncertainties, the GATT Contracting Parties negotiated an Antidumping Code⁹ which set forth a series of procedural and substantive rules regarding the application of antidumping duties, partly due to the desire to prevent antidumping duty practices and procedures of governments which were damaging to international trade.¹⁰

The Antidumping Code as negotiated is not an amendment of Article VI of the GATT; the preamble makes it clear that it is but an interpretation of Article VI.¹¹ The purpose of the antidumping investigation is to ascertain whether dumping is taking place and as a result causing injury to the domestic industry of the country importing the allegedly dumped imports. What is meant by this in essence is that the process places much emphasis on:

⁵ Jackson "Dumping in International Trade: Its Meaning and Context" in Jackson and Vermulst (eds) *Antidumping Law and Practice: A Comparative Study* (1989) 6.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ The rules for both substantive and procedural issues are laid down in the Antidumping Code. The Code is more like an administrative manual in antidumping procedures.

¹⁰ Jackson in Jackson and Vermulst (eds) *Antidumping Law and Practice* 7.

¹¹ Dale *Antidumping Law* 73.

- (i) establishing a “normal value” of the allegedly dumped product when sold in the domestic market of the exporting country;
- (ii) establishing the “export price” of the product;
- (iii) comparing the export price with the “normal value” established, and
- (iv) ascertaining in no unclear terms whether the domestic industry of the importing country is suffering injury as a result of the dumped imports.¹²

Since 1 January 1995, the rules of the multilateral trading system relating to antidumping are found in the following WTO provisions:

- (i) Article VI of the GATT 1994;¹³
- (ii) The ADA.¹⁴

GATT Article VI allows countries to take action against dumping. The ADA clarifies and expands upon Article VI and the two instruments operate simultaneously.¹⁵ The three basic preconditions which have to be met before antidumping actions can be taken are set out in Article VI of the GATT 1994. A WTO member country alleging that dumping is taking place within its territory must have determined:

- (i) that the imports in question are being dumped;
- (ii) that its own industry is being materially injured or is threatened with material injury, or that the establishment of a domestic industry is being retarded; and
- (iii) that the injury contemplated under (ii) is being caused by the dumped imports.¹⁶

¹² Czako *et al* *A Handbook on Antidumping Investigations* 1.

¹³ Article VI contains the basic provision relating to antidumping action and is the “enabling provision”.

¹⁴ It contains detailed provisions relating to methodologies and procedural issues involved in antidumping investigations.

¹⁵ ANON “Dumping (Pricing Policy)”. Available at [http://en.wikipedia.org/wiki/Dumping\(Pricing_Policy\)#External_links](http://en.wikipedia.org/wiki/Dumping(Pricing_Policy)#External_links) (accessed 12-04-07). The two WTO legal instruments complement each other and for that reason must be read together.

¹⁶ This last requirement basically focuses on the issue of causation. It is therefore submitted that, for a finding of dumping to be properly made and consequently for the proper imposition of antidumping duties, a country alleging dumping must be able to show and

Although all members of the WTO are also parties to the ADA, it is not mandatory for members to have in place a legal framework for antidumping action or to take antidumping action when, or if, injurious dumping occurs.¹⁷ The ADA clearly specifies that if a member chooses to take antidumping action, such action should be consistent with the rules set out therein and must be preceded by the required investigation conducted on the basis of the ADA.¹⁸ The rules of the multilateral trading system require that antidumping investigations be conducted with due cognisance taken of the principles of “due process”, meaning that antidumping investigations have to be conducted in a transparent, objective and equitable way, with all interested parties given adequate opportunity to defend their interests.¹⁹ The main objective of this chapter is to provide a detailed exposition of the key elements of the WTO antidumping regulatory framework. It also seeks to identify those aspects of the said regulatory framework, that are shrouded in significant legal uncertainty and therefore vulnerable to abuse by importing authorities in pursuit of protectionist goals.

4 2 Dumping: The GATT definition

The concept of dumping is defined in Article VI of the GATT 1947, according to which a product is dumped if it is introduced into the commerce of an importing country at less than its normal value.²⁰ Thus, in as far as Article VI(1) is concerned, there is a clear and indisputable case of dumping “if the price of the product exported from one country to another:

prove that the injury being suffered by its domestic industry is caused by the dumped products.

¹⁷ Czako *et al* *A Handbook on Antidumping Investigations* 2. It is submitted that a country that elects to be an open dumping field will not be forced to impose antidumping duties against exporters of the dumped products. It is also not mandatory for such a country to have a domestic legal framework that will enable it to counteract dumping. It seems however logical that in order to protect its domestic market, its economy and its consumers from this trade practice, a country should not allow itself to be an open dumping ground as this can have a negative impact on the industrial growth and economy of the country.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Stanbrook and Bentely *Dumping and Subsidies* 31.

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

This concept of dumping has been incorporated into the GATT 1994.²¹ In its endeavour to prescribe a comparison between the export price and the normal value, Article VI (1) provides further that "due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation and for other differences affecting price comparability". It is, therefore, important at this point to understand that the WTO concept of dumping does not necessarily refer to the exportation of cheap goods to the importing country. However, the fact that the goods exported are cheaper can be clear evidence of dumping.²² A critical analysis of the definition of dumping in Article VI(1) supports the above view that the mere selling of imported goods at cheaper prices does not necessarily mean that dumping is taking place. Dumping involves a comparison between two sets of prices and values, and therefore it is a misconception to think that cheapness is tantamount to dumping.²³ In reaching a conclusion that dumping is taking place the focus should be on whether the export price is lower than the normal value, after due adjustment has been made for factors affecting price comparability as set out in Article VI(1).²⁴ In

²¹ The ADA.

²² Stanbrook and Bentley *Dumping and Subsidies* 31.

²³ *Ibid.*

²⁴ See Jackson and Vermulst *Antidumping Law and Practice* 6. They submit that in order to determine whether dumping is taking place, the authorities in the country of importation must determine whether the export price of the product is lower than the normal value, after adjustments to bring both prices back to the ex-factory level. See also Corr "Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures" 1997 *Northwest J of Int'l Law and Business* 49-110 79. He submits that in a quest to determine whether or not dumping is taking place, the national authority must compare the export price of subject merchandise with the "normal value" of the merchandise (the exporter's home market price, third country price or a constructed price). See further Finger and

order to achieve an equitable comparison, the ADA mandates a comparison of ex-factory starting price for sales of the same or similar product.²⁵ This further requires the national authority to adjust prices by deducting transportation and selling expenses.²⁶ From the definition of dumping as set out in Article VI of the GATT, the following three elements are critical to a proper determination of dumping:

- (a) Normal Value;
- (b) Export Price; and
- (c) Adjustments for factors affecting price comparability.

4 2 1 Normal value

Establishing the normal value is always the first step in any antidumping investigation.²⁷ Generally, the normal value of a product is its domestic price in the exporting country. More specifically, normal value is the “comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin.”²⁸ Normal value is therefore usually based on prices and costs in the country of origin.²⁹ The preferred method of establishing normal value in Australia, Canada, the EU and the USA is the use of prices of sales transactions in the domestic market of the foreign producer provided that:

- (a) such sales are in the ordinary course of trade; and
- (b) permit a proper comparison with the export sales.³⁰

Nogués *Safeguards and Antidumping in Latin American Trade Liberalization* (2006) 98; Taylor *International Competition Law: A New Dimension for the WTO* (2006) 6; and the Agreement on Implementation of Article VI of the GATT 1979, more specifically Article 2.2.

²⁵ See Article 2.4 of the ADA.

²⁶ Article 2.3 and 2.4 of the ADA.

²⁷ Farr *EU Anti-Dumping Law: Pursuing and Defending Investigations* (1998) 10.

²⁸ Bryan and Boursereau “Antidumping in the European Communities and the United States: A Comparative Analysis” 1984-1985 *Geo Wash J of Int’l Law and Economics* 631-701.

²⁹ Stanbrook and Bentely *Dumping and Subsidies* 32.

³⁰ Vermulst “The Antidumping Systems of Australia, Canada, the EEC and the USA: Have Anti-Dumping Laws Become A Problem in International Trade?” 1989 *Michigan J of Int’l Law* 765-806 793.

The first condition is used sometimes to exclude sales to related companies, distress sales or special sales such as sales to employees. The second condition has been invoked to justify exclusion of home market sales in negligible or small quantities. Thus, in this respect, it is worth noting that home market sales do not permit a proper comparison where such sales amount to less than five percent (5%) on a model by model basis of the sales to third countries.³¹ Canada and the USA, however, seem to make this determination on a case by case basis.³² Vermulst³³ submits that with the exception of the sales below cost concept, the exclusion seems logical because they prevent distortions and manipulation of the sales prices in the domestic market.³⁴ The five percent (5%) rule in essence serves the dual purpose of administrative convenience and predictability and is according to Vermulst, no more arbitrary than any rule would be.³⁵

The 1955 Swedish Antidumping Duties GATT Panel Report³⁶ is significant in the establishment of rules governing “normal value”.³⁷ This case involved Sweden’s imposition of antidumping duties on Italian exports of nylon stockings. Italy brought the case before the GATT in 1954, complaining of the reference price system employed by Sweden. The reference prices were linked to prices in Sweden’s market. Initially Sweden automatically imposed an antidumping duty whenever a shipment of imported merchandise was below the reference price, also referred to as the basic price. Once Italy filed the complaint, Sweden altered its practice, investigating shipments below the reference price for dumping, and exempting all other shipments from scrutiny. The GATT Panel held that Sweden’s antidumping regulations did not violate Article VI. The Panel Report is important because it assists in the establishment of the rules relating to “normal value”, more specifically, the following excerpt:

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ See *Swedish Anti-Dumping Duties* B.I.S.D (3rd Supp) 81, 86 (1955).

³⁷ Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 695.

“Unless the customs authorities (of Sweden) were prepared to decide on the alleged cases of dumping in a matter of days after arrival of the consignment, and unless the basic prices were constantly kept under review to make sure that they did not exceed the actual prices prevailing for all the varieties of stockings on domestic markets of the cost efficient producer, there was a certain danger of discrimination against low-cost producers in individual cases. Constant supervision of the operation of the scheme would also be necessary in order to avoid it being turned into a general protection against low-cost producers, even in the absence of dumping practices”.³⁸

From the Panel Report on Swedish Anti-Dumping duties, Bhala identifies four rules that emerge, relating to the concept of normal value:

- (a) the Panel authorises a fixed price system and under such a system, the importing country of allegedly dumped merchandise is compared not to the actual price of the foreign like product in the exporter’s home country, but rather some minimum price;
- (b) according to the Panel, under such a system, the minimum price must either be equal to or lower than the price in the home market of the lowest cost producer of the good;
- (c) the Panel does not require the existence of a relationship between the minimum price and either costs of production and actual sale prices; and
- (d) the administration of an antidumping regime must not lead to delays and uncertainties.³⁹

Another case worth mentioning which provided further guidance with respect to interpretation of Article VI is a 1962 case involving *Exports of Potatoes to Canada*.⁴⁰ A GATT Panel ruled that in the absence of a showing of cross-border price discrimination, an antidumping case must fail.⁴¹ Canada failed to prove that there was a difference between the price of potatoes consumed in the USA and the price of potatoes exported to Canada. Thus, with respect to the calculation of the dumping margin, Canada did not appreciate the language used in Article VI:1(a)

³⁸ *Swedish Antidumping Duties* para 81.

³⁹ For example a decision on the status of allegedly dumped goods must be made in a matter of days of the arrival of the goods into the importing country, otherwise the regime may operate in a discriminatory manner against low-cost producers. See Bhala *Modern GATT Law* 695. Also, in a different passage of the Report, the Panel assigns the burden of proof in an antidumping case to the GATT Contracting Party seeking to impose antidumping duties. This is in line with Article VI of the GATT.

⁴⁰ *Exports of Potatoes to Canada* B.I.S.D (11th Supp) 88 1963 (adopted 16-11-1962).

⁴¹ *Ibid.*

concerning “comparable price...for consumption in the exporting country.”⁴² Article VI imposes an affirmative duty on the petitioner in an antidumping case to prove price discrimination and therefore determine two prices.⁴³ A sale cannot be less than the normal value unless the price of the allegedly dumped good in the importing country is less than the price of the like product destined for consumption in the exporter’s home market.⁴⁴

In some cases, however, the product may originate, say, for instance in country X and be shipped to country Y before being exported to country Z, which is the importing country. In such cases the question of dumping can be determined by reference to exports from the country of origin, or from the country of re-export.⁴⁵ In theory, in such instances, antidumping proceedings could be brought against both exports from the country of origin and exports from the country of intermediate export, in which case it would be necessary to determine separate normal values in the country of origin and the country of immediate export and compare the corresponding export prices with their respective normal values.⁴⁶

As has been noted above, the determination of dumping involves an analysis of the normal value and the export price. The normal value therefore, is the benchmark to which the export price is compared and it can be arrived at in a number of ways.⁴⁷ The first priority under the ADA is to select comparable sales in the exporting country’s domestic or “home” market. However, the home market will only be used when there are sufficient sales of comparable or “like” merchandise. The GATT 1994 and the ADA now stipulate at least five percent (5%) of the amount sold to the importing country.⁴⁸ Comparable or “like” merchandise basically refers to identical or similar models.⁴⁹ The national authority may also investigate whether home

⁴² Bhala *Modern GATT Law* 695.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Stanbrook and Bentely *Dumping and Subsidies* 32.

⁴⁶ *Ibid.* This view is further supported by Bryan and Boursereau. See 1984-1985 *Geo Wash J of Int’l Law and Economics* 640.

⁴⁷ Corr 1997 *Northwest J of Int’l Law and Business* 80.

⁴⁸ See Article 2 of the ADA.

⁴⁹ Article 2.6 of the ADA refers to “... a product which is identical, that is, alike in all respects

market sales are made below the cost of producing the product.⁵⁰ Thus, sales below cost in substantial quantities may be rejected as a basis for price comparison.⁵¹ Also, if home market sales cannot serve as a basis for comparison, the national authority may elect either to use export sales to third countries or alternatively, to calculate a constructed value for exported merchandise.⁵²

In instances where no comparable home market prices exist, Article VI is not at all silent, but instead provides alternative benchmarks. If the authorities in the importing country determine that there are no home market sales in the ordinary course of trade or that such sales do not permit a proper comparison, they can, pursuant to GATT Article VI base normal value on either:

- (a) the comparable price of the “like” product when exported to a third country; or
- (b) the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits.⁵³

What this means in essence is that where the exporter does not sell the goods on his home market and consequently the authorities have no information to work with, recourse can be sought from the domestic prices of other sellers or producers in that market. Another alternative is for the authorities to take into account export prices for third markets. Such a price will be adequately representative of the concept of normal value and care must be taken to establish comparability since some goods may differ in quality or type or other characteristics thus making them hard to compare.⁵⁴ Where third market sales are not to be used to determine the dumping margin comparison, then WTO rules allow a “constructed cost” approach. In this

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

⁵⁰ Article 2.2.1 of the ADA.

⁵¹ *Corr 1997 Northwest J of Int’l Law and Business* 81.

⁵² *Ibid.*

⁵³ Article VI:1(b) of the GATT and Article 2.4 of the ADA.

⁵⁴ Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 263.

situation, the export sales price will be compared to a price that is “constructed” as the “normal value” or home market price.⁵⁵ This constructed price is developed by examining the production costs of the product and then adding to it a profit amount to establish what shall be deemed the normal price.⁵⁶

Although the phrase “ordinary course of trade” is not defined in the ADA, some examples of transactions that are not considered to be in the ordinary course of trade are provided by legislation from a number of jurisdictions.⁵⁷ According to the EC regulatory framework on antidumping, when there are reasonable grounds to believe that the domestic price of the like product in the exporting country is less than the cost of production, such sales may be considered not to have been made in the normal course of trade.⁵⁸ Secondly, if the trading parties appear to be associated or to have entered into a compensatory arrangement with each other, then sales are considered not to have been in the ordinary course of trade.⁵⁹

4 2 2 Constructed normal value

As briefly highlighted above, constructed value is used if there are no home market or third country sales to provide the basis for comparison, either because there are no such sales or because they have been disregarded for being below fully allocated costs.⁶⁰ This constructed normal value can be viewed as an alternative method of ascertaining normal value when the general rules do not apply.⁶¹ The exporter’s variable costs, as well as the materials and fabrication costs incurred in producing the particular merchandise exported to the importing country are the basis for constructed value.⁶² Cost of production is the total of the manufacturing cost, thus,

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Bryan and Boursereau 1984-1985 *Geo Wash J of Int’l Law and Economics* 641.

⁵⁸ This should be so provided that the sales are made over an extended period of time and in substantial quantities and not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade.

⁵⁹ Bryan and Boursereau 1984-1985 *Geo Wash J of Int’l Law and Economics* 641.

⁶⁰ Palmeter “Antidumping Law: A Legal and Administrative Non-Tariff Barrier” in Boltuck and Litan (eds) *Down in the Dumps: The Administration of Unfair Trade Laws* (1991) 75.

⁶¹ Farr *EU Anti-Dumping Law* 10.

⁶² Palmeter submits that part of the formula for establishing the normal value is rather

the actual cost of materials, labour and overheads incurred in producing the merchandise sold in the comparison market plus selling, general and administrative expenses.⁶³

4 2 2 1 Criticisms of the “constructed value” approach

Many difficulties are linked with computing the constructed cost of a product, and some of these difficulties certainly raise questions about the administration of antidumping laws of various countries.⁶⁴ Under the law of the USA, the requirement of a minimum addition for general expenses and profit may appear to have some justification when the exporter in question is a multi-product organization, hypothetically capable of shifting general expenses away from a product subject to an antidumping investigation or willing to take a lower than usual profit on a particular product in order to penetrate the export market.⁶⁵ This theory is, according to Palmeter, questionable and does not justify the minimums required by the USA law relating to antidumping investigations. Proper accounting procedures and sufficient audits would make these manipulations difficult if not impossible to hide.⁶⁶ These minimums also apply to single product companies that export all their merchandise to the USA. These companies are unable to shift expenses or obtain higher, offsetting profits elsewhere.⁶⁷ Even in cases involving multi-product companies, the actual amount of general expenses and profits must be calculated in any event in an endeavour to determine whether they are lower than the statutory ten percent (10%) and eight percent (8%) minimums.⁶⁸

unsound for it involves fully allocated costs and more. According to USA Law relating to Antidumping, fully allocated fixed costs that by law must be equal to ten percent (10%) are added to materials and fabrication costs. This means that an exporter with fixed overheads below ten percent (10%) will be deprived of this efficiency when constructed value is being calculated. An allowance for profit addition then follows. Thus, by law it must be equal to a minimum of eight percent (8%) of fully allocated costs. This total constructed value is then compared to the exporter's price to make a determination of whether dumping is occurring or not. At the very least an exporter earning less than eight percent (8%) on its USA sales will automatically be found to be dumping. See Palmeter in Boltuck and Litan (eds) *Down in the Dumps* 75.

⁶³ Article 2.2.1 of the ADA.

⁶⁴ Jackson *The World Trading System* 264.

⁶⁵ Palmeter in Boltuck and Litan (eds) *Down in the Dumps* 75.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Thus these statutory amounts are not surrogates for data that are difficult to ascertain but

National authorities normally require actual product-specific costs and profit and generally will not accept standards or budgeted amounts.⁶⁹ The use of actual profit was based on the practice previously in effect in the EU.⁷⁰ Many manufacturers make use of a process cost accounting system and they do not derive actual per-product costs. The actual product cost and profit requirement often means that a company must make a meticulous recalculation of product costs for antidumping purposes.⁷¹ Also the ADA's requirement of "fully-loaded" production costs, including fixed overheads, rather than variable or marginal costs, contradicts normal business practices and may create artificial dumping margins.⁷² Corr further notes that authorities have substantial discretion to "adjust" an exporter's reported full costs, specifically where the exporter is forced to depart from its normal accounting system to derive per product costs.⁷³ These adjustments can have a significant effect on the antidumping margin arrived at.⁷⁴

Since normal value can be based on home market price or constructed value, the exporter must bear in mind that it can still be found guilty of dumping even if its

are minimums to be used should the real amounts prove too low for the law's protectionist purposes. If general expenses are in fact greater than 10% or if the profit is greater than 8%, those greater amounts will be used in lieu of the statutory minimums. See further, *Final Determination of Sales at Less than Fair Value: Antifriction Bearings (Other than tapered Roller Bearings) and Parts Thereof* from the Federal Republic of Germany, 54 Fed. Reg. 18992, 19073 (1989). Cited by Palmetier *ibid*. In all cases, the actual general expenses of the company exceeded the ten percent (10%) statutory minimum requirements so that no adjustment to general expenses was required.

⁶⁹ Corr 1997 *Northwest J of Int'l Law and Business* 81.

⁷⁰ See Wright "Validity of Antidumping Remedies- Some Thoughts" in Vermulst and Jackson (eds) *Antidumping Law and Practice* 447.

⁷¹ Corr 1997 *Northwest J of Int'l Law and Business* 81.

⁷² *Ibid*. See also Article 2.2.1 of the ADA.

⁷³ Corr *ibid*.

⁷⁴ According to Wright "...it may be unrealistic to expect an economically rational cost of production or constructed value analysis for what has become, in essence, a subtle web of import protection decisions". He further submits that "...when the cost of production is calculated in an arbitrary manner...antidumping rules can easily be used for protectionist purposes and by inflating the normal value, lead to establishment of dumping margins where none (should) exist". Clearly Wright is of the view that the calculation of antidumping adjustments has displayed a "tilt towards finding the existence of dumping". See Wright in Vermulst and Jackson (eds) *Antidumping Law and Practice* 447.

export price is above home market price and production cost.⁷⁵ These and other peculiarities of antidumping law render it suspect in so many ways.

4.3 Treatment of non-market economies

For various historical and other reasons, the GATT has always had a few non-market economies as contracting parties. Several of these are now WTO members. In some cases, these were nations that were contracting parties to GATT before they shifted to a non-market economy structure.⁷⁶ In other cases, the GATT explicitly accepted into membership certain non-market economies under special provision or protocols.⁷⁷ Commentators⁷⁸ are quick to note, however, that the contracting parties who were non-market economies in GATT were relatively small in terms of their impact on trade.⁷⁹ Furthermore, relations between the GATT and its non-market contracting parties were always wearisome.⁸⁰ Debatably, the trading relationship does not work well, but the other members of the GATT were willing to tolerate the situation because they either had special arrangements of their own with the countries concerned or the volume of trade was small.⁸¹ Neither of these situations would apply to a country like China or Russia, both of which are very large and therefore very important in terms of possible trade impact in the GATT/WTO milieu.⁸²

⁷⁵ Corr 1997 *Northwest J of Int'l Law and Business* 82.

⁷⁶ *Ibid.* Czechoslovakia and Cuba serve as perfect examples in that regard.

⁷⁷ Poland, Romania and Yugoslavia to name but a few.

⁷⁸ See Bentley and Silberston *Anti-Dumping and Countervailing Action: Limits imposed by Economic and Legal Theory* (2007) 135; Ehrenhaft *Policies on imports from Economies in Transition: Two Case Studies* (1997) 15; Berliner *Doing Business with the Russians* (1979) 44; Winiecki *Transition Economies and Foreign Trade* (2002) 54; Hinteregger and Heinrich *Russia - Continuity and Change* (2004) 191; Martin and Winters *The Uruguay Round and the Developing Economies* (1995) 298; Trebilcock *The Regulation of International Trade* (2005) 691 and Soesastro and Findlay *Reshaping the Asia Pacific Economic Order* 2005 42.

⁷⁹ Jackson *The World Trading System* 328.

⁸⁰ See Patterson "Improving GATT Rules for Non-Market Economies" 1986 *J of World Trade* 185-205. See also Ianni "The International Treatment of State Trading" 1982 *J of World Trade* 480-496 and Grzybowski "Socialist Countries in GATT" 1980 *American J of Comparative Law* 539-554.

⁸¹ Jackson *The World Trading System* 328.

⁸² *Ibid.* See also Kennedy "The Accession of the Soviet Union to the GATT" 1987 *J of World Trade* 23-39. See further Dirksen "What if the Soviet Union Applies to Join the GATT?" 1987 *The World Economy* 228-230.

In an economy where the government exercises complete control over price and allocation decisions, it is difficult to apply antidumping duties.⁸³ The government's control means that the home market price is not a real price in the sense in which that term is used in market economies. Consequently, an Interpretative Note to Article VI states that special difficulties in applying antidumping rules arise when allegedly dumped imports come from an economy where all prices are fixed by the state and there is a state monopoly of foreign trade.⁸⁴ In such cases the Note states that a strict comparison of prices may not be appropriate.⁸⁵ Most jurisdictions however, make use of the freedom that the GATT regime basically permits in as far as the application of antidumping action against non-market economies is concerned.⁸⁶ The freedom entails developing the so-called surrogate producer concept by which the authorities ignore the nominal prices or costs in the non-market economies, and instead base normal value on the prices or costs of a producer of the like product in a market economy.⁸⁷ In most jurisdictions, the authorities are often forced to make use of the prices or costs of a producer located in an economy at a substantially higher level of economic development than the market economy under investigation. This can however inflate the normal value.⁸⁸

4.4 The export price

The export price is the targeted exporting producer's sale price to an unaffiliated customer destined for consumption in the domestic market of the importing country.⁸⁹ The export price may be the sale price to a purchasing agent or trading

⁸³ Jackson *et al* *Legal Problems of International Economic Relations: Cases, Materials and Text* (1995) 711.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Vermulst 1989 *Michigan J of Int'l Law* 789.

⁸⁷ Vermulst's view point is further supported by Corr 1997 *Northwest J of Int'l Law and Business* 81.

⁸⁸ For non-market economies, normal value is to be based on constructed value, where the costs are derived from a market economy country. If such information is inadequate, normal value must be determined on the basis of sales prices of comparable merchandise from a market economy country. In each case the market economy country chosen is to be at a level of development comparable to that of the non-market economy country. See Jackson *et al* *Legal Problems of International Economic Relations* 711.

⁸⁹ See Article 2.3 of the ADA. Also in terms of the EC antidumping law, Article 2(8) of Regulation

company in the exporting country for shipment to the importing country.⁹⁰ More specifically, the export price is essentially the sale price to a buyer in the importing country. It is a prerequisite that the customer must be unaffiliated to the exporter, and because of this the export price may be based on the resale price of the exporter's sales subsidiary in the importing country rather than the exporter's sales to its subsidiary.⁹¹ Sales through subsidiaries are deemed "constructed export price" transactions because all of the expenses of the subsidiary including any further manufacturing cost and profit must be deducted from its resale price in order to "construct" an ex-factory starting price.⁹² In as far as the definition of export price is concerned, it is important at this point to clarify the meaning of "price actually paid" and "price actually payable". If an export sale is made, the price is booked immediately as payable but is not necessarily paid during the reference period.⁹³ It is therefore correct to deem an export sale which has been made but not paid for as falling within the reach of an antidumping investigation.⁹⁴ Australia, Canada, the USA and the EU calculate the export price on the basis of the price paid or payable by the importer.⁹⁵ In cases where it is apparent that the importer is related to the exporter, these jurisdictions reconstruct the export price by taking the resale price to the first independent customer in the country of importation and deducting the costs incurred between importation and resale, as well as the costs incurred by the foreign producer from the moment the product left the factory.⁹⁶ Such costs include the

(EC) No 384/96 defines the export price as the "price actually paid or payable for the product when sold for export from the exporting country to the Community". Effectively, this means the price in the EU.

⁹⁰ Corr 1997 *Northwest J of Int'l Law and Business* 80.

⁹¹ *Ibid.*

⁹² Article 2.3 and 2.4 of the ADA. This proxy is used for the first sale of the subject merchandise in the importing country to a buyer that is independent of the importer. See Czako *et al A Handbook on Antidumping Investigations* 50. Constructed Export price is therefore a resale price, namely, the first resale price in the chain of commercial transactions where the purchaser is unrelated to the seller. What then is the meaning of affiliation in terms of the WTO rules? GATT Article VI does not provide a definition for affiliation. However, through practice, the WTO members do fill in this lacuna. Typically affiliation is said to result from common parental control, cross-shareholding, common directors or managers and even family ties. See Bhala *Modern GATT Law* 725.

⁹³ Stanbrook and Bentley *Dumping and Subsidies* 52.

⁹⁴ *Ibid.*

⁹⁵ Vermulst 1989 *Michigan J of Int'l Law* 790.

⁹⁶ *Ibid.*

selling, administrative and other general expenses of the related exporter and in most jurisdictions, a reasonable profit for the importer.⁹⁷

A number of deficiencies exist in the provisions of the ADA relating to the determination of the export price.⁹⁸ The ADA does not deal with some key issues such as the determination of the export price in case a product is not exported by its producer but by an intermediate firm in the exporting country.⁹⁹ It also does not deal with the question of how authorities are to deal with exchange rate fluctuations.¹⁰⁰ Koulen¹⁰¹ further observes that Article 2.5 of the ADA which deals with cases where the export price is constructed on the basis of the first resale to an independent buyer in the importing country has not been applied consistently by Parties to the ADA.¹⁰²

4.5 The dumping margin

The above discussion highlighted that in order to make a determination whether or not dumping is occurring, the rules mandate a comparison of the export price with some degree of fairness. It seems therefore logical that, after the national authorities have determined the appropriate normal value and having derived the adjusted ex-factory price, the next step would be to calculate the dumping margin. For this purpose, the average unit export prices are normally deducted from the average unit normal value on a product by product basis.¹⁰³ In some jurisdictions where the net export price for a product is higher than the normal value, the

⁹⁷ *Ibid.*

⁹⁸ Koulen "Some Problems of Interpretation and Implementation of the GATT Antidumping Code" in Vermulst and Jackson (eds) *Antidumping Law and Practice* 369.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² For example, in the determination of the "exporter's sale price" the USA normally does not deduct the profits of the related importer, whereas the EU makes allowance for a "reasonable profit margin," often based on the margin of profit realised by the independent importers of the product in question. Furthermore, the use of a reconstructed export price in the USA influences the adjustments made to the normal value under the provisions for circumstances of sales adjustments whereas the EU considers the method of determining the export price as irrelevant for the purpose of sales adjustments. *Ibid.*

¹⁰³ Corr 1997 *Northwest J of Int'l Law and Business* 82.

dumping margin for that particular product is normally set at “zero.”¹⁰⁴ Thus, the exporter is not given credit for a “negative” margin. On the contrary, if the export price turns out to be less than normal value, a quantity weighted dumping margin is calculated and the margins for sales are tallied to obtain an overall dumping margin.¹⁰⁵ This margin therefore, constitutes the antidumping duty.

The methodology for imposing the duty varies among WTO members, as they are afforded significant discretion.¹⁰⁶ Some members collect the duty on all subject products while others collect on products priced above a minimum normal value.¹⁰⁷ The EU for instance collects an *ad valorem*¹⁰⁸ duty amount as a percentage of the export price, whilst Canada and Australia establish a minimum normal value, and collect only when import prices exceed this minimum.¹⁰⁹ The EU, Canada and Australia collect the duties on a prospective basis, meaning that the margins calculated for past imports during the investigation period serve as the basis for antidumping duties in the future.¹¹⁰ The ADA requires that separate margin rates be derived for each exporting company where possible, but the authority has discretion to sample selected exporters when it cannot examine them all.¹¹¹ An “all others duty” is then applied to those exporters in the target country who were not specifically investigated.¹¹² This means that irrespective of the fact that the other exporters in the targeted country were not investigated, the same duty determined through the analysis and investigation of the sampled countries will be imposed on the countries not subjected to investigation.

¹⁰⁴ *Ibid.* See also Blonigen “Evolving Discretionary Practices of the U.S Antidumping Activity” 2006 *Canadian J of Economics* 874-900 and Lindsey “The U.S Antidumping Law: Rhetoric versus Reality” 1999 *Trade Policy Analysis* 4.

¹⁰⁵ Corr 1997 *Northwest J of Int’l Law and Business* 82.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ It is a duty imposed on imported products based on a percentage of the value.

¹⁰⁹ Corr 1997 *Northwest J of Int’l Law and Business* 82.

¹¹⁰ See further Koulen in Jackson and Vermulst (eds) *Antidumping Law and Practice* 336 and 371.

¹¹¹ See Article 6.10 and Article 9.2 of the ADA.

¹¹² Article 9.4 of the ADA.

4.5.1 The dumping margin formula

While the second clause of GATT Article VI:1 outlines the definition of dumping, subsection (a) on the other hand outlines the price comparisons. A combination of these two provisions yields the formula for the calculation of the dumping margin.¹¹³

Thus the difference between the foreign and domestic market prices is commonly referred to as the dumping margin. A broad formula for the calculation of the dumping margin is thus:

$$\text{Dumping Margin (DM)} = \text{Normal Value (NV)} - \text{Export Price (EP)}$$

where Normal Value is representative of the domestic price, that is, the price the exporter or producer charges for the like product in its home market; Export Price, on the other hand, being the price the exporter or producer charges for the subject merchandise in the importing country.¹¹⁴

Article 2.1 of the ADA states that merchandise is “dumped” if it is sold in an importing country at an Export Price or Constructed Export Price that is less than its Normal Value. The definition of the Dumping Margin Formula in terms of Article 2.1 reads:

“For the purposes of this agreement, a product is to be considered 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”.

When all adjustments have been made to the Normal Value and Export Price and the dumping margin remains positive (meaning that the Normal Value exceeds the Export Price) then there is a clear indication of dumping.¹¹⁵ Conversely, in cases where the dumping margin is zero, or if such margin is expressed in the negative, it is concluded that dumping has not occurred.¹¹⁶ Inasmuch as a positive dumping margin indicates that dumping is occurring, in practical terms however, even a positive dumping margin must be significant in order to make a case for the imposition of

¹¹³ Bhala *Modern GATT Law* 718.

¹¹⁴ See Bryan and Boursereau 1984-1985 *Geo Wash J of Int'l Law and Economics* on a discussion of Normal Value and Export Price 640 and 644 respectively.

¹¹⁵ Bhala *Modern GATT Law* 718.

¹¹⁶ *Ibid.*

antidumping duties worth pursuing by the relevant authorities.¹¹⁷ There is no doubt that filing an antidumping petition, investigating and consequently arguing the case can be costly and is therefore not worth pursuing unless the alleged dumping margin is significant. As a legal matter, for a dumping margin to be significant in terms of the law of the WTO, the dumping margin has to be either equal to or exceed two percent (2%) of the export price otherwise it will be deemed *de minimis*. This is pursuant to Article 5.8 of the ADA which reads:

“An application under paragraph 1 (on the investigation to determine the existence, degree and effect of any alleged dumping) shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is no sufficient evidence of either dumping or injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the dumping margin is *de minimis*, or that the volume of the dumped imports, actual or potential, or the injury is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 percent expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of the dumped imports from a particular country is found to account for less than 3 percent of imports of the like product in the importing Member, unless countries which individually account for less than 3 percent of the imports of the like product in the importing country collectively account for more than 7 percent of imports of the like product in the importing Member”.¹¹⁸

As has been discussed above, in most cases, a proxy or substitute for Normal Value is essential. Thus, in all instances where sales are outside the normal course of trade, the drafters of the GATT provided two possible alternatives for Normal Value.¹¹⁹ In Article VI:1(b)(i) the drafters spelled out what is known as the “Third Country Price,” that is, the price of the like product sold in the ordinary course of trade in a third

¹¹⁷ *Ibid.*

¹¹⁸ Article 5.8 of the ADA can be interpreted as follows: there shall be immediate termination if the dumping margin is *de minimis* or if the volume of the imports, actual or potential is negligible or if the injury is negligible. As noted above, an antidumping action can be costly and therefore it would be illogical to pursue such an action in instances where the dumping margin is insignificant. The rules state clearly that anything less than 2 percent in as far as the dumping margin is concerned, is to be deemed negligible for the purposes of filing an antidumping action. Also, clearly stated is the fact that if the volume of the imports account for less than 3 percent of imports of the identical merchandise in the importing WTO Member, the authorities must immediately effect termination of the proposed proceeding. However, in as far as the volume of the imports are concerned, where exporting countries account individually for less than 3 percent each of the imports of the identical merchandise but collectively account for more than 7 percent of the imports, then the imports are not to be considered as negligible. In this regard, the administering authorities must make an analysis that a collective lumping up of each country’s dumping margin will account for more than 7%. That way, the dumping margin will not be viewed as *de minimis*. Failure to prove that after a collective lumping up, the margin is above 7% will render the dumping margin negligible for the purposes of pursuing an antidumping action.

¹¹⁹ Bhala *Modern GATT Law* 722.

country.¹²⁰ In Article VI(b)(ii) the drafters identified the cost of production plus a reasonable amount for selling expenses and profit as a second alternative.¹²¹ This alternative is known as the “constructed value.”¹²² This alternative is generally used if a third country price is not available. Paragraph 2.2 of the ADA states:

“When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus reasonable amount for administrative, selling and general costs and for profits”.

In other words, if there are no sales in the normal course of trade of the like product, or there are such sales, but such sales are incomparable to sales in the importing country because of a particular market condition or there are such sales, but they are incomparable because of their low volume, then Article 2.2 mandates the use of a proxy for Normal Value. The proxies are sales of the like product in an appropriate third country (Third Country Price) or Constructed Values, sometimes called “Constructed Normal Value”.¹²³ In light of the above discussion on the proxies available for the determination of Normal Value in some instances, it is plausible to conclude that, a more precise iteration of the Dumping Margin Formula is:

$$DM = NV \text{ (Third Country Price or Constructed Value)} - EP$$

The above formula is also not a complete and precise one for in instances where the exporter and importer are affiliated, the price charged by the exporter to the importer for the subject merchandise might not be a market-based price, simply because of the relationship between the two.¹²⁴ Article 2.3 of the ADA reads:

“In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not sold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine”.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² See 4.2.2 above on a discussion on Constructed Value.

¹²³ Bhala *Modern GATT Law* 724.

¹²⁴ *Ibid.*

Thus, in certain instances what is known as the “Constructed Export Price” must be used as a substitute for export price. The Dumping Margin Formula then becomes:

$$DM = NV \text{ (Third Country Price or Constructed Value)} - EP \text{ (Constructed Export Price)}$$

Another aspect worth noting in respect of the dumping margin formula is the issue of different currencies. It would make no sense to compare normal value or its alternative denominated in the currency of the exporter’s home country with an Export Price or Constructed Export Price denominated in the currency of the importing country.¹²⁵ The foreign denominated Normal Value is therefore converted to the currency of the export price using the exchange rate in effect on the date of the export sale.¹²⁶ There is a possibility that currency exchange movements can create dumping margins. Because of this, the agreement explicitly allows for adjustments to compensate for significant short-term exchange rate fluctuations or to cover a sustained long-term appreciation of the currency of the exporting country.¹²⁷ This is consistent with Article 2.4.1 which reads:

“When a comparison under Paragraph 4 (*ie comparison between export price and normal value*) requires a conversion of currency, such conversion should be made using the rate of exchange on the day 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 during the period of investigation”.¹²⁸

The issue of adjustments must also be taken into consideration when determining the dumping margin. Along with the injury determinations, this requirement is the most contentious aspect of many antidumping cases.¹²⁹ GATT Article VI:1 provides for adjustments to both the normal value and export price. Thus, allowances for adjustments are made for both the normal value and the export price and their

¹²⁵ See Article 2.4.1 of the ADA.

¹²⁶ *Ibid.*

¹²⁷ Corr 1997 *Northwest J of Int’l Law and Business* 82.

¹²⁸ The date of sale will normally be the date of the contractual agreement, the purchase order, order confirmation or notice, whichever establishes the material terms of sale. See Czako *et al A Handbook on Antidumping Investigations* footnote 8 48.

¹²⁹ Bhala *Modern GATT Law* 725.

respective proxies. The drafters of the GATT seemingly appreciated the fact that the price of a like product and the subject merchandise should be comparable.¹³⁰ Differences between the exporter's home country and the importing country as to conditions and terms of sale, taxation or other factors could render the prices incomparable.

Article 2.4 of the ADA states that the comparison between Normal Value and Export Price must be fair. The *chapeau* to this provision mandates the comparison to be fair, at the same level of trade, normally the ex-factory level, and with respect to simultaneous sales.¹³¹ Adjustments for differences affecting price comparison, such as differences in conditions and terms of sale, levels of trade and physical characteristics, quantities, taxation or any other factor that may affect a comparison between Normal Value and Export price are permitted by the *chapeau*.¹³² In instances where the Constructed Export price has to be used in lieu of the Export Price, the *chapeau* encourages the adjustments for costs (duties and taxes) incurred between importation and resale by an independent buyer in the importing country, and for profits accruing to the exporter or importer.¹³³ It also requires the level of trade established for Normal Value to be at a level of trade equivalent to the level of trade of the constructed Export Price. In an endeavour to ensure a fair comparison, the *chapeau* further instructs investigating authorities to highlight to parties what information they must produce in order to ensure this fairness with regard to price comparisons.

Inasmuch as it has been highlighted above that the formula for determining the dumping margin is the difference between the normal value and the export price, the method for calculating the dumping margin is not uniform especially with respect to transactions that yield a negative dumping margin. With regards to such transactions, countries like the USA simply convert the negative dumping margin to a

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

zero. The question therefore is whether such a modification is proper. Can such a conversion be justified mathematically or by simple logic? This practice commonly known as “zeroing” is discussed in chapter 5 with specific reference to recent decisions of the WTO Panel and AB.¹³⁴

4 5 2 Intermediate country pricing

The GATT drafters did not contemplate a situation where subject merchandise is not shipped directly by an exporter from its home market, or from the country of origin of the merchandise, to the importing country in which an antidumping action is brought, but rather is shipped through an intermediate country; hence Article VI does not provide for such a scenario.¹³⁵ The gap in the antidumping regulatory framework became evident years after the GATT was drafted. Jackson had such scenarios in mind when he wrote:

“Suppose goods produced in country A are first shipped to B, then from B to C where C alleges dumping. Both the 1961 Report on Antidumping and Countervailing Duties, issued by a Group of Experts and the 1967 Kennedy Round Antidumping Code attempt to deal with such situations. The former expresses doubt that Article VI technically allows offsetting duties in such a case, but Article 2 (c) of the 1967 Code states that the export price will usually be that price export from B, the intermediate country and that the comparable price (normal value) will be found there with three exceptions: (i) “mere” transshipment (ii) products not produced in B or (iii) not comparable in B. In these three cases, A, the country of origin, may be used for the comparable price”.¹³⁶

In the above example given by Jackson, two key issues about dumping margins arise. First, should the basis for calculating the export price be sale transactions between the country of origin and the intermediate country or between the intermediate country and the importing country.¹³⁷ Secondly, should the basis for determining normal value be sale transactions in the country of origin or the intermediate country.¹³⁸ Both questions are now resolved in Article 2.5 of the ADA which states that:

¹³⁴ See pages 106-127.

¹³⁵ *Ibid.*

¹³⁶ Jackson *World Trade Law and the Law of the GATT* 1969 84.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.* See also Yanowitch “Foreign Assembly and Outsourcing: New Challenges to the

“In the case where products imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price from the country of origin, if, for example, the products are merely transshipped through the country of export, or there is no comparable price for them in the country of export”.

The dumping margin is in terms of the Law of the WTO often expressed as a percentage of the export price. For this reason, the complete formula for the dumping margin calculation in respect of antidumping actions becomes:

$$DM = \frac{NV \text{ (Third Country Price or Constructed Price)} - EP \text{ (Constructed Export Price)}}{\text{Export Price}} \times 100$$

4 6 The “material injury test” in antidumping actions

Under international trading rules,¹³⁹ both the imposition of antidumping duties and countervailing duties require fulfillment of the material injury test. The basic idea is that in the case of imported dumped or subsidized goods, the importing country is not authorised to respond with antidumping or countervailing duties, unless it can be established that the imports have caused “material injury” to the competing industry for the like product in the importing country.¹⁴⁰ Thus, the idea behind this requirement is that in order to respond when goods are dumped, the importing country must show a harmful impact on the domestic industry producing the like product in the importing country.¹⁴¹ This is however, not a matter of harm to a particular firm in the importing country, but rather, it must be material injury to the domestic industry as a whole.¹⁴² Several firms may go out of business because of the dumped merchandise but despite that, if the industry in question is generally

Antidumping Law” 1986 *Law and Policy in Int’l Business* 815-850 and Hsu “Input Downstream and Upstream Subsidies: Trade Loopholes Which Need Closing” 1986 *Columbia J of Transnational Law* 137-167.

¹³⁹ GATT Article VI:1 clearly states that, “the contracting parties recognize that dumping by which products of one country are introduced...is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry...”

¹⁴⁰ Jackson *The World Trading System* 266.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

prosperous, then there is no material injury and consequently, an antidumping action will not be successful in such a scenario. It is therefore submitted that international trade policy rules do not place particular emphasis on individual companies within the importing country but rather focus on the injury that is suffered by the import-competing industry of such a country as a whole.

The ADA does not provide a specific definition of injury, although it does specify that three types of “injury” may be found in an antidumping investigation.¹⁴³ From Paragraph 1 of Article VI of the GATT 1947 and footnote 9 to Article 3 of the ADA, the term injury encompasses three distinct concepts:

- (i) material injury to a domestic industry;
- (ii) threat of material injury to a domestic industry; and
- (iii) material retardation of the establishment of a domestic industry.¹⁴⁴

In turn, pursuant to Article VI:1(a), 2 and 6(a), an antidumping duty may be imposed by the authorities in the importing country if the prescribed requirements are met. The amount of the duty is designed to offset the dumping margin. Many international trade law commentators “preach” about a “level playing field” when it comes to the “game” of trade. Thus, the amount of duty imposed on a country engaging in harmful and injurious dumping practice supposedly levels the competitive playing field.¹⁴⁵ Article VI of GATT not only serves as an enabling

¹⁴³ Czako *et al A Handbook on Antidumping Investigations* 273.

¹⁴⁴ *Ibid.* Vermulst on the other hand, places emphasis on the point that the domestic industry producing the like product must have suffered material injury as a result of the dumped imports. According to him material injury in this sense has three components namely:

- (i) The domestic industry is suffering harm during the investigating period.
- (ii) The domestic industry is not suffering any form of injury as yet during the investigation period but can reasonably be foreseen to suffer such injury in the very near future.
- (iii) There is no domestic industry producing the like product, but such industry could exist, had it not been for the dumped imports. See Vermulst 1989 *Michigan J of Int'l Law* 796.

¹⁴⁵ See Lindsey and Ikenson “Antidumping 101: The Devilish Details of ‘Unfair Trade’ Law” 2002 *Trade Policy Analysis* 1; Bhagwati *The Level Playing Field: Unfair Trade Practices and Comparative Advantages* (1995) 1 and Nottage “Trade and Competition in the WTO:

provision for the rules on dumping margin in Article 2 of the ADA but also for the rules on rendering an injury determination in Article 3 of that Agreement.¹⁴⁶ What this means in essence is that there are two notable “seeds” in Article VI which are concerned with the determination of injury.¹⁴⁷ These notable “seeds” are Paragraph 1 and Paragraph 6(a). The third clause in the first sentence of Article VI:1 condemns the practice of dumping if it causes or threatens material injury to a domestic industry producing a like product, or if it materially retards the establishment of a domestic industry.¹⁴⁸

Paragraph 6(a) bars the imposition of an antidumping duty without an affirmative determination of material injury, threat or retardation.¹⁴⁹ The importance of the thorough determination of material injury in antidumping actions is evident in the way this requirement is carried through, directly or impliedly into the ADA.¹⁵⁰

Pondering the Applicability of Special and Differential Treatment” 2003 *J of Int’l Economic Law* 23-47.

¹⁴⁶ Bhala *Modern GATT Law* 771.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry. See Paragraph 6(a) of GATT 1994.

¹⁵⁰ See for example the following Articles:

- Article 1 which basically deals with general principles.
- Article 3 which is the specific provision in the Agreement that seeks to address the issue of injury in as far as antidumping actions are concerned.
- Article 7:1 (ii) which states that provisional measures may only be applied if a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry.
- Article 8.1 deals with price undertakings and reference is made to injury to the domestic industry.
- Article 9.1 deals with the imposition and collection of antidumping duties and in this article there is reference to injury.
- Article 10:2 deals with retroactivity of antidumping duties. This article states that where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, antidumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.
- Article 11:1 deals with the duration and review of antidumping duties. This article states that an antidumping duty shall remain in force only as long as and to the extent necessary to counter dumping which is causing injury. The reasoning behind the imposition of antidumping duties is to try and create a “level playing field”

As has been discussed above, not all dumping is evil. The WTO trade law rules only condemn dumping practice which is injurious to the domestic industry. Before antidumping duties may be imposed under the GATT, the importing country must meet the above stated criteria for injury. The result of this requirement of injury is that in terms of the Law of the WTO, dumping is only actionable to the extent that it has actual or threatened injurious consequences for an existing or would-be industry in the importing country.¹⁵¹

4 6 1 An analysis of Article 3.1

Article 3 of the ADA is the most important provision dealing with injury. It elaborates on GATT Article VI:1 and VI:6 (a). It further identifies variables for examination in both actual injury and threat determinations.¹⁵² Article 3.1 reads:

“A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products”.

As has been noted, the term “material injury” is not explicitly defined in the ADA. However, such injury determination must according to Article 3.1 be based on

between the trading partners. Thus, antidumping duties are meant to neutralize the injurious effects inherent in dumping practices. The antidumping duty therefore remains in force, as long as the dumped merchandise continues to cause injurious effects on the domestic industry. Where it is shown that the domestic industry is no longer suffering any form of harm whatsoever, the relevant authorities are under an obligation in terms of the international trade rules to terminate the duties.

- Article 14.3 deals with antidumping action on behalf of third country investigations. In considering such an application the Agreement states that the authorities of the importing country shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say, the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.
- Article 18.1 explicitly reprimands administering authorities from taking specific action against dumping of exports in a manner that is not in accordance with the provisions of GATT 1994 as interpreted by the ADA. Although this article does not make reference to “injury” it is logical to conclude that if action against dumping is to tally with the rules on dumping as prescribed by GATT 1994 then, there is no doubt that a Member intending to take such specific action against dumping should fulfill the injury requirement. Failure to fulfill the injury requirement will definitely not be in accordance with the provisions of GATT 1994 read together with the ADA.

¹⁵¹

Bhala *Modern GATT Law* 771.

¹⁵²

Ibid.

positive evidence and involve an objective analysis of factors that are listed therein. The following factors must be examined:

- (i) the volume of the dumped goods;
- (ii) the effect of the dumped goods on prices in the domestic market for like products; and
- (iii) the consequent impact of the dumped imports on domestic producers of the like products.¹⁵³

In as far as the volume of the goods is concerned, it is apparent that the greater the volume of the dumped merchandise, the greater the probability of a positive injury determination.¹⁵⁴ Article 3.2 elaborates on the volume as follows:

“With regard to the volume of the dumped imports the investigating authorities shall consider whether there has been a significant increase in dumped imports either in absolute terms or relative to production or consumption in the importing Member”.

What criterion is therefore used by the administering authorities in order to reach a conclusion that the increase in volume is “significant”? The ADA neither gives the answer nor sets criteria for the interpretation of what may be deemed “significant”, and because of this loophole, administering authorities in each WTO Member may make such decisions on a case-by-case basis.¹⁵⁵ The authorities could deliver a confirmatory injury determination based on an increase in the volume relative to production or consumption in the importing country.¹⁵⁶ In such a situation, it would

¹⁵³ Article 3.2 of the ADA addresses the first two factors, providing additional guidance regarding the criteria to be considered and the analysis to be conducted with respect to volume and price effects of the dumped merchandise. Article 3.4 addresses the third factor. Specific criteria that should be considered in evaluating the impact of the dumped imports on the domestic producers are listed in this article. See Czako *et al A Handbook on Antidumping Investigations* 274.

¹⁵⁴ Bhala *Modern GATT Law* 772.

¹⁵⁵ Investigating authorities treat the determination of material injury on a case by case basis and as indicated in Article 3.2 and 3.4 of the ADA, no single factor is dispositive. Each investigation involves a unique set of facts and should be treated as such. All of the criteria listed in Article 3.2 and 3.4 should be evaluated within the background of existing business cycles, conditions of competition, or other circumstances in which the market normally operates within the industry in question. The investigating authorities should seek to make out whether dumped imports are causing injury that is outside normal practice or beyond the usual competitive conditions under which the industry normally functions. See Czako *et al A Handbook on Antidumping Investigations* 274.

¹⁵⁶ Bhala *Modern GATT Law* 772.

be critical for a petitioner to establish that the relative increase occurred at its expense, not at the expense of exporters and foreign producers other than the respondent.¹⁵⁷

As discussed above in paragraph 4 5 2 of this chapter¹⁵⁸, the drafters of the GATT did not address the interesting possibility that subject merchandise might come from a number of exporting countries concurrently, and that while merchandise from any one of these countries might not be the cause of injury in the domestic industry, the cumulative effect of the merchandise from all these countries may result in injury.¹⁵⁹ In terms of trade law rules, this type of scenario is called Cumulation. Suppose Country A, B, C and D are dumping exports in Country X. The export volumes of Country A, B, C and D can be amassed together for purposes of assessing the presence of material injury.¹⁶⁰ Administering authorities may only cumulatively assess the effects of such imports if the dumping margin in relation to each country is more than *de minimis*. Article 3.3 deals with instances where these various cases need to be compounded for the purposes of establishing material injury. That article states:

“ Where imports of a product from more than one country are simultaneously subject to antidumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as discussed in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) 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”.

Article 3.3 must therefore, be read in conjunction with Article 5.8 which gives distinct guidelines as to what should be deemed *de minimis* in as far as the institution of antidumping actions is concerned. Read together, it is clear that

¹⁵⁷ *Ibid.*

¹⁵⁸ See pages 76-77.

¹⁵⁹ Bhala *Modern GATT Law* 772.

¹⁶⁰ Jackson *The World Trading System* 270. Let us suppose that countries A, B, C and D each export a small quantity of textiles into South Africa, say, 5% of the South African market for each. If each of these countries is determined to be engaging in dumping, the cases will go to the administering authorities for the determination of injury. The authorities may however, conclude that an individual country's dumping is not the actual cause of material injury to the competing South African industry. However, when dumping by all four countries is combined, the dumped imports now take 20% of the South African market and it becomes easier for the authorities to make an affirmative injury determination.

cumulation is only allowable subject to three conditions. The first condition is that the dumping margin must not be *de minimis* as required by Article 5.8. The dumping margin therefore, has to be at least 2 percent or more of the Export Price. No material injury exists where the dumping margin is below the stipulated percentage. Second, in determining injury the rules allow an analysis of the volume of the dumped imports.¹⁶¹ Thus, in respect of volume, cumulation will only pass scrutiny if it is established that the volume of the dumped imports is not trifling. Pursuant to Article 5.8 the volume has to be 3 percent or more of imports of the like product into the importing country. And third, cumulation must be appropriate in the particular circumstances having regard to the conditions of competition.

Now that we have seen that the greater the volume of the dumped goods, the greater the likelihood of an affirmative determination of injury, it is important to analyse the effect of the particular dumped import on the home market and the impact of those imports on the welfare of the importing country as a whole. The greater the effect of dumped imports on the price of an identical domestic product, the greater the likelihood of a positive determination of injury.¹⁶² Article 3.2 elaborates on the price variables by focusing on the tendency of like product prices within the importing country.¹⁶³ Finally, there is no doubt that the greater the effect of the dumped merchandise on other economic factors pertinent to the health of a domestic industry producing a product that is like the subject merchandise, the greater the likelihood of an affirmative injury determination.¹⁶⁴ Of the three variables discussed above, impact calls for a wider investigation than the other two. This is simply because central to all antidumping actions is the question of whether or not the industry petitioning is suffering any material injury. All factors must

¹⁶¹ Jackson *The World Trading System* 270.

¹⁶² Bhala *Modern GATT Law* 773.

¹⁶³ Whether 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, it is up to the administering authorities to decide whether any price undercutting, depression or suppression is "significant". See Bhala *ibid* and Czako *et al A Handbook on Antidumping Investigations* 275.

¹⁶⁴ Bhala *Modern GATT Law* 773.

therefore be examined in order to determine the impact of the dumped products on the domestic industry.¹⁶⁵

4.7 Causation

In addition to the analysis of injury, the antidumping investigation must also evaluate whether the dumped imports in question are the actual cause of the injury that is being suffered by the domestic industry. Therefore, before making a confirmatory injury determination, the national authorities must establish the causal relationship between the dumped imports and the injury to the domestic industry.¹⁶⁶ Although one can technically separate the requirements that there must be material injury and that such injury must come about as a result of the dumping, the two are evidently interrelated.¹⁶⁷

There is no doubt that many trend indicators for assessing whether material injury occurred will concurrently point to the direction where the injury came from.¹⁶⁸ However, national authorities such as the International Trade Commission (ITC) in the USA read this provision to require that dumped products must merely be “a” cause of injury among other factors, not the only cause.¹⁶⁹ Certain commissioners at the ITC do not separately analyse the causation question, but rather consider material injury and causation together as part of a “unitary” econometric analysis.¹⁷⁰

¹⁶⁵ *Ibid.*

¹⁶⁶ Article 3.5 of the ADA states that:

- It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumped, 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.

¹⁶⁷ Vermulst 1989 *Michigan J of Int'l Law* 797.

¹⁶⁸ *Ibid.*

¹⁶⁹ Corr 1997 *Northwest J of Int'l Law and Business* 85.

¹⁷⁰ *Ibid.* See further *Certain Brake Drums and Rotors*, USITC, Publication No. 3035, Inv. No.

National authorities are further mandated by the ADA to examine “any known factors other than the dumped imports” which may also cause the injury, such as non-dumped import volumes and contraction of demand.¹⁷¹ These causes must not however, be ascribed to the dumped imports.¹⁷²

The 1967 Antidumping Code required that the dumped imports be clearly the principal cause of injury. In reaching this determination, the authorities were required to evaluate, on one hand, the effect of the dumping and, on the other hand, all other factors taken together which might be adversely affecting the industry.¹⁷³ This rather strict causal link requirement was replaced by the much weaker phrase in the 1979 Code that it must be established that the dumped imports are, through the effects of dumping, causing material injury.¹⁷⁴ The key question therefore is: Should the causal link relate to the dumping or to the dumped imports? Are administering authorities supposed to focus on the analysis of the dumping margins or focus only on the import analysis? Although this issue has been largely overlooked in other jurisdictions, there is no doubt that it has raised extensive controversy in the USA.¹⁷⁵ Proponents of the margins analysis argue that the size of the dumping margin should play a certain role in the causation analysis.¹⁷⁶ The United States Court of International Trade has held that the ITC is not obligated to, but may, take into account the size of the dumping margins.¹⁷⁷ The wording of

731-TA-744 15 n.87 April 1997; *Melamine Institutional Dinnerware* USITC Publication No. 3016, Inv. No. 731-TA-741-743, 23 n.148 February 1997; *Bicycles from China* USITC Publication No. 2968, Inv. No. 731-TA-731, 12 n.88 June 1996.

¹⁷¹ See Article 3.5 of the ADA.

¹⁷² *Corr 1997 Northwest J of Int'l Law and Business* 85.

¹⁷³ Vermulst 1989 *Michigan J of Int'l Law* 797.

¹⁷⁴ See Article 3.4 of the Antidumping Code of 1979. See also DeGrandis “Proving Causation in Antidumping Cases” 1986 *Int'l Lawyer* 563-590.

¹⁷⁵ Vermulst 1989 *Michigan J of Int'l Law* 798.

¹⁷⁶ *Ibid.* A perfect and fitting example is a situation where the dumping margin is 10% but the margin of price undercutting is 55%. This alone, might be an indication that any injury caused by the dumped imports is not caused by the dumping. In addition the imposition of an antidumping duty of 10% will not alleviate the injury that is being suffered by the domestic industry in such a case. As has been noted in the preceding chapters, the rationale behind the imposition of an antidumping duty is to try as much as possible to neutralize the injurious effects of dumping. In the given facts however, it seems to Vermulst that the imposition of the 10% antidumping will not neutralize the injurious effects of dumping. This then leads to the conclusion that there is no causal nexus between the dumping and the injury that is being suffered by the domestic country.

¹⁷⁷ *Ibid.*

the ADA is much more inclined to a margins analysis in that it requires in Article 3.4 that it must be demonstrated that the dumped imports are through the effects of dumping, causing material injury.

4 8 The “Like Product” concept in antidumping investigations

4 8 1 The General Agreement on Tariffs and Trade and the “Like Product” Concept: A General Overview

Given that GATT 1994 is a legal instrument primarily concerned with products, it is not surprising that problems of identifying product similarities as well as problems of classifying and describing products are encountered with some frequency in the instrument.¹⁷⁸ The concept of “like product” is a central one in the General Agreement. It appears in numerous provisions, and then classifies to which products the rights and obligations of the GATT Agreement apply.¹⁷⁹ An example is Article III of the GATT which enshrines the MFN principle. According to this principle, once a WTO member grants a tariff benefit to a particular imported product, the same benefit must be given to any “like product” imported from every WTO Member.¹⁸⁰ In general, the “like product” concept remains undefined and consequently its application controversial within the international trading system. One GATT provision where the interpretation of the “like product” requirement has been especially difficult is Article III:2 prohibiting tax discrimination between imported and domestic products. As a result, this interpretation has shifted over the years.¹⁸¹

¹⁷⁸ Jackson *The World Trading System* 259.

¹⁷⁹ The term “like product” appears in 17 places in the General Agreement although not defined therein. The term appears in Articles I:1, II:2, III:4, VI:1, IX:1, XI:2(c), XIII:1, XVI:4, XIX:1 of the GATT. In addition the term “like commodity” appears in Article VI:7 and the term “like merchandise” is used in Article VII:2 of GATT 1994.

¹⁸⁰ One of the most important principles of the General Agreement is the prohibition of non-discrimination and preferential treatment. Those responsible for drafting the agreement did their best to base the new system on principles of equality, and their endeavours are reflected in many parts of the text. Articles I and III of GATT are the key provisions that reflect the results of these endeavours. They state that in general no less favourable treatment should be accorded to “like” or “directly competitive or substitutable” products regardless of the origin of goods in question. See Choi *Like Products In international Trade Law: Towards a Consistent GATT/WTO Jurisprudence* (2003) 12.

¹⁸¹ Bronckers and McNelis “Rethinking the ‘Like Product’ Definition in GATT 1994: Antidumping and Environmental Protection” in Cottier and Mavroidis (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (1999) 345.

A new approach has however, been confirmed by the AB. This approach clearly emphasises the importance of the “market place” in the determination of “like products.”¹⁸² Thus, simply referring to the similarities and the physical characteristics of the products is not adequate; focus should be on the consumer perspective. Thus, the authorities in an antidumping investigation must seek to determine whether or not, from a consumer perspective, “like products” are sufficiently competitive or substitutable. The AB has ruled that the WTO is concerned with markets and the rationale of the AB’s approach that the WTO is about markets and improving competitive conditions in those markets suggests that the test it approved for Article III:2 is capable of broader application.¹⁸³ A market-based analysis of competitive relationships between products should therefore be an essential aspect in any inquiry into GATT provisions that use the “like product” language, where it can be said that the purpose is to protect or improve competitive conditions.¹⁸⁴

If one were to draw a line of product relationship, one would put the concept of “identical” at one end, and the concept of “different” at the other end.¹⁸⁵ The closest relationship between products is therefore represented by the “identical goods” concept. The opposite is true, where goods are labelled “different goods”, the conclusion being that there can be no form of relationship whatsoever in respect of those goods. In between these extremes, however, one would be able to deduce such concepts as “similar”, “directly competitive or substitutable”, and “indirectly competitive or substitutable”.¹⁸⁶ The text of the GATT and several multilateral agreements annexed to the WTO Agreement provide a good basis for the ultimate definitive interpretations of these basic categories of product relationship.

¹⁸² See Choi *Like Products In international Trade Law* 127 on a discussion of the market-based approach.

¹⁸³ Bronckers and McNelis in Cottier and Mavroidis (eds) *Regulatory Barriers* 345.

¹⁸⁴ *Ibid.*

¹⁸⁵ Choi *Like Products In international Trade Law* 12.

¹⁸⁶ *Ibid.*

4 8 2 Identical

Article 15 of the Customs Valuation Agreement (CVA) provides a definitive concept of “identical”:

Identical goods mean goods which are the same in all respects including physical characteristics, quality and reputation. Minor differences in appearance would not preclude goods otherwise conforming to the definition from being regarded as identical.¹⁸⁷

With this definition in mind, an identical product refers to a product that is alike, a product that is the “same” in all respects (and this includes physical as well as functional characteristics) to the product under consideration. This represents the closest relationship between products in the GATT product “likeness” problem.¹⁸⁸

4 8 3 Similar

Article 15 of the CVA provides a definitive interpretation for the concept of “similar goods”:

Similar goods mean goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, their reputation and the existence of a trademark are among the factors to be considered in determining whether goods are similar.¹⁸⁹

A critical analysis of the above definition of “similar” explicitly shows that there is no requirement of “alike in all respects” as in the definition of “identical”. The question one might ask is: How elastic is the concept of “similar” in this context? If products under comparison share most of the significant characteristics, they can be safely designated as “similar” products. But what if those products share fewer than most characteristics? Are they supposed to be viewed as similar simply because Article 15

¹⁸⁷ This interpretation is shared in Article 2.6 of the ADA and Article 15.1, footnote 46 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Footnote 46 of the SCM Agreement reads “Throughout this Agreement, the term “like product” (*produit similaire*) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.” It is submitted that with this definition in mind, it seems logical to borrow this interpretation in an attempt to understand the meaning of “like product” relationship throughout the General Agreement.

¹⁸⁸ Choi *Like Products In international Trade Law* 13.

¹⁸⁹ This understanding seems to be shared by the ADA as well as the SCM Agreement.

deems them similar as long as they share the same characteristics? Are products similar where the products share like component materials but do not share like functions? It is submitted that an analysis of Article 15 of the CVA in respect of the definition of “similar” should not be confined to the like characteristics and like component materials alone. Instead this analysis should stretch to the specific functions attached to each of the products under investigation, and also a determination with regard to commercial interchangeability must be reached.

The concept of “similar” could however, be inclusive, depending on the context of the cases with which it is involved, particularly in instances where a product has multiple functions.¹⁹⁰ Such a product could attract different similar products according to each function. This concept can therefore be divided into two distinct categories: closely similar goods and remotely similar goods. The former applies to the relationship of products that share as many significant physical as well as functional characteristics as possible whilst on the other hand there are as few characteristics shared as possible.¹⁹¹

Since the WTO is mainly concerned with markets, perhaps the market-based-approach will be the best way to develop a precise definition of “like products” in the context of international trade.¹⁹² The market-based approach has been used by both the Panel and the AB in *Japan - Taxes on Alcoholic Beverages*.¹⁹³ In this case the Panel was called upon to determine whether Japan’s system of alcohol taxation, which taxed spirits such as vodka and whisky more highly than the largely domestically produced “sochu” was in violation of the GATT rules on non-discriminatory taxation. The Panel stressed that:

...in the Panel’s view, the wording makes it clear that the appropriate test to define whether two products are “like” or directly competitive or substitutable products is the market place. The Panel stated that the words used in the Interpretative Note of Article III, paragraph 2, namely “where competition exists” clearly favour the market-based approach for competition exists by definition of markets.¹⁹⁴

¹⁹⁰ Bronckers and McNelis in Cottier and Mavroidis (eds) *Regulatory Barriers* 346.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ WT/DS10/R 1996. Hereinafter *Japanese Liquor Taxes*.

¹⁹⁴ *Japanese Liquor Taxes* para 6.22.

The Panel also came to the conclusion that “like products” should be viewed as a subset of directly competitive or substitutable.¹⁹⁵ In reviewing the case, the AB made the following remarks on the Panel’s approach:

“The Panel emphasized the need to look not only at such matters as physical characteristics, common end uses, and tariff classifications, but also at the “market place”. This seems appropriate. The GATT 1994 is a commercial agreement and the WTO is concerned after all, with markets”.¹⁹⁶

There is no doubt that the market-based approach is the most captivating approach, for it ensures that the determination of the class of products subject to the GATT rule is made in such a way that ensures fair competitive conditions between imported and domestic goods.¹⁹⁷

4 8 4 The “Like Product” concept in the antidumping context

The “like product” determination in any antidumping investigation is a key threshold issue which has a tendency of controlling the outcome of the case.¹⁹⁸ It is therefore not surprising that the “like product” concept has long been a contentious issue in the antidumping field. Defining the category of “like products” is a decisive preliminary step that sets the stage for the rest of the investigation, which will, if the measures are imposed, govern the scope of their application.¹⁹⁹ The “like product” concepts in GATT Articles VI:1, VI:4 and XVI:4 call for a comparison between imported products and products sold in the home market of the exporting

¹⁹⁵ Bronckers and McNelis in Cottier and Mavroidis (eds) *Regulatory Barriers* 346.

¹⁹⁶ See *Japan – Taxes on Alcoholic Beverages* WT/DS11/AB 1996. This approach was subsequently followed by the Panel and the AB in *Korea-Taxes on Alcoholic Beverages* WT/DS84/AB/AR 1998. Hereinafter *Korean Liquor Taxes*. This case also involved an Article III:2 determination. The AB stated that “the context of the competitive relationship is necessarily the market place since this is the forum where consumers choose between different products”. The two cases (*Liquor Cases*) have emphasized that in determining “like” or “directly competitive or substitutable” products focus should be on the market place where commercial activity takes place and this determination must be from the consumer’s perspective. The interesting aspect about this approach is that it ties together the different elements of the “like product” determination such as physical characteristics, end use, price, channels of distribution and allows them to be given their proper weight in a coherent analysis. See Bronckers and McNelis in Cottier and Mavroidis (eds) *Regulatory Barriers* 346.

¹⁹⁷ Bronckers and McNelis *ibid.*

¹⁹⁸ Nedumpara “Antidumping Under the GATT/WTO: Fair Prices and Less Than Fair Rules-An Agenda for Reforms” 2002 *Indian J of Int’l Law* 275-311.

¹⁹⁹ Bronckers and McNelis in Cottier and Mavroidis (eds) *Regulatory Barriers* 346.

country.²⁰⁰ Article VI:1 provides that the practice of dumping exists when a specific class of imported products is sold at less than the normal price of the “like product” in the exporting country, or, in the absence of such a domestic price, of either the “like product” in any third country or the cost of production plus selling cost and profit.²⁰¹

It is worth noting however, that the non-discrimination provisions and the dumping provisions are designed to serve different “masters” in different economic contexts of international trade.²⁰² Provisions dealing with dumping seek to protect domestic firms producing import competing products that are materially injured, through imports, by unfair artificial advantages enjoyed by foreign competing producers.²⁰³ The targeted advantages include protected home markets that create opportunities for dumping.²⁰⁴ On the other hand, provisions dealing with non-discrimination simply protect the foreign competitors from being dispossessed of legitimate competitive benefits obtained by tariff concessions, or of comparative advantages acquired by individual diligence or natural conditions.²⁰⁵ Non-discriminatory provisions seek, therefore, to prevent intervention by an importing country while the fair trade provisions on the other hand, are primarily concerned with depriving the foreign producers of unfair advantages.²⁰⁶

²⁰⁰ Choi *Like Products In international Trade Law* 127.

²⁰¹ See also Articles 2.1 and 2.2 of the ADA. With this comparison between imported and home products of the exporting country, GATT members are charged to refrain from maintaining certain practices that place exports at a different price from that that would be charged if they had been sold in the home market of the exporting country. It is submitted that the result of this reasoning is that exports are to carry a price that is undistorted, a price that precisely reflects the price of each supplying state. Competition on a fair and non-discriminatory basis is therefore the underlying principle of these provisions, with the winners determined through performance on a level playing field. See further Choi *ibid*. See also Gifford and Matsushita “Antitrust or Competition Laws Viewed in a Trading Context: Harmony or Dissonance?” in Bhagwati and Hudec (eds) *Fair Trade and Harmonization* Vol 2 (1996) 299.

²⁰² Choi *Like Products In international Trade Law* 127.

²⁰³ See Cass and Boltuck “Antidumping and Countervailing Duty Law: The Mirage of Equitable International Competition” in Bhagwati and Hudec (eds) *Fair Trade and Harmonization* 365-368.

²⁰⁴ Choi *Like Products In international Trade Law* 127.

²⁰⁵ *Ibid*.

²⁰⁶ *Ibid*.

Because of the fact that the definition of “like product” has not been settled in the antidumping context, administering authorities enjoy great latitude in the interpretation of the term.²⁰⁷ As stated earlier, determination of the “like product” is one of the most crucial and delicate phases in an antidumping investigation. For this reason, it is not surprising that this determination is susceptible to abuse by administering authorities in their endeavours to achieve protectionist outcomes. In the interest of legal certainty this abuse and manipulation should be limited as much as possible²⁰⁸ and in that respect, it is submitted that the market based approach adopted by both the Panel and the AB in the *Liquor Taxes Cases* should play a crucial role in minimizing this abuse by providing a foundational basis for the determination of “like products” in the antidumping arena. Since antidumping is designed to rectify an injurious situation in the market, the market-based approach could ensure that antidumping measures are tailored in such a way that they serve the intended objective.²⁰⁹

How then should administering authorities interpret the meaning of “like product” in the antidumping context? Are they supposed to use a broad interpretation of the term or rather adopt a narrow interpretation? The negotiation records of GATT Article VI seemingly give support to a narrow interpretation of “likeness” in the antidumping field.²¹⁰ During the 1946 London Conference, contrary to the USA draft text of the provision containing references not only to “like” but also to “similar” products, the Australian Government submitted a proposal that sought to delete the term “similar” from the provision.²¹¹ Acceptance of the proposed deletion of the term “similar” suggests that the drafters were in favour of a narrow interpretation of the term “like” in respect of antidumping investigations. It is also apparent that the

²⁰⁷ Nedumpara 2002 *Indian J of Int'l Law* 280.

²⁰⁸ Bronckers and McNelis in Cottier and Mavroidis (eds) *Regulatory Barriers* 248.

²⁰⁹ *Ibid.*

²¹⁰ Choi *Like Products In international Trade Law* 127.

²¹¹ The USA furnished the basic negotiating text for the International Trade Organization Charter employed during the 1946 London Conference. The language of the text not only referred to ‘like’ products but went further to make reference to “similar” products. Having spotted this wording, Australia proposed that any reference to “similar” be deleted from the provision, presumably because of an awareness of the possibility of disruptive protective action by importing countries. See Choi *ibid.*

adoption of the term “similar” could have cast the “net too wide” and consequently this could have given the administering authorities a much wider discretion in the interpretation of the term. A wider and broad interpretation would consequently not be consistent with legal certainty as far as antidumping investigations are concerned. The term “similar” was subsequently deleted, indicating that the intention of the drafters was to put a ceiling on the scope of “likeness” in the realm of antidumping investigations. The reason for this deletion could have been the fact that the drafters were worried about the consequences that the flexibility of the term “similar” might create, which favours the argument that they wanted to eliminate only the “remotely similar” concept from the definition of “likeness”.²¹² Thus, the term “like” in the antidumping context should be interpreted to mean products that are the same.²¹³

The basic idea underlying Article VI:1 is to allow such countervailing measures that seek to neutralise unfair pricing advantages and consequently upsetting the normal competitive relationship between two related markets.²¹⁴ It is therefore, critical to determine which products are at issue, because the investigation cannot be initiated if the complaint is not adequately supported by the “domestic industry”.²¹⁵ The domestic industry is defined in terms of the “like product”. This is because the domestic industry is made up of those firms which produce the “like product” in the importing country:

“For the purposes of this Agreement, the term “domestic industry” shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitute a major proportion of the total domestic production of those products except that...when producers are related to the exporters or are themselves importers of the allegedly dumped, product the term “domestic industry” may be interpreted as referring to the rest of the producers”.²¹⁶

The determination of “like product” is also important to the calculation of the dumping margin. In determining whether products are sold at home at a price that is

²¹² *Ibid.*

²¹³ At the Havana Conference, an Australian delegate suggested that the “like product” concept used in the context of antidumping and countervailing duties referred to products that are the same. *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ See Article 5.4 of the ADA.

²¹⁶ See the definition of “domestic industry” under Article 4 of the ADA.

more or less than the price abroad, antidumping authorities will try to compare these two prices and the aim here is for the “like products” to be the same products manufactured and sold by the same company in two markets.²¹⁷ Not only is the determination of the “like product” important in the calculation of dumping margins, but as has been discussed above, it is important from the very inception of an antidumping investigation. Because of its crucial and delicate nature, the determination of “like product” can be a decisive tactical choice, and complainants are faced with contradictory interests in this regard.²¹⁸ There is no doubt a strong motivation on the part of national authorities to define the “like product” term broadly. The reason is because that way, one can actually throw in as many products as possible into the scope of the antidumping investigation, and the throwing in of a larger range of products consequently results in the imposition of antidumping duties that cover a larger spectrum of products. On the other hand, drawing too broad a category of “like products” can be disadvantageous to the complainant, in the sense that it may be difficult to prove injury.²¹⁹ It is therefore advantageous to narrow the scope of the “like product” definition so as to enhance the success rate in the investigation in question.²²⁰

The problem of system abuse with regard to the latitude in the determination of the “like product” definition is clearly illustrated by the WTO Panel decision in *New Zealand-Imports of Electrical Transformers from Finland*.²²¹ The issue in this case was whether different ranges of transformers were to be treated separately for the purpose of dumping and injury determination.

“In its examination whether the New Zealand transformer industry had suffered injury from the imports in question, the Panel subsequently dealt with the argument put forward by New Zealand that this industry was structured in such a way that there existed four distinguishable range of transformers...which for purposes of injury determination had to be considered separately. The Panel was of the view that this was not a valid argument, especially in light of the fact that the complaining company representing...the New Zealand transformer industry in the year 1982/3 produced the whole range of transformers, most of which in a range which was not at all affected by the imports from Finland...It was thus, in

²¹⁷ Bronckers and McNelis in Cottier and Mavroidis (eds) *Regulatory Barriers* 349.

²¹⁸ Choi *Like Products In international Trade Law* 128.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ L/5814, adopted 18 July 1985, BISD 32S/55. Hereinafter *New-Zealand-Electrical Transformers*.

the Panel's view, the overall state of health of the New Zealand transformer industry which must provide the basis for a judgment whether injury was caused by dumped imports. To decide otherwise would allow the possibility to grant relief through antidumping duties to individual lines of production of a particular industry or company - a notion which would clearly be at variance with the concept of industry in Article VI..."²²²

This addresses the problem of "like product" definitions that are too narrow, so as to carve out a pocket of injury in an otherwise healthy industry.²²³ The WTO Panel has in *United States-Definition of Industry Concerning Wine and Grape Products*²²⁴ addressed the problem of "like product" definitions that are too wide. The Panel analysed amendments that had been made by the USA to its antidumping and countervailing laws to the effect that wine and grapes would be considered as "like products". This interpretation was rejected by the Panel holding that:

"...because of different physical characteristics wine and grapes were not "like products" in the sense of the Code. In view of the precise definition of "domestic industry", the Panel considered that producers of the like products could be interpreted to comprise only producers of wine".²²⁵

The Panel seems to have taken a stance that grape growers do not produce wine and because of that fact they did not form part of the domestic industry.²²⁶ This meant that wine and grapes were not to be considered as 'like products' within the purview of the ADA.²²⁷ From the analysis of the two preceding cases, it is evident that too narrow a scope of likeness will not be desirable because it would enable one "to carve a out a pocket injury in an otherwise healthy industry"²²⁸ and at the same time an overly broad interpretation of the term would make it possible to "sweep a larger group of products into the scope of the investigation to make the foreign industries concerned suffer regardless of the investigation".²²⁹ The WTO has resolved this dilemma by adopting definitive interpretations that furnish the "narrowest" interpretation which is the term "identical" in the first place and the

²²² *New-Zealand-Electrical Transformers* para 4.6.

²²³ Bronckers and McNelis in Cottier and Mavroidis (eds) *Regulatory Barriers* 352.

²²⁴ *United States-Definition of Industry Concerning Wine and Grape Products* BISD SCM/71 – 39S/436 1992. Hereinafter *US-Wine and Grape Products*.

²²⁵ *US-Wine and Grape Products* para 4.2.

²²⁶ Vermulst 1989 *Michigan J of Int'l Law* 793.

²²⁷ Nedumpara 2002 *Indian J of Int'l Law* 281.

²²⁸ Choi *Like Products In international Trade Law* 129.

²²⁹ *Ibid.*

term “closely similar” in the second place.²³⁰ According to Article 2.6 of the ADA, “like product” refers to an “identical” product but in the absence of such an identical product reference can be made to the closely similar product concept. Although the expressions “identical” and “alike in all respects” seem clear, the problem arises in the second part of the Article 2.6 definition which refers to “characteristics closely resembling” the product under consideration.²³¹ This rather vague definition has resulted in divergent findings on the product scope of antidumping investigations.²³²

In between the “too narrow” approach and the “too broad” approach lies a wide gulf of uncertainty as to the limits placed by the GATT on the interpretation of the “like products” definition in the context of antidumping.²³³ Thus, the “like product” definition obviously gives administering authorities a wide discretion in its interpretation and this has resulted in inconsistent national practices in that regard as discussed below.²³⁴

4 8 5 The “Like Product” approach in the EC

The “like product” determinations have been made in many different and often irreconcilable ways in the EC. In the beginning more emphasis was placed on the physical and technical characteristics of the particular products under investigation.²³⁵ The emphasis has however shifted over the years, and administering authorities now place emphasis on the end use and consumers’ perceptions.²³⁶ The 1988 *Serial-Impact Dot-matrix Printer* case provided a useful summary of the elements evaluated:

“In order to determine the like product....the commission had first to examine the physical and technical characteristics of the printers. Secondly when assessing the closeness to and resemblance of the different products, it had also to take into account their application and use. Thirdly, the commission took the view that in the proceedings the “like product” determination cannot be separated from the particularities of the printer market in question

²³⁰ *Ibid.*

²³¹ Nedumpara 2002 *Indian J of Int’l Law* 281.

²³² See *US- Wine and Grape Products*.

²³³ Bronckers and McNelis in Cottier and Mavroidis (eds) *Regulatory Barriers* 352.

²³⁴ *Ibid.*

²³⁵ See Vermulst and Waer *EC Antidumping Law and Practice* (1996) 282.

²³⁶ Bronckers and McNelis in Cottier and Mavroidis (eds) *Regulatory Barriers* 353.

and the consumer's perceptions of these products. Finally, with regard to the different types of printer models, the Commission thought it should also consider other factors in order to find whether a clear dividing line exists".²³⁷

From the guidelines that the EC has built up as to the interpretation of the "like product" definition, one can safely conclude that these guidelines leave a great deal of discretion to the implementing authorities and are undoubtedly prone to abuse. In that regard the European court of First Instance, which is charged with judicial review of the EC antidumping investigation has reiterated in *Industrie des Poudres Spheriques v Council of the European Union*²³⁸ that: "the institutions enjoy a wide discretion in analyzing complex economic situations ...and the determination of "like products" falls within that context."²³⁹ There is no doubt that this lack of clear guidelines in the EC jurisdiction has resulted in many different types of products being grouped together as "like products" while other seemingly similar products are excluded.²⁴⁰ Because of the inconsistencies with regard to the 'like product' definition in the EC, one would suggest that the EC follows the market-based approach in respect of its "like products" determinations. But the inconsistencies are evident in the *Footwear Case*.²⁴¹ In the *Footwear Case*, the Commission included in the category of "like products" a wide range of indoor and outdoor slippers and

²³⁷ Regulation No. 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on *Imports of Serial-Impact Dot-Matrix Printers Originating in Japan*, OJ L130, 26/05/88 12.11. The definition of "like product" in this case was challenged and upheld by the European Court of Justice in Case C-69/89 *Nakajima All precision Co. Ltd v Council of the European Communities* 1991 ECR I-2069. The Commission's reasoning has recently been reiterated in Commission Regulation 165/97 of 28 January 1997 imposing a provisional antidumping duty on *Imports of certain footwear with textile uppers originating in the People's Republic of China and Indonesia* (Hereinafter *Footwear Case*): "It should be recalled that the main criteria to be applied in the determination of the "like product" are based on the general technical or physical characteristics, the use or functions and finally, the consumer perception of products..." OJ L29, 31/01/1997 3.18. Cited Bronckers and McNelis in Cottier and Mavroidis (eds) *Regulatory Barriers* 280.

²³⁸ Case T-2/95 1988.

²³⁹ *Shanghai Bicycle Corporation v Council*, 1997 ECR II-1383 Case T-170/94 1997. Also see further important past cases that dealt with the issue of the definition of "like product", such as the *Photocopiers* cases, *Canon v Council* 1992 ECR I-123 Case C-171/87; *Ricoh v Council* 1992 ECR I-1335 Case C-174/87; and *Sharp Corporation v Council* 1992 ECR I-1635 Case C-179/87.

²⁴⁰ *Footwear Case* para 6.2.

²⁴¹ *Ibid.*

shoes with rubber or plastic soles and textile uppers for both adults and children.²⁴²

The Commission admitted that:

“Although the footwear falling within any of the above categories can cover a wide range of styles and types, as well as different production methods, their essential characteristics, their uses and consumer perception thereof remain basically the same. Therefore, for the purposes of the present proceeding and in accordance with the consistent Community practice, they are regarded as one single product”.²⁴³

The Commission did not include tennis shoes, basketball shoes, gym shoes, training shoes and espadrilles²⁴⁴ in this pool of selected products. It is difficult to deduce how the Commission could have come to group indoor slippers and outdoor shoes in the same category and thereby label these products as “alike”. Without even analyzing the physical characteristics of these two products, it is clear that the two products do not possess the same physical characteristics. How can indoor slippers and outdoor shoes possibly be regarded as “like products?” To begin with, indoor slippers serve a completely different function from the one served by outdoor shoes. Thus, their end uses are by no means closely related. It would seem hilarious to come to a conclusion that a customer shopping around for indoor slippers would substitute these with outdoor shoes. Similarly a customer intending to buy outdoor shoes will not substitute these with indoor slippers. The two products are not interchangeable, and thus cannot be grouped together as like products. Also, if the Commission classified specific outdoor shoes with the indoor slippers, then how is it possible that tennis shoes, basketball shoes, gym shoes, training shoes and espadrilles were excluded from this classification given that they ordinarily qualify as outdoor shoes?

The Commission changed its approach stating that:

“...slippers, due to their usual flimsiness, do not appear to be suitable for outdoor uses. This also appears to be confirmed by the consumers’ perception of both products. It has therefore to be concluded that the second interchangeability test, “i.e., whether an indoor shoe can replace an outdoor shoe, is not satisfied and accordingly that slippers and outdoor footwear of the kind under consideration cannot be regarded as one single category of products. Such a conclusion also means that the results of the investigation will have to distinguish between slippers and outdoor footwear”.

²⁴² Bronckers and McNelis in Cottier and Mavroidis (eds) *Regulatory Barriers* 354.

²⁴³ *Footwear Case* 6.2.

²⁴⁴ A shoe usually has a fabric upper part and a sole made of a flexible material, such as a rope or rubber. Definition available at www.dictionary.com (accessed 21-11-2007).

It is submitted that in light of the discrepancies encountered in an attempt to define the “like product” concept in the antidumping field, it seems both sound and logical to adopt the stance taken by the Panel and the AB in the *Liquor Taxes* cases. The use of the market-based approach seems both fair and appropriate, since GATT is mainly concerned about interactions between various markets.

The Liquor Taxes cases further stand for the proposition that “like products” are a “subset” of “directly competitive or substitutable products”²⁴⁵ and therefore according to that definition products that do not compete within a particular market cannot be viewed as “like products.”²⁴⁶ As has been stated before, antidumping measures seek to undo an injurious situation on a WTO member’s market and for that reason, the use of the market-based approach seems ideal.²⁴⁷ The only way that an exporter’s behaviour can have this impact is when his products are actually in competition with domestically produced goods.²⁴⁸ Therefore, if dumped products are not competing with domestic products, then that dumping will have no bearing on the domestic producer’s welfare.

An attempt to show that products are directly competitive or substitutable would be a logical starting point for the like product determination in an antidumping context.²⁴⁹ Article VI, however, does not make use of the terms “directly competitive and substitutable products”. These terms are only used in the Interpretive Note to Article III:2. However, despite the fact that GATT Article VI does not make reference to these terms, it goes without saying that all products are “in competition” for a consumer’s budget and the result of this will be that in the antidumping field products that are not in direct competition would be excluded from the definition of “like products” even though these products are physically alike.²⁵⁰ This appears to

²⁴⁵ *Japanese Liquor Taxes* para 6.22; *Korean Liquor Taxes* para 118.

²⁴⁶ Bronckers and McNelis in Cottier and Mavroidis (eds) *Regulatory Barriers* 358.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.* See also Holmer and Bello “The Scope of ‘Class or Kind of Merchandise’ in Antidumping and Countervailing Duty Cases” 1986 *International Lawyer* 1015-1024.

make perfect sense, and for that reason, a market-based approach seems ideal for the determination of “like products” in antidumping investigations.

4.9 Domestic industry

The ADA, more specifically Article 4.1 provides:

“...the term “domestic industry shall be interpreted as referring to the domestic producers as a whole of the like products or those of them whose collective output of the products constitute a major proportion of the total domestic production of those products...”

Thus, the determinations regarding the “like product” concept will also play a critical role in determining which producers represent the domestic industry.²⁵¹ Also, Article 4.1 clearly states that in order for a firm to be regarded as a “domestic industry”, such firm should be a producer of the “like product”. If it does not produce the “like product” under investigation, then such a firm does not fall within the ambit of the definition as stated by the ADA.²⁵² One of the most critical factors to take note of when determining whether a particular firm forms part of the domestic industry is to pay particular attention to the sufficiency of the firm’s domestic production.²⁵³ It is true, that some firms may engage in very limited production or processing within the importing Member country, while other more significant phases of production either take place outside the Member country or are handled by other firms.²⁵⁴ An evaluation of whether such a firm’s domestic operations are sufficient to constitute

²⁵¹ Czako *et al* *A Handbook on Antidumping Investigations* 316.

²⁵² See Bryan and Boursereau 1984-1985 *Geo Wash J of Int’l Law and Economics* 651-652. They submit that injury determinations are made in reference to industries and this generally refers to a pool of producers of the like product as a whole, or to the producers whose combined output represents a major proportion of the total domestic production of the like product. Two exceptions are however, provided in Article 4.1. The first exception is where some of the producers in question are actually associated with the exporters or importers in one way or the other. The second depicts a situation where the producers themselves are the importers of the dumped merchandise. In such instances, such producers can be excluded from the definition.

²⁵³ Thus, investigating authorities will indeed need to make an analysis of whether each firm considered has sufficient domestic production operations to be treated as part of the domestic industry. See Czako *et al* *A Handbook on Antidumping Investigations* 317.

²⁵⁴ *Ibid.*

“domestic production” of the like product should be undertaken by the relevant administering authorities.²⁵⁵

The ADA permits the exclusion of domestic producers that are “related to the exporters or importers or are themselves importers of the allegedly dumped product” from the definition of “domestic industry”.²⁵⁶ The question of whether parties are related is important to the dumping margin calculation because it

²⁵⁵

A number of factors can be considered by the administering authorities in their endeavor to make a determination of whether a particular firm has adequate domestic production operations. The following factors are submitted by Czako *et al*:

- The value added to the product in the realm of domestic production operations.
- The source and quality of the firm’s capital investments relating to domestic production of the like product(s).
- The technical expertise involved in activities relating to domestic production of the like product(s).
- The investigating authorities can also consider the domestic employment levels of the firm.
- A consideration of the quality and type of parts or materials sourced domestically could also be a relevant factor that could play a significant role in this determination. This does not however, mean that in order for a firm to be regarded as a domestic producer, it has to source all parts and materials domestically. It is increasingly a common feature in today’s global markets for companies to source a significant portion of parts and materials from external suppliers who are not part of the domestic market. Are these firms part of the “domestic industry” as required by the ADA? Should they be accorded the “domestic industry” status irrespective of the fact that a significant portion of its parts and materials is sourced externally? To answer these questions Czako *et al* submit that provided other factors considered indicate significant domestic production operations and a commitment to domestic production operations these producers can be deemed as falling within the “domestic industry” definition stated in the ADA. It is submitted, however, that when administering authorities are making a determination of whether or not a firm has sufficient production of the “like product”, various factors should come into play. Thus, this determination is not to be confined to a single factor but rather all factors should be considered as a whole.
- Any other domestic costs and activities directly relating to production of domestic like product(s).

It is submitted that these factors are not exhaustive. Investigating authorities should seek to identify any factors in addition to the above, which will assist in the determination of whether or not a firm qualifies as a domestic producer. *Ibid*.

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Article 4.1(1) of the ADA. The use of “may” in this article implies that investigating authorities may exercise some level of discretion in determining whether circumstances merit the exclusion of certain related parties from the scope of the definition. See Czako *et al* A *Handbook on Antidumping Investigations* 319 in that regard.

determines who can support or oppose a dumping complaint as a member of a domestic industry.²⁵⁷

4 10 Anti-Circumvention

Article VI of the GATT 1994 and the rules set out under the ADA seek to arm WTO members with the necessary tools to counter the practice of dumping. These tools are, however, inadequate in the face of international trade practices. The provisions of the ADA, certainly do not in any way contemplate strategies such as the circumvention of antidumping measures, a trade practice by which exporters disguise their activities of dumping so as to avoid the antidumping measures of the importing country. Circumvention of antidumping duties can be a major quandary in providing effective relief under the ADA. The EU was the first country to devise a legislative provision in June 1987 that sought to combat the practice of circumventing antidumping duties. It was later on followed by the USA in 1988.²⁵⁸ Because of the fact that the international community has not reached a unified agreement on circumvention and anti-circumvention measures, the application of anti-circumvention measures remains controversial. Anti-circumvention has a dual effect. On one hand, the measures can effectively prevent the circumvention of antidumping duties. This way, it safeguards the remedial effect of antidumping duties and assures the domestic industries in the importing countries of the benefits. On the other hand, if anti-circumvention measures are not used appropriately, it seems that the situation may impact negatively on both international trade and international investment.²⁵⁹

A respondent may try to avoid an antidumping order in several ways. According to Corr, anti-circumvention issues arise when an exporter subject to an antidumping duty:

²⁵⁷ Corr 1997 *Northwest J of Int'l Law and Business* 94.

²⁵⁸ See section 781 of the Tariff Act of 1930 as amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 s1321, 102 Stat 1107, 1192-95. Section 781 has further been amended although no definitive agreement on anti-circumvention was reached in the Uruguay Round.

²⁵⁹ Vermulst 1989 *Michigan J of Int'l Law* 776.

- (i) sends components of the subject product to the importing country for assembly into a finished product that otherwise would be subject to the antidumping duty, or
- (ii) sends the components to a non-subject third country for assembly and then re-export to the importing country as a product of the third country.²⁶⁰

The imposition of an antidumping duty on a specific product may create an incentive for the producers of the like product in the exporting country to move production to other countries or to embark on the production of slightly different merchandise that will not be covered by the antidumping duty.²⁶¹ Vermulst notes four situations which can arise as a result of this production shifting:

- (i) production in the jurisdiction which imposed the antidumping duty;
- (ii) production in a third country;
- (iii) production of a slightly different product; and
- (iv) production of new products.

The aim of these strategies in some cases will be to simply circumvent the antidumping duty.²⁶² The ADA does not provide for rules on circumvention. In the absence of multilateral agreement to deal with the strategies, a number of signatories have found it necessary and in their best interests to act unilaterally against certain corporate practices considered to constitute circumvention.²⁶³ The EU, South Africa and the USA have implemented regulations that seek to address the problems of circumvention.²⁶⁴

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ Adamantopoulos K and De Notaris D "The Future of the WTO and the Reform of the Anti-Dumping Agreement: A Legal Perspective" 2000-2001 *Fordham Int'l Law J* 56.

²⁶⁴ Anti-circumvention legislation was first implemented in the late 1980s, via the "screwdriver" amendment to the EU antidumping law. Under this provision, components will be subject to the dumping order on the finished merchandise if it is established that the value of the imported components is significant. See Council Regulation 2423/88 of 11 July 1988 on "Protection Against Dumped and Subsidized Imports from Countries Not Members of the European Economic Community" Article 13, 1988 O.J. (L209) 1, 13. Cited by Corr 1997 *Northwest J of Int'l Law and Business* 95. See also section 60.2 of the South African Antidumping Regulations 2003.

The controversy around anti-circumvention provisions carried over into the Uruguay Round negotiations. The USA and the EU both sought to include in the ADA a provision permitting the use of anti-circumvention measures. Most Asian and developing countries opposed the proposals. The controversy behind rules on circumvention lies in the fact that application of these duties to products assembled in third countries is to some extent a violation of custom origin rules.²⁶⁵ For example, in *United States- Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors originating from Korea*,²⁶⁶ the USA applied the duty to Korea-fabricated semiconductors that were encapsulated in non-subject third countries and exported to the USA even though the latter's Customs Service origin rules deemed the imported semiconductors to be products of the third countries rather than products of Korea.²⁶⁷ Despite the absence of any allowance for anti-circumvention measures in the ADA, the USA, South Africa and the EU continue to apply their anti-circumvention provisions.²⁶⁸ Continued application of these provisions may lead to challenges on the ground that the deliberate silence of the ADA should be interpreted as a WTO stand not to permit such actions.²⁶⁹

4 11 Conclusion

Indeed, GATT Article VI and the ADA sets out the various substantive and procedural aspects dealing with antidumping investigations. Through a critical analysis of the substantive provisions of the ADA and the said GATT Article, this chapter has attempted to demonstrate how the interpretation of some of the provisions is susceptible to abuse by administering authorities. An example is the interpretation

²⁶⁵ Japan has already complained about EC third country anti-circumvention investigations. See Statement on Anti-Circumvention 15-12-1993, Ministerial Decisions and Declarations Agreement on Implementation of Article VI of GATT 1994. Also in 1996 Korea filed a WTO challenge against the USA anti-circumvention action concerning television sets assembled in Mexico and Thailand from Korean components. The Mexican government complained that if the USA were to treat televisions assembled in Mexico from Korean parts as Korean televisions subject to an antidumping order, the USA will be violating the NAFTA because under the NAFTA origin rules, the television sets were from Mexico. The USA rescinded the duties. See *Colour Television Receivers from Korea* 61 Fed.Reg. 1339, 1343 (1996).

²⁶⁶ WT/DS/296/R 2004.

²⁶⁷ Corr 1997 *Northwest J of Int'l Law and Business* 95.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

of the “like product” concept. With respect to the calculation of the dumping margin, the discussion has also shown that some jurisdictions abuse the manner of calculation in instances where the dumping margin is negative. The chapter also highlighted how investigating authorities manipulate the calculation of dumping margins through the “zeroing” method. As will be demonstrated in the discussion in chapter 5, the ADA does not address the issue of zeroing negative dumping margins.²⁷⁰ The determination of “injury”, the application of anti-circumvention measures and the rules relating to non-market economies are some of the other aspects susceptible to abuse by administering authorities. There is no doubt that a number of gaps exist in the WTO antidumping regulatory framework. Does this imply that the drafters must go back to the drawing board? This question must be answered in the affirmative. It seems logical for the problematic provisions of GATT Article VI and the ADA to be amended in order to reduce the manipulation and abuse of the WTO antidumping instruments by administering authorities for protectionist ends. Further exposition of the manipulation and abuse of the WTO antidumping framework is demonstrated in the chapters that follow.²⁷¹

²⁷⁰ See pages 106-127.

²⁷¹ See chapters 5, 6 and 7.