

**Dumping and antidumping regulations with specific  
reference to the legal framework in South Africa and  
China**

*by*

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# Chapter 1

## Introduction

### 1.1 Introduction

In general, dumping refers to the sale of imports in a country at a price less than their fair value (normal value) or cost.<sup>1</sup> It can cause material injury or a threat thereof to the domestic producers of similar products in the importing country. An importing country is allowed by domestic laws and by international laws to impose an antidumping duty to offset the dumping margin of a dumped product by showing the injury.<sup>2</sup> This process protects the domestic industry from alleged unfair price competition from abroad.<sup>3</sup> The General Agreement on Tariffs and Trade (GATT), as well as the World Trade Organization (WTO) regime provides antidumping measures under Article 6 of the GATT 1994 and the Agreement on Implementation of Article 6 of the GATT 1994 (the WTO Anti-dumping Agreement).<sup>4</sup>

The act of dumping has traditionally been held as an unfair international trade practice because of its price discrimination and trade-distortive effects.<sup>5</sup> Ehrenhaft states that,<sup>6</sup>

[S]ince 1947, when the General Agreement on Tariffs and Trade, now the World Trade Organization, came into effect, dumping has been seen as an economic practice against which border measures have been accepted by the world's most important economies, including the

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<sup>1</sup> Rafiqui 1999:203; Bhala and Kennedy 1998:650; Lantz 1994-1995:996; Osode 2003-2004:19. See also Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994. Part 1:Article 2.1.

<sup>2</sup> Lowenfeld 1983:155.

<sup>3</sup> Bailey 1992:433; Stewart 1999:706.

<sup>4</sup> Ostoni 2005:408; Hidetaka 2001:22. Agreement on Implementation of Article 6 of the GATT 1994, at [http://www.wto.org/english/docs\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/final_e.htm)

<sup>5</sup> Rafiqui 1999:203; Ehrenhaft 2002:366. See also Osode 2003-2004:19-20 for a discussion about the reasons for widespread disapproval.

<sup>6</sup> Peter D. Ehrenhaft: Member, Miller & Chevalier Chartered, Washington, D.C. He served as Deputy Assistant Secretary (tariff Affairs) and Special Counsel, U.S. Department of the Treasury, and, as such, was the principal administrator of the U.S. antidumping law in 1977-1979 and U.S. negotiator of the GATT Antidumping Code of 1979. The revisions of U.S. antidumping law included in the Trade Agreements Act of 1979 were initially drafted by his office.

United States (U.S.), the European Union (E.U.) and Japan.<sup>7</sup>

In the 1980s, antidumping law became a potent weapon in some countries of the world.<sup>8</sup> Between 1980 and 1990 the United States, Australia, Canada, and the European Union were responsible for bringing 95% of all antidumping cases worldwide. That figure dropped to 80% between 1985 and 1992, suggesting an increase in other countries' use of antidumping law as a weapon.<sup>9</sup> Unsurprisingly, the Economist printed in 1988 that "[a]nti-dumping suits are emerging as the chemical weapons of the world's trade wars."<sup>10</sup>

From 1994, due to the creation of the WTO, the increased liberalization of economies in many parts of the world, and the lowering of tariff and non-tariff barriers, including on a regional basis, both producers and administering authorities in many countries have found that Article 6 of the GATT 1994 is a critical element of a rational trade system.<sup>11</sup> Today, to a producer of any product (consumer goods, raw materials, agricultural products, intermediate goods, or other items), understanding the rights and obligations of the WTO in respect of antidumping can be very important to making correct business decisions about entry into, exit from, or expansion of particular product lines.<sup>12</sup> Also, dozens of countries now have and are using domestic antidumping duty laws to protect their domestic industries. Therefore, antidumping cases are currently increasing worldwide.<sup>13</sup> It should not come as a shock or surprise.

According to Petersen's study, since South Africa's emergence from behind the curtain of sanctions against apartheid, South African manufacturers have faced increased competition within international market. Consequently, between 1994 and 1995, South African authorities have actively investigated alleged dumping by various European and Asian companies. The goods investigated include engines, chemicals, footwear, and industrial

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<sup>7</sup> Ehrenhaft 2002:366; Adamantopoulos and Notaris 2000-2001:32. Article VI of the original GATT, as well as the Antidumping Agreements concluded in the Kennedy, Tokyo and Uruguay Rounds reflect such view.

<sup>8</sup> Bhala 1995:4.

<sup>9</sup> Bhala 1995:4.

<sup>10</sup> Bhala 1995:4.

<sup>11</sup> Stewart 1999:693.

<sup>12</sup> Stewart 1999:694. See also Ross and Ning 2000:43.

<sup>13</sup> Wang Jingqi 2000:53-54; Shang Ming 2003:13-18; Bryan and Boursereau 1984-1985:633; Krishna 2001:5.

products from numerous European and Asian countries.<sup>14</sup>

According to Petersen,<sup>15</sup> a number of investigations were initiated in South Africa between 1994 and the first half of 1995, e.g. Hydrogen Peroxide from Italy and Taiwan; Titanium Dioxide Pigment from Australia; Volvo Mid-Engined Bus Chassis from Sweden; Acetaminophenol from People's Republic of China and Hong Kong; 88 kV Electrical Power Cable from Germany; PVC Cling Film from France and Taiwan; Sterile Surgical Sutures from the United States, the United Kingdom and Germany; Super Calendared Magazine Paper from Finland; and Trichloroethylene from the Netherlands and Germany.<sup>16</sup>

As an exporting country, South Africa during 1995-2003 faced a total of 34 antidumping measures while applying 108 antidumping measures, which expressed as a ratio comes to 0.31(34/108). For India this ratio was 0.18 and for the EC 0.17, which means that relative to being a user of antidumping protection, South Africa tended to be more of a target of antidumping measures than India and the EC.<sup>17</sup>

For China, since it adopted the "opening door" policy in 1980's, its international trade has expanded rapidly. At the same time, its trade partners have lodged numerous antidumping complaints against its trade practices. China ranks first in the world for the number of antidumping suits lodged against it.<sup>18</sup>

According to the WTO antidumping statistics, there are 299 cases initiated against China between January 1, 1995 and June 30, 2001, with Korea the distant second with 127 cases.<sup>19</sup> By the end of 2001, more than 450 antidumping cases involving tens of billions of dollars were initiated against more than 4,000 categories of Chinese products.<sup>20</sup>

On the other hand, since the first antidumping case was initiated by the Chinese authorities in December 1997 against imports of newspapers from the United States, Canada, and Korea,<sup>21</sup> the

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<sup>14</sup> Petersen 1996:377.

<sup>15</sup> Petersen 1996:378.

<sup>16</sup> Petersen 1996:378.

<sup>17</sup> Barral ea 2005:55.

<sup>18</sup> Lei Yu 2002:298-299.

<sup>19</sup> See WTO Antidumping Statistics, available at [http://www.wto.org/english/tratop\\_e/adb\\_e/adb\\_stattabl\\_e.htm](http://www.wto.org/english/tratop_e/adb_e/adb_stattabl_e.htm)

<sup>20</sup> Lei Yu 2002:298-299.

<sup>21</sup> Public Notice No.4/1997 (1997-12-10).

number of cases initiated and measures applied has increased overall.<sup>22</sup>

## 1.2 Purpose of the study

As South Africa and China increasingly participate in the international trade regime, they must remain aware of their rights as member states of the WTO. One of the legal rights is the authorization to impose antidumping duties on goods sold at prices lower than the price for like products in the exporting country's market.<sup>23</sup> From the practices of antidumping legislations of South Africa and China, the provisions set out in antidumping regulations or statutes of South Africa and China are mostly compatible with those of the WTO Antidumping Agreement. However a few provisions are still problematic. In particular, the problems with a nonmarket economy country, price undertaking and anticircumvention are still imperfect. A problem of captive production is never reached. Therefore, the purpose of this study is to identify and analyse the problems of the dumping and antidumping acts, with specific reference to the legal framework of South Africa and China.

With this purpose in mind, after providing some background information, dumping is first of all legally defined, followed by identification of the different forms of dumping and the constitutional conditions pertaining to it. Then antidumping law will be defined as well, the characteristics and effects of antidumping laws will be discussed. Present practices of antidumping laws in world trade will be also discussed, especially for the reasons, why all countries including developed and developing countries prefer to use antidumping instruments, will be analysed.

Secondly, in a brief historic overview, the initiation and further development of antidumping legislations by the United States, the international community, South Africa and China are discussed. Since many of these developments reflect in the GATT Agreement

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<sup>22</sup> See: e.g.: China: total number of antidumping measures and investigations, 1997-2003

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Year:	1997	1998	1999	2000	2001	2002	2003
Number:	3	0	7	6	17	30	22

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Source: Barral ea 2005:28.

<sup>23</sup> Petersen 1996:378.

and the WTO, the development of this agreement, especially Article 6, is interpreted.

Thirdly, turning to more practical matters, antidumping substantive laws, including normal value, export price, dumping margin, injury, and domestic industry, especially with the problem of a nonmarket economy country will be discussed. And a new problem, captive production, in the antidumping legislation field will be analysed. South African and Chinese antidumping legislations have no consideration with regard to this respect.

Fourthly, antidumping measures will be discussed. Specific attention will be given to price undertaking, a measure used frequently by both exporters and administering authorities. The advantages and disadvantages of price undertakings related to South Africa will be discussed. The problem pertaining to price undertaking in administration reviews will be analysed historically and comparably.

Fifthly, in the light of the anticircumvention provisions domestically adopted by some of the WTO Members, namely the E.U. and the U.S., this part will focus on the criteria of a common anticircumvention legislation. A comparison will be done between the anticircumvention legislations of the U.S., the E.U., South Africa and China.

Finally, the study concludes with recommendations for the reform of antidumping laws in South Africa and China.

### **1.3 Methodology**

The research has a qualitative nature in that antidumping problems will be described and discussed. In order to come to a clear understanding of the problems and solutions, the antidumping laws of the U.S., the E.U., South Africa and China will be compared. The study also has a quantitative approach, since statistics on dumping will be examined and debated. Finally, case studies will be reviewed. The lessons learned from this will contribute to recommendations on antidumping laws for South Africa and China.

### **1.4 Relevance**

An analysis of dumping and antidumping regulations will contribute to solve some problems in international trade. Today many

countries develop their international trade under the WTO arrangements. Dumping and antidumping cases will feature increasingly in the world. The participation of South Africa and China in world trade will increase the number of dumping and antidumping cases in these countries. The study will contribute to the South African jurisprudence as there is not much written on the subject in South African law.

## **1.5 Referencing**

The style of the referencing used in this study is that of the *Journal for Juridical Science*.

## **Chapter 2**

### **Dumping and antidumping: theory and practice**

#### **2.1 Introduction**

At the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century, some European countries entered into antidumping agreements.<sup>24</sup> Britain, Holland and other European countries were dissatisfied with sugar dumping from some countries. In 1920 they first signed an international agreement on antidumping.<sup>25</sup>

When the first antidumping laws were enacted, the prevailing economic thought of the time condemned dumping as a predatory activity of monopolists. It was felt that dumping ought to be deterred to ensure a market system characterized by fair competition.<sup>26</sup>

The aim of this chapter is to consider the various definitions of dumping and antidumping. The reasons for dumping as well as the kinds of dumping will be analyzed. In conclusion, antidumping measures are examined.

#### **2.2 Dumping**

Antidumping legislation reflects both economic and legal concerns as well as some accounting concepts. Therefore at least two definitions of dumping, one economic and the other statutory, must firstly be considered.<sup>27</sup>

##### **2.2.1 Economic definition of dumping**

In economics, dumping refers to the sale of goods at an unfairly discounted price, making the market unpredictable, and thus difficult for the competitors to operate in.<sup>28</sup> Lowenfeld defined that “dumping embraces any sales by a producer at low prices to get rid of surplus—if possible after the costs of production of the entire line have been recovered”.<sup>29</sup> Parkin defined that “[d]umping is the selling of goods in a foreign market for a lower price than in the

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<sup>24</sup> Chen Xiaoying 2003:212

<sup>25</sup> Zhang Zhibin 2002:1

<sup>26</sup> Seavey 1970:1; Zhang Zhibin 2002:1

<sup>27</sup> Bryan 1980:3; Shang Ming 2003:2-5; Wang Jingqi 2000:3-5.

<sup>28</sup> Wang Jingqi 2000:3; Smit ea 1996:453.

<sup>29</sup> Lowenfeld 1983:36.

domestic market or for a lower price than its cost of production.”<sup>30</sup> Such a practice can arise from a discriminating monopoly seeking to maximize profit. Free capitalism encourages domestic production for export at low prices. At the same time it blocks the import of foreign goods at discount prices by both tariff and non-tariff measures.<sup>31</sup>

In 1922 Jacob Viner,<sup>32</sup> an American economist, defined dumping as “price discrimination between national markets”.<sup>33</sup> The term “price discrimination” was accepted in the field of economics.<sup>34</sup> Also most observers believe that dumping occurs often as a form of international price discrimination.<sup>35</sup> Specifically, price discrimination is a function of the manufacturer selling comparable products at different prices in different markets. But what is “price discrimination between national markets”?

According to Lantz, economists have found that for a firm to engage in classic price discrimination, the firm must operate under conditions where markets are separable, the firm has market power, and the two markets have different levels of demand for the product. When these conditions exist, price discrimination results in a firm maximizing its profits.<sup>36</sup>

Viner did not expound on this question. What he ought to have said is that “price discrimination between national markets” has two different forms: one is if the price in the importing country’s market is *higher* than the price in the exporting country’s market.<sup>37</sup> The other is if the price in the importing country’s market is *lower* than the price in the exporting country’s market.<sup>38</sup> Economists call the former phenomenon “reverse dumping”, and the latter “obverse dumping”.<sup>39</sup>

Reverse dumping means a high-priced export.<sup>40</sup> It is not sanctioned presumably because producers benefit from the resulting

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<sup>30</sup> Parkin 1993:975; Feller 1971:121.

<sup>31</sup> Wang Jingqi 2000:3.

<sup>32</sup> Viner 1923.

<sup>33</sup> Viner 1923:3; Bryan 1980:3.

<sup>34</sup> Smit ea 1996:453; Bhala 1995:8-9. See also Lipsey ea 1984:245-251 for a detailed discussion of price discrimination in the theory of economics.

<sup>35</sup> Viner 1923:3; Bryan 1980:3; Lantz 1994-1995:997.

<sup>36</sup> Lantz 1994-1995:997-998; Parkin 1993:975.

<sup>37</sup> Bryan 1980:4.

<sup>38</sup> Bryan 1980:4.

<sup>39</sup> Chen Xiaoying 2003: 212.

<sup>40</sup> Bryan 1980:4.

increased profits and consumers may be favored by lower domestic prices.<sup>41</sup> Obverse dumping, on the other hand, means a low-priced export.<sup>42</sup> It is generally sanctioned because the consumers of the importing country like to purchase the cheap price products and the domestic producers will lose their share of the domestic market and profits.<sup>43</sup>

In this study the focus will be on “obverse dumping”, because only this form of dumping can injure and threaten the development of industries of the importing country. During the 16<sup>th</sup> and 17<sup>th</sup> centuries, Britain adopted this way to destroy similar industries in foreign markets.<sup>44</sup> During the early 20<sup>th</sup> century, dumping by firms in Germany was also widespread.<sup>45</sup>

### 2.2.2 Legal definition of dumping

The economic definition of dumping<sup>46</sup> is the basis for dumping as a law notion. In contrast to the economic definition, the legal definition should include both the act of price discrimination in international trade and the fact of an injury to a domestic industry.<sup>47</sup> Feller defined that “dumping is in essence the practice of selling goods abroad at a price lower than that charged for like goods by the same producer in its domestic market.”<sup>48</sup> The authoritative legal definition of dumping is in the WTO Antidumping Agreement.<sup>49</sup> It is more limited and technical. The WTO Antidumping Agreement states:

For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.<sup>50</sup>

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<sup>41</sup> Bryan 1980:4.

<sup>42</sup> Bryan 1980:4.

<sup>43</sup> Bryan 1980:4.

<sup>44</sup> Viner 1966:39-40.

<sup>45</sup> Viner 1966:51-53.

<sup>46</sup> See par 2.2.1.

<sup>47</sup> Bryan 1980:3; Lowenfeld 1983:155.

<sup>48</sup> Feller 1971:121.

<sup>49</sup> That is Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

<sup>50</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Article 2.1.

For instance, in 1970 SONY sold a TV for \$180 in America. At the same time this TV was sold in Japan for \$333. This pricing action in America constitutes dumping.<sup>51</sup>

The Agreement does not outlaw acts of dumping altogether. It condemns and embodies discipline only on dumping that:

- causes material injury to a domestic industry;<sup>52</sup> or
- poses a threat of material injury to a domestic industry;<sup>53</sup> or
- causes material retardation of the establishment of a domestic industry.<sup>54</sup>

This legal requirement of injuries to a domestic industry is not part of the economic definition, but it can help to distinguish between those cases in which dumping should not be prohibited and those situations in which duties should be imposed.<sup>55</sup>

On the basis of the WTO Antidumping Agreement, each member country stipulates the definition of dumping in their own antidumping law, which is similar to the WTO's, e.g. that of the United States and South Africa.

South African International Trade Administration Act of 2002 stipulates the definition of dumping as follows:

[D]umping means the introduction of goods into the commerce of the Republic or the Common Customs Area at an export price contemplated in section 32(2)(a) that is less than the normal value, as defined in section 32(2), of those goods.<sup>56</sup>

The China Antidumping Statute defines dumping as occurring when “an imported product is introduced, in the ordinary course of trade, into the commerce of the People’s Republic of China at an export

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<sup>51</sup> <http://www.wto.org>

<sup>52</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Article 3.1.

<sup>53</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Article 3.7.

<sup>54</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Article 3. Notes:9. See also Rafiqul 1999:204; Bhala 1995:10.

<sup>55</sup> Bryan 1980:5.

<sup>56</sup> South Africa International Trade Administration Act 2002: Chapter 1.1(2).

price less than its normal value”.<sup>57</sup>

### 2.2.3 Reasons for dumping

Why companies choose to dump products abroad can vary greatly from case to case or even sale to sale.<sup>58</sup> So dumping has different aims and motivations.<sup>59</sup> Sometimes it is to sell superfluous products, in order to keep businesses alive and to develop their positions. Sometimes it is to earn foreign exchange, in order to balance income and expenses. Sometimes it is to compete for clients, gain a share in foreign markets and test the reaction of foreign markets to a low price. Sometimes it is in order to drive out competitors and set up a monopolistic status.<sup>60</sup> For these aims and motivations firms cannot be legally rebuked because laws, including the GATT antidumping agreement and antidumping laws, do not take aims and motivations into consideration. The law only notices the fact and the aftermath.<sup>61</sup>

Oudsten divided the reasons for dumping into two groups.<sup>62</sup> First, “firm-oriented” reasons related to circumstances within the firm.<sup>63</sup> For instance, the dumping firm may simply want to get rid of old stock, or of excess supply due to a decrease in demand. Second, “market-oriented” reasons related to the firm’s position on the foreign market.<sup>64</sup> A firm may be willing to accept initial low profits or even losses in order to gain a foothold in the market, to increase its market share, or drive out its competitors.<sup>65</sup>

Specifically, three causes of dumping should be mentioned here:

First, the export of goods may be driven by a program or policy. Nonmarket economic forces and influences can have a determining effect on price level in the marketplace. Industries that produce certain goods only for export may engage in price discrimination among export markets for a variety of reasons, such as differences in trade barriers in different markets, targeting of countries, the

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<sup>57</sup> See the China Antidumping Statute 2002:Article 3. For a brief historic overview of antidumping legislation of China, see Section 3.5 of this dissertation. See also Li Yang 2003:2.

<sup>58</sup> Stewart 1999:697.

<sup>59</sup> Wang Jingqi 2000:5; Shen Muzhu 2002: 468.

<sup>60</sup> Ehrenhaft 2002:371; Lantz 1994-1995:997; Victor 1983:350.

<sup>61</sup> Wang Jingqi 2000:5; Shen Muzhu 2002: 468.

<sup>62</sup> Oudsten 1989:325.

<sup>63</sup> Oudsten 1989:325.

<sup>64</sup> Oudsten 1989:325.

<sup>65</sup> Oudsten 1989:325.

need to generate hard currency, imperfect information, and differences in duty rates.<sup>66</sup>

Price discrimination may be supported directly or indirectly by producers' government in an effort to develop an industrial infrastructure through growth in exported goods. In the case of Japan, in particular, such export development has been tied to industrial policy, and the implementation of this policy has driven Japanese competitiveness up and pushed prices in the targeted markets down.<sup>67</sup>

Second, dumping is used strategically to expand market share. This market-driven strategy is often a corollary to the success of an export-oriented industrial policy, but it can also operate in any competitive market. The rationale is simple: sell or dump goods ... gain market share ... raise prices. The strategy does not have to be drastic or involve monopolistic or oligopolistic arrangement; it is an effective and inexpensive way of maximizing returns on long-term investment, especially when the hurdle rate for investment and the short-term expectations of investors are not a great concern.<sup>68</sup>

Third, it is necessary to dispose of excess domestic products. Although sporadic dumping is probably less likely to produce an antidumping allegation, since price depression is only temporary if structural adjustment in an industrial economy has been delayed by government action or support, dumping conditions may prevail for a longer period. Such delayed structural adjustment and governmental largesse have been behind the world's steel crisis of the past twenty years, making the steel industry the largest user of antidumping laws, in the U.S. and elsewhere.<sup>69</sup>

Dumping for whatever reason is an unfair competitive action.<sup>70</sup> It not only affects the economic development of an importing country, but also disturbs the normal international competitive order. Therefore dumping is an action that should be prohibited.<sup>71</sup>

Many states have set up domestic laws against dumping and some

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<sup>66</sup> Stewart 1999:697.

<sup>67</sup> Stewart 1999:698.

<sup>68</sup> Stewart 1999:698.

<sup>69</sup> Stewart 1999:698.

<sup>70</sup> Wang Jingqi 2000:5; Shen Muzhu 2002: 469; Rafiqul 1999:203.

<sup>71</sup> Wang Jingqi 2000:5; Shen Muzhu 2002: 468; Shang Ming 2003:10-11.

international agreements to limit and bar dumping were made.<sup>72</sup> South Africa is one of the first countries that set up antidumping laws. South Africa has had laws to control acts of dumping since 1914.<sup>73</sup> China first formulated its Foreign Trade Law in 1994, containing some principles about antidumping and measures against dumping. In 1997, China enacted an Antidumping and Countervailing Law. In 2001 China adopted an “anti-dumping statute” on the basis of the said Antidumping and Countervailing Law.<sup>74</sup>

#### 2.2.4 Kinds of dumping

In order to analyse dumping both theoretically and empirically it is necessary to categorise and classify the type of dumping.

In 1923, Viner identified three types of dumping situations: sporadic or temporary dumping, short-term or intermittent dumping and long-term or continuous dumping.<sup>75</sup> In 1998, Willig provided two kinds of dumping: monopolizing and nonmonopolising dumping.<sup>76</sup> There are two sources of monopolizing dumping namely strategic and predatory. Nonmonopolising dumping consists of market expansion, cyclical and state trading dumping.<sup>77</sup> Viner’s classification is more acceptable widely and traditionally by most economists.<sup>78</sup> Therefore, in this section Viner’s classification will be introduced in detail.

Sporadic dumping refers to an action where exporters, in order to get rid of overstocked goods, at times lower the price to sell goods in a foreign country.<sup>79</sup> Because this kind of dumping has no intention to spoliage foreign markets, some antidumping theorists think it is not a danger. But others think it is the most harmful practice to the economy of the importing country. It can cause a baleful aftermath to the producers of the importing country, who rely on the domestic market.<sup>80</sup> The Antidumping regulation document

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<sup>72</sup> Lantz 1994-1995:1000.

<sup>73</sup> Shang Ming 2003: 440.

<sup>74</sup> Shang Ming 2003: 464; Chen Xiaoying 2003: 215.

<sup>75</sup> Viner 1966:23; Shang Ming 2003:6-7; Wang jingqi 2000:6; Krishna 2001:6-7.

<sup>76</sup> Willig 1998:67. See also Merle Holden 2002:9. Anti dumping: a reaction to trade liberalisation or anti competitive? University of Natal, Durban. <http://www.essa.org.za/download/papers/004.pdf>. (Last view on 15 May 2006)

<sup>77</sup> Holden 2002:9. See above note.

<sup>78</sup> Shang Ming 2003:6-7; Wang jingqi 2000:6; Krishna 2001:6-7.

<sup>79</sup> Smit ea 1996:453; Krishna 2001:6.

<sup>80</sup> Zhang Yuqing 1993:4; Shang Ming 2003:6; Wang Jingqi 2000:6.

(1979) concerning injury caused by dumping confirms the last-mentioned viewpoint.<sup>81</sup>

Short-term or intermittent dumping refers to an action that lasts for a limited period of time. Exporters, in order to control or compete in foreign markets from time to time, sell goods at a price less than its home price or less than its cost of production.<sup>82</sup> If competitors have been eliminated, the exporters increase the price as monopolies and gain the highest profits.<sup>83</sup> This kind of dumping is different from sporadic dumping; the aim of exporters is to control and dominate foreign markets. It is an action that is predatory in nature.<sup>84</sup> It progresses systematically during a time, and harms the industry of the importing country. It is an unfair practice. Antidumping laws act mostly to prohibit these actions.<sup>85</sup>

Long-term or continuous dumping, refers to exporters continuously selling goods at a low price in foreign markets.<sup>86</sup> The aim and character of this kind of dumping are the same as intermittent dumping. The difference is that the predatory aim is clearer. Exporters keep the domestic price leveled off by long-term dumping in foreign countries, in order to keep their productive capacity.<sup>87</sup> The dumped products might get governmental export encouragement or even an export subsidy.<sup>88</sup> For an importing country, this kind of dumping injures its domestic industry producing similar products. For an exporting country, one reason that exporters are able to perform long-term dumping, is that they sell goods at a high price in their own country.<sup>89</sup> Consumers in this way indirectly subsidize dumping. In this way long-term dumping does not benefit the economy of the exporting country.<sup>90</sup> Another reason is that the foreign demand for a product may be more price elastic than the domestic demand, in other words, the foreign demand diminishes quickly when prices are increased.<sup>91</sup>

### 2.2.5 Conditions of dumping

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<sup>81</sup> The Antidumping regulation document (1979) refers to the Agreement on Implementation of the General Agreement on Tariffs and Trade 1979.

<sup>82</sup> Krishna 2001:6.

<sup>83</sup> Smit ea 1996:453.

<sup>84</sup> Lipsey ea 1984:800.

<sup>85</sup> Shang Ming 2003:6-7; Wang Jingqi 2000:6.

<sup>86</sup> Smit ea 1996:453.

<sup>87</sup> Krishna 2001:6.

<sup>88</sup> See Lowenfeld 1983:37 for a brief introduction of subsidies.

<sup>89</sup> Osode 2003-2004:20.

<sup>90</sup> Wang Jingqi 2000:7; Shang Ming 2003:6.

<sup>91</sup> Smit ea 1996:453.

An exporter may successfully engage in a bifurcated cross-border price strategy upon the existence of three necessary and sufficient conditions.<sup>92</sup>

First, the exporter's home market and the importing country's market must be separated so that the product does not flow between them.<sup>93</sup> Tariff and nontariff barriers in the exporter's home market must support a higher home market price and consumers must face significant costs in traveling to the importing country's market.<sup>94</sup> The consumers of the exporting country in this way indirectly subsidize dumping.<sup>95</sup> A question then arises whether such segmentation is possible in the international market.<sup>96</sup> In this connection it is pointed out:

However, in practice, market segmentation will usually be the primary necessary condition for price dumping to occur. The question then arises: is international market segmentation common? For many products and industries the answer is yes. Product differentiation, variation in tastes, trade policies and regulatory regimes, differing product standards, etc., all work to segment markets. The result is that the trading environment will often be quite conducive to acts of intentional and unintentional price dumping.<sup>97</sup>

Second, there are no perfect competitions in both markets.<sup>98</sup> The exporter must have sufficient market power to influence the price of the product in at least one of the markets.<sup>99</sup> Without such power, any price differential for the product in the different market would not be in its control. In an extreme level, the exporter is a monopolist in its home market and a perfect competitor in the importing country's market.

Third, there is a relatively more elastic demand for the dumped product in the importing country's market, and a relatively rigid demand for the product in the exporter's home market.<sup>100</sup> This

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<sup>92</sup> Bhala 1995:10.

<sup>93</sup> Bhala 1995:10; Krishna 2001:7.

<sup>94</sup> Bhala 1995:10.

<sup>95</sup> Wang Jingqi 2000:7.

<sup>96</sup> Krishna 2001:8.

<sup>97</sup> Hoekman and Leidy 1989:31.

<sup>98</sup> Bhala 1995:10.

<sup>99</sup> Bhala 1995:10; Krishna 2001:7-8.

<sup>100</sup> Bhala 1995:10; Krishna 2001:8.

differential may result from trade barriers that shield the exporter from competition in its home market. Absent this elasticity differential, the price charged by the exporter in the importing country's market would equal or exceed the price charged in its home market and there would be no dumping.<sup>101</sup>

## 2.2.6 Effects of dumping on the economy

Dumping may also be analyzed in terms of its effect on the particular economic interests of the countries directly involved: the country of origin of the dumped products, the importing country, and the third country which also produce or sell similar products to the importing country.<sup>102</sup>

### 2.2.6.1 Effects on the importing country

The effects of dumped products on the economy of the importing country are extensive, direct and maximal. On the one hand, there is one advantaged effect. It is that low prices benefit the consumers, importers, retailers, and domestic manufacturers who use these dumped merchandises to manufacture finished added-value products in the importing country.<sup>103</sup> On the other hand, the most effects are negative.<sup>104</sup> It has two harms: direct harm and indirect harm.

First, for the direct harm, the most obvious danger for the importing country is that it can harm or destroy the domestic industries producing similar products. Its harmful extent depends on the range and the quantity of the dumped products. Because customers usually like low price products, domestic producers find it difficult to expand or even keep their own market share. Then they may lose their share of the market. Investors in those companies in the affected domestic industry will lose their profits. The workers will lose their jobs. The reduction of employment consequently affects national income, government tax revenues, and adjustment costs for workers and companies. The enterprises may close down.<sup>105</sup>

Second, for the indirect harm, there are three following respects:

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<sup>101</sup> Bhala 1995:10.

<sup>102</sup> Shang Ming 2003:7-9; Seavy 1970:6; Wang Jingqi 2000:11-14.

<sup>103</sup> Smit ea 1996:453; Wellhausen 2001:1028-1029; Bhala 1995:11.

<sup>104</sup> Osode 2003-2004:20.

<sup>105</sup> Wang Jingqi 2000:12. Shang Ming 2003:8. Seavy 1970:8; Ehrenhaft 2002:372.

- (a) Dumping will injure the domestic industry of the importing country which has no direct competition with the dumped products.<sup>106</sup> Although there is no competition between products (not like products) of the importing country and the dumped products, because the dumped products have lower price, the domestic consumers will turn to purchase the dumped products. They will not buy or will be less likely to buy domestic products which they formerly wanted to buy. So, the industry that has no relationship with the dumped products will be harmed.<sup>107</sup>
- (b) Dumping will injure the industry of the importing country which consumes the dumped products. Because, this industry uses the dumped imported products as raw materials to produce another finished product, they will make wrong decision to expand their production size by using the incorrect low price information of the raw materials. Once exporters stop to dump the products, the industry will be unable to carry on producing at that level. So this industry will waste their resources and be injured.<sup>108</sup>
- (c) Dumping will injure the industry of the importing country which produces the like products. When dumped products enter the importing country's market, the industry that produces the like products may lose their share in the market. Even if this does not happen, they will lose the share which they should increase in the same market. So this industry also will be injured.<sup>109</sup>

Therefore, for the domestic industry of the importing country which produces the like product, dumping has both direct and indirect harm on it.

#### 2.2.6.2 Effects on the exporting country

Dumping does not only do harm to industries of the importing country, but also harms the industries of the exporting country. Firstly, it puts the exporting country's resources to waste. The Chinese government and industries should pay more attention to this aspect. Because now Chinese companies are rebuked by many countries for dumping all kinds of goods in the world. For instance,

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<sup>106</sup> Wang Jingqi 2000:12; Shang Ming 2003:8.

<sup>107</sup> Wang Jingqi 2000:12; Shang Ming 2003:8.

<sup>108</sup> Wang Jingqi 2000:12; Shang Ming 2003:8.

<sup>109</sup> Wang Jingqi 2000:12; Shang Ming 2003:8.

by the end of 2001, more than 450 antidumping cases involving tens of billions of dollars were initiated against more than 4,000 categories of Chinese products.<sup>110</sup> When they are earning foreign exchange, during the same time, they are wasting the resources in China. Then questions arise here: how about future generations? what are they going to do without resources? Therefore, the Chinese government needs to take it into consideration today. Secondly, dumping does harm to the producers of similar products in the exporting country. Because they may not have a monopolization power, or cannot partake in dumping. In this way they lose their rightful share of the foreign market.<sup>111</sup> Also they will not get an opportunity to gain experience and development in a foreign market. So dumping can be considered to provide an unfair trade advantage to some exporters.<sup>112</sup>

### 2.2.6.3 Effects on third country

If dumped products compete with products of the third country in the importing country's market, the demands for the products of the third country will decline.<sup>113</sup> This result is the third country losing its share in the importing country's market. Producers in the third country will consequently lose their profits.<sup>114</sup> It is clear that dumping also harms the third countries which produce similar products. According to GATT regulations the third country can demand that the importing country investigate the origin of dumped products.<sup>115</sup> But the decision whether or not to proceed with an antidumping case shall rest with the importing country.<sup>116</sup>

## 2.3 Antidumping laws

Since the establishment of the antidumping regime, the discussion on whether antidumping is necessary, hasn't ceased. On the one hand, some scholars, like Greg Mastel, firmly insist that an antidumping regime is for the protection of fair trade and thus is

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<sup>110</sup> See Chapter 1, section 1.1, above.

<sup>111</sup> Chen Xiaoying 2003:213.

<sup>112</sup> Krishna 2001:8.

<sup>113</sup> Seavy 1970:8.

<sup>114</sup> Seavy 1970:8.

<sup>115</sup> Wang Jingqi 2000:12. Chen Xiaoying 2003:214. See also Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Article 14.1. It states: "An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action."

<sup>116</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Article 14.

the cornerstone of the world trading system.<sup>117</sup> On the other hand, other scholars oppose the existing antidumping regime to different extent. Finger found, by case study, that “[a]ntidumping, as practiced today, is a witches’ brew of the worst of policy-making: power politics, bad economics, and shameful public administration. Antidumping law is an oxymoron”.<sup>118</sup> Prusa concluded that anti-dumping does not make any sense economically.<sup>119</sup>

In the theories and practices of international trade, we can see that dumping is looked on as a kind of price discrimination that distorts the price level of the free competitive mechanism, and goes against the basic principle of WTO – the principle of fair competition.<sup>120</sup> In order to safeguard this, the WTO agreed to antidumping regulations. The Antidumping Agreement allows its members to investigate and levy some measures to limit the import of products that could cause injury to domestic industries.<sup>121</sup> The WTO Antidumping Agreement states:

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.<sup>122</sup>

### 2.3.1 Definition of antidumping laws

Antidumping laws refer to a totality of acts and regulations that prohibit unfair competitive activities. Concretely, antidumping laws are the laws, which an importing country uses as prevention against dumping whether it has already occurred or will occur in the future. The aim, as always, is to protect the domestic economy and industries from being harmed,<sup>123</sup> and safeguard the normal international trade order.<sup>124</sup> Therefore, antidumping laws are the product of a conflict between two policy goals: the development

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<sup>117</sup> Mastel 2001:3.

<sup>118</sup> Finger 2001:57.

<sup>119</sup> Prusa 1996:18.

<sup>120</sup> See Chapter 2, section 2.2.1, above. See also Osode 2003-2004:19-20.

<sup>121</sup> Shang Ming 2003:6

<sup>122</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Article 1. Principles.

<sup>123</sup> Oudsten 1989:329; Osode 2003-2004:21.

<sup>124</sup> Wang Jingqi 2000:17; Shen Muzhu 2002:471.

and maintenance of open and nondiscriminatory world trade and the safeguarding of national industries and labor from unfair competition.<sup>125</sup>

Antidumping laws consist of two aspects. One is using the norm of the law to eliminate the injury that dumping causes effectively, protecting domestic producers' rights. The other aspect is to align a country's antidumping laws with international standards, in order not to hamper international trade by abusing antidumping measures.<sup>126</sup> Therefore, antidumping laws are among a group of internationally approved safety valves used to defend against purportedly unfair international trade practices, such as dumping and subsidies.<sup>127</sup>

### 2.3.2 Characteristics of antidumping laws

Antidumping laws have four characteristics:

First, antidumping laws originate from domestic and international laws. Domestic laws refer to the specific laws and regulations of a country, such as its foreign trade law, administrative decrees, or tariff laws. International laws refer to the antidumping instruments of GATT, namely the GATT Antidumping Regulation and WTO Antidumping Agreement. The two law systems affect each other: domestic antidumping laws contextualize the development of international antidumping laws; international antidumping laws restrict the application of domestic antidumping laws.<sup>128</sup>

Second, antidumping law belongs to the category of economic administrative law. Whether a country has a special law about antidumping or not, generally, some of the laws, such as tariff law, foreign trade law, and administrative decrees, will contain antidumping provisions. For instance: Industry Protection Law of 1901 in Australia; Customs Law of 1904 in Canada; Revenue Law of 1916 in America; Foreign Trade Law of 1994 in China. At the same time, the administration of a country's antidumping laws usually is the implementation of antidumping international laws. An example is the American commerce department and its close collaboration with the international trade committee, EU ministers' council, as well as the Chinese foreign trade department and economic trade committee. To place an antidumping case on file,

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<sup>125</sup> Bryan and Boursereau 1985:700.

<sup>126</sup> Wang Jingqi 2000:17

<sup>127</sup> Kennedy 2005:411.

<sup>128</sup> Wang Jingqi 2000:18-19; Shen Muzhu 2002:471.

to investigate it, to make preliminary and final determinations is all done by national administration.<sup>129</sup>

Third, antidumping laws do not relate to the parties in an import and export contract, but to the exporter and the producer of similar goods in the importing country. The acts of the exporter can injure the interest of the producer. No other laws can safeguard this interest, only antidumping laws can do it.<sup>130</sup>

Fourth, the aim of antidumping laws is to protect the importing country's economy and industry.<sup>131</sup> According to Lantz, antidumping duties serve three purposes. First, they protect domestic industry and jobs in the short run from the effects of unfair pricing from abroad. Because nations have a particular interest in protecting domestic industries from unfair competition, especially the governments of those nations rely heavily on the support of domestic industries for political power.<sup>132</sup> The second purpose is connected to the first; namely, antidumping duties prevent foreign producers from dumping products into the importing country. Finally, antidumping duties ultimately protect the consumer from higher prices. Because after the firms of the importing country lose considerable market share or are driven from the market by the dumping of the foreign firms, the foreign firms will recoup their initial losses by charging higher prices.<sup>133</sup> Antidumping instrument is a legal measure taken by the importing country to protect itself. But this measure must be bound to reasonable constraints. Otherwise it will be abused and become a barrier to international trade.<sup>134</sup>

### 2.3.3 Effects of antidumping laws on exporters

Antidumping laws not only effectively protect domestic industry, but also have a significant effect on exporters. Specifically, antidumping law may create two crucial incentives for an exporter.<sup>135</sup>

First, antidumping law may distort an exporter's marketing decisions.<sup>136</sup> An exporter might reduce its exports and increase its

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<sup>129</sup> Wang Jingqi 2000:19; Shen Muzhu 2002: 471.

<sup>130</sup> Wang Jingqi 2000:17-18; Shen Muzhu 2002:471-472.

<sup>131</sup> See Chapter 2, section 2.3.1, above.

<sup>132</sup> Hamilton 2003:265; Osode 2003-2004:21.

<sup>133</sup> Lantz 1994-1995:998-999.

<sup>134</sup> Wang Jingqi 2000:19-20; Shen Muzhu 2002:472.

<sup>135</sup> Bhala 1995:18.

<sup>136</sup> Bhala 1995:18.

home market sales to minimize the risk of being named as a respondent in an antidumping action. In turn, the price of its product in the importing country rises, reducing competitive pressure on producers in that country, while the price of its product in its home country falls.

Second, antidumping law may distort an exporter's decisions about foreign direct investment.<sup>137</sup> If the importing country represents a significant market, the exporter may relocate its production facilities there.

## **2.4 Present practices of antidumping laws in international trade**

The U.S., EU, Australia and Canada have been generally viewed as the traditional main users of antidumping measures.<sup>138</sup> These four countries initiated 1489 of the 1558 antidumping cases in 1980s.<sup>139</sup> According to the statistics released by the WTO, during the period of July 1, 1999 to July 30, 2000, there were 236 cases initiated. According to the WTO, the most active Members, in terms of initiations of antidumping investigations, were the European Community (49), the United States (29), India (27), Argentina (23), Australia (18), Brazil (17), Indonesia (13), and Canada and South Africa (11).<sup>140</sup> The four traditional members initiated 107 cases, occupying more than 45% of the total number of antidumping cases recorded by the WTO. It should be pointed out that with the development of developing countries, more and more large developing countries, such as India, Argentina, Brazil, and South Africa, join the antidumping club.<sup>141</sup> These four developing countries initiated 91 antidumping cases, occupying 38.5% of the total number of antidumping cases. It seems that those large developing countries could compete with the traditional users.

In addition, Barral indicates that the use of antidumping has increased since the formation of the WTO in 1995. A novelty in this context is that developing countries have overtaken the traditional developed country users, such as the EU and the US, as the largest users.<sup>142</sup> For instance, also according to the statistics

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<sup>137</sup> Bhala 1995:19.

<sup>138</sup> Barral ea 2005:6. See also Chapter 1, section 1.1, above.

<sup>139</sup> Finger 2001:10.

<sup>140</sup> See World Trade Organisation Annual Report 2001. (WTO Publications, Geneva, 2001)

<sup>141</sup> Countries according to World Bank classification.

<sup>142</sup> Barral ea 2005:6.

released by the WTO, during the period of July 2001 to June 2002, developing countries initiated 194 of the 305 antidumping cases (developed countries initiated 111 cases); during the period of July 2002 to June 2003, developing countries 158 of the 239 cases (developed countries 81 cases); and during the next year, developing countries 132 of the 234 cases (developed countries 102 cases).<sup>143</sup>

Why are all countries including developed and developing countries obsessed about using antidumping instruments? There are four reasons.

Firstly, as a result of several rounds of multilateral negotiations on free trade, all tariff barriers and quantitative restrictions are decreased or prohibited according to the WTO agreements. The antidumping regime is the exception to the whole world trading system.<sup>144</sup> This situation has led to intensive use of antidumping measures by all member countries. They had no choice if they wanted to resort to a protectionist regime to satisfy the domestic industries. An antidumping regime, therefore, can reduce the risk of participation in world trade, just like a kind of compensation for the increasing liberalization of tariffs and non-tariff barriers.<sup>145</sup>

Secondly, using antidumping measures is more advantageous than other measures, such as safeguard measures, for the importing country. For example, the conditions of using safeguard measures are more serious than antidumping measures, such as standard of injury.<sup>146</sup> In contrast, if the importing country takes an antidumping measure, it could be easier to reach its goal to protect its domestic industry.

In addition, an antidumping regime is country-specific, while a safeguard regime is industry-specific. That means, if a country takes an antidumping action, the affected countries are particularly selected and usually one country specifically. As to the

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<sup>143</sup> See World Trade Organisation Annual Report.

<sup>144</sup> Barral ea 2005:7.

<sup>145</sup> See United Nations conference on trade and development preparing for future Multilateral Trade Negotiations: issues and research needs from a development perspective (United Nations, Geneva, 2001) p123.

<sup>146</sup> Agreement on Safeguards. Article 2.1 states: "... such conditions ... cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products." See also Shen Muzhu 2002: 475-476 for a discussion for difference between antidumping measures and safeguard measures.

safeguard measures, the affected countries cannot be identified by the importing country and are usually too many in number. It is likely to risk conflict with those countries.<sup>147</sup> That is why we see so many antidumping cases now and very few safeguard cases. In the 1980s, the four traditional antidumping measure users, only undertook 25 safeguard cases, while the total amount of antidumping cases was 1489.<sup>148</sup>

Thirdly, according to Mastel, protectionism arises as a result of poor economic performance. There were more antidumping cases when the economy did not perform well.<sup>149</sup> Mastel concluded by analyzing statistics from 1980 to 1997 that “in general, the volume of cases seems to be inversely correlated with the strength of the economy in the past year or more”.<sup>150</sup>

Fourthly, there may be another version of explanation which is to more morally and strategically address this issue. Finger thought developing countries frequently initiated antidumping actions as a kind of retaliation.<sup>151</sup> They expect that developed countries will reduce antidumping actions against them and they can export their products into developed countries’ markets smoothly.<sup>152</sup> Therefore, in this way, the primary objective is not to protect domestic industries or block imports but to support domestic exporters.

For example, China has an ambiguous provision in the regulations which could open the possibility for China to use antidumping rules as a retaliatory instrument. Section 56 states:

Where a country (region) discriminatorily imposes antidumping measures on the exports from the People’s Republic of China, China may, on the basis of the actual situations, take corresponding measures against that country (region).<sup>153</sup>

## **2.5 Conclusion**

From the above discussion of the definition of dumping and the effects of dumping, dumping is one of the international trade

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<sup>147</sup> Shen Muzhu 2002: 475.

<sup>148</sup> Finger 2001:10.

<sup>149</sup> Mastel 2001:30.

<sup>150</sup> Mastel 2001:30.

<sup>151</sup> Barral ea 2005:32; Finger 2001:6.

<sup>152</sup> Finger 2001:6.

<sup>153</sup> The China’s Antidumping Statutes 2004:section56.

practices of which widespread disapproval exists in the international community.<sup>154</sup>

It is clear from the kinds of dumping that the WTO Antidumping Agreement does not stipulate which kind of dumping should be prohibited. If dumping only injured the domestic industry of the importing country, the importing country can adopt an antidumping measure by way of its own antidumping law and the international agreements.<sup>155</sup> In practice, both developed and developing countries use antidumping laws frequently to protect their domestic industries.<sup>156</sup> However, the importing country must use the laws and agreements correctly. Otherwise, the antidumping measures will become the new trade protective measure, and block the development of international trade.

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<sup>154</sup> Osode 2003-2004:19.

<sup>155</sup> Here the international agreements refer to the WTO Antidumping Agreement and some regional trade agreements, such as the North American Free Trade Agreement (NAFTA).

<sup>156</sup> See Chapter 2, section 2.4, above.

## Chapter3

### A brief historic overview of antidumping laws

#### 3.1 Introduction

According to Viner, the economists Adam Smith and Alexander Hamilton reported in 1791 on “bounty” practices, foreign practices of underselling competitors.<sup>157</sup> Instances of allegations of “dumping” by British manufacturers on the new American market were also reported during most of the nineteenth century.<sup>158</sup> Indeed, one of the first U.S. laws relating to international trade, the Tariff Act of 1816, was concerned with practices we might identify as dumping today.<sup>159</sup>

According to Lei Yu, since the end of the 19<sup>th</sup> century, “international trade policy rules have generally recognized dumping as a practice to be condemned, and have allowed an importing country to take certain countermeasures when the dumped goods cause ‘material injury’ to competing industries in the importing country.”<sup>160</sup>

During the early 20<sup>th</sup> century, dumping by firms in Germany was widespread. The government of Germany allowed cartels to get legal recognition, supported their development, and encouraged them to occupy foreign markets by using predatory dumping. Because of these activities of Germany and other states using predatory dumping, the affected countries enacted antidumping laws.<sup>161</sup> The antidumping actions originated first in Canada under an Act of 1904.<sup>162</sup> Canada was followed by New Zealand (1905), Australia (1906) and South Africa (1914).<sup>163</sup> During and after World War I, the U.S. Congress enacted several antidumping statutes.<sup>164</sup> During the 1930’s, America included in many bilateral treaties some provisions on antidumping and permitted the use of

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<sup>157</sup> Viner 1966:37.

<sup>158</sup> Viner 1966:38.

<sup>159</sup> Viner 1966:44.

<sup>160</sup> Lei Yu 2002:304.

<sup>161</sup> Wang JingQi 2000: 31

<sup>162</sup> See An Act to Amend the Customs Tariffs of 1897, S.C. 1904, C 11, S. 19. See also Krishna 2001:14-15 for a brief discussion of the municipal antidumping laws.

<sup>163</sup> Krishna 2001:14.

<sup>164</sup> See e.g. The Revenue Act of 1916 (commonly referred to as the “Antidumping Act of 1916,” 15 USC §72 [1976])

antidumping import duties in America.<sup>165</sup> From then onwards the history of antidumping is one of increased refinement and fine-tuning. With the passage of time, almost all the countries had enacted new antidumping legislation.<sup>166</sup>

When the GATT was negotiated in 1947, special provision was made for cases of dumping. Article VI of GATT allows GATT contracting parties to utilize antidumping import duties to offset the profit margin of dumping, provided that it can be shown that such dumping is causing or threatens to cause “material injury” to competing domestic industries.<sup>167</sup>

As time passed, however, some contracting parties of GATT began to feel that certain countries, in applying their antidumping laws, were doing it in such a way as to raise a new protectionist barrier to trade.<sup>168</sup> Some believed that antidumping procedures, such as margin calculations and the injury test, were causing restrictions and distortions on international trade flows, therefore creating risks and uncertainties for traders. Consequently, during the Kennedy Round of the GATT trade negotiations (1962-1967), the contracting parties of GATT negotiated the first international Antidumping Code,<sup>169</sup> which set forth a series of procedural and substantive rules regarding the application of antidumping duties. The Code was intended to limit the practices of abusing antidumping, damaging to international trade.<sup>170</sup>

In 1979, the Tokyo Round developed a new Antidumping Agreement replacing the 1967 GATT Antidumping Code. The Uruguay Round, building on the prior Antidumping Agreements, further modified the antidumping rules,<sup>171</sup> and led to Agreement on Implementation of Article 6 of the GATT 1994 (WTO Antidumping Agreement). The Uruguay Round text became a mandatory agreement in the WTO.<sup>172</sup> The WTO Antidumping Agreement

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<sup>165</sup> See, e.g. Article IX: 2 of the 1938 Reciprocal Trade Agreement between the United States and United Kingdom (54 Stat. 1897), where a provision allowed the UK to take measures that it deemed necessary to act as an effective deterrent to the practice.

<sup>166</sup> Krishna 2001:14.

<sup>167</sup> General Agreement of Tariff and Trade, Article VI. 30 October 1947, 61 Stat. (5), (6), TIAS No. 1700, 55 UNTS 194 (1948) as amended and Vol. IV BISD. See also Lantz 1994-1995:1000.

<sup>168</sup> Lei Yu 2002:306.

<sup>169</sup> Agreement on the Implementation of Article VI (the “1967 Code”) 651 UNTS 320, GATT, BISD 15 Supp. 24 (1968).

<sup>170</sup> Evans 1971:106-110.

<sup>171</sup> WTO Antidumping Agreement.

<sup>172</sup> Corr 1997a:49; 1997b:55.

constitutes a further refinement of the antidumping rules.<sup>173</sup>

As can be seen from the remarks above, the history of antidumping laws is fraught with controversy, with laws being introduced, revised and repealed. The U.S.A. played a major role in leading the legal campaign against dumping. But the voice of the U.S.A. was not enough; a truly global solution had to be found. How this developed, will be discussed in the chapter to follow. Finally, the position of South Africa and China regarding antidumping laws will be discussed.

### **3.2 American antidumping laws**

#### **3.2.1 Antidumping law of 1916**

The antidumping laws of the United States originated with the Antidumping Act of 1916 (1916 Act) which made it unlawful for an importer to sell merchandise at a price substantially lower than the actual market value or wholesale price in the country of their production, if done with the intent to destroy or injure an industry in the United States.<sup>174</sup> Criminal sanctions and treble damages were included in the 1916 Act.<sup>175</sup> The Antidumping Law of 1916, in fact, was the antidumping provision of the Revenue Act of 1916.<sup>176</sup> It had more the character of antitrust laws than trade laws.<sup>177</sup> Proponents of the legislation expressed concern that German cartels, particularly in the chemical industry, would destroy the U.S. industry through predatory pricing.<sup>178</sup>

The Revenue Act of 1916 of U.S. defined dumping as follows:

It is unlawful to import articles into the United States at a price substantially less than the actual market value or wholesale price of such articles, provided that it was done with the intent to destroy or injure a United States industry or to prevent the establishment of such industry.<sup>179</sup>

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<sup>173</sup> Lantz 1994-1995:1000.

<sup>174</sup> Bailey 1992:435; Victor 1983:339-340; Krishna:2001:14.

<sup>175</sup> Seavey 1970:56; Bryan and Boursereau 1984-1985:665; Victor 1983:339-340; Bailey 1992:435.

<sup>176</sup> Bryan and Boursereau 1984-1985:665; Lantz 1994-1995:999; Victor 1983:339.

<sup>177</sup> For a historical overview, see Laroski 1999a:369; 1999b:371-374. See also Victor 1983:339-346.

<sup>178</sup> Bryan and Boursereau 1984-1985:665.

<sup>179</sup> Krishna 2001:15.

The “intent to destroy or injure” a U.S. industry was not easy to establish.<sup>180</sup>

Early American statutes dealing with price discrimination in domestic commerce, such as the Sherman Antitrust Act of 1890 and the Clayton Act of 1914, have not been effective against dumping because American Courts have no jurisdiction over foreign countries.<sup>181</sup> Likewise, as Seavy indicated, the Revenue Act of 1916, “which imposed criminal sanctions against dumping done with predatory intent, has never been enforced due to difficulties of proof.”<sup>182</sup> Its narrowly drawn intent provision seemed to render it virtually and wholly inadequate to protect American industries from the perceived threat of predatory price discrimination by their larger foreign rivals.<sup>183</sup>

### 3.2.2 Antidumping law of 1921

Because it proved to be difficult for the injured domestic industry to obtain relief from dumping under the 1916 Act, the U.S. Congress enacted the Antidumping Act of 1921 (1921 Act),<sup>184</sup> which dropped the intent requirement of the 1916 Act and required only proof that dumping had occurred and injury to domestic industry had resulted.<sup>185</sup> The 1921 Act provided:

A special dumping duty will be applied upon a finding that a U.S. industry is being or is likely to be injured, or is prevented from being established, due to the

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<sup>180</sup> Krishna 2001:15; Victor 1983:339-340; Lantz 1994-1995:999-1000.

<sup>181</sup> In the United States several statutes have been enacted to regulate price discrimination that results in injury to competition in the national market. The aim of maintaining decentralized economic power agreed with the tradition of federalism and the separation of political power. In 1890, the Sherman Act was designed to check concentrations of economic power organized primarily in trusts. The Clayton Act of 1914 singled out for prohibition the practices used by trusts, such as price discrimination; it was amended in 1936 by the RobinsonPatman Act to cover secondly line discrimination by large and powerful buyers, originally food marketing chains.

<sup>182</sup> Seavey 1970:56; Bryan and Boursereau 1984-1985:665; Victor 1983:339-340; Lantz 1994-1995:999-1000.

<sup>183</sup> Victor 1983:346-347.

<sup>184</sup> For a historical overview on the Antidumping Act of 1921, see Victor 1983:339-350.

<sup>185</sup> Antidumping Act of 1921, (codified in 19 U.S.C. 1303). However, the 1916 Act was not repealed and was challenged, after a recent U.S. decision, before the WTO DSB and was held to be in violation of the international trade obligations under the WTO.

importation of a class or kind of foreign merchandise that is being sold or is likely to be sold in the U.S. or elsewhere at less than its fair value.<sup>186</sup>

Unlike the 1916 Act, which provides for a private right of action as well as for criminal prosecution, the 1921 Act was purely administrative in nature.<sup>187</sup> The 1921 Act vests the responsibility for determining whether price discrimination exists with the Secretary of the Treasury, with the responsibility for determining whether the dumped imports cause injury to a domestic industry is vested with the Tariff Commission.<sup>188</sup> It viewed its role as that of an investigator, with broad discretionary power to pursue the cases brought to its attention by domestic industries.<sup>189</sup> The statute changed the criminal nature of the dumping behavior, abolished the criminal punishment measure prescribing compensation amounting to three times the damages, and replaced compensation with levying a special dumping tax. The 1921 Act also added the provision of an offsetting duty equal to the amount of the price differential of the dumped merchandise.<sup>190</sup> The basic substantive provisions of the 1921 Act provided a basis for modern antidumping legislation.<sup>191</sup> The 1921 Act formulated the basic constitutional conditions of dumping and civil remedy measures. It introduced concepts such as an injury determination, purchase price, exporter's sale price, and foreign market value. It established the procedures to decide which administration heard the antidumping petition and under which administrative regulations.<sup>192</sup> The 1921 Act still focused on punishing predatory dumping, and did not aim at other price discrimination situations.<sup>193</sup> It was construed and enforced in a much more protectionist

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<sup>186</sup> Antidumping Act of 1921, Ch. 14. §201-12, Pub. L. No.67-10, 42 Stat. 9, 11-15.

<sup>187</sup> Victor 1983:347.

<sup>188</sup> Feller 1971:121-122.

<sup>189</sup> Ehrenhaft 2002:376.

<sup>190</sup> Bailey 1992:435.

<sup>191</sup> Bryan and Boursereau 1984-1985:666. See formerly 19 U.S.C. §160.(repealed 1979). The Act provided:

[W]henver the Secretary of the Treasury ...finds that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation into the United States of a class or kind of foreign merchandise, and that merchandise of such class or kind is being sold or is likely to be sold in the United States or elsewhere at less than its fair value, then he shall make such finding public ...

<sup>192</sup> Bryan and Boursereau 1984-1985:666-667.

<sup>193</sup> Wang JingQi 2000:147.

manner.<sup>194</sup>

### 3.2.3 Antidumping law of 1930

Since promulgating the first antidumping law in 1921, America revised its antidumping laws many times. Especially the revision of 1930 was important. In 1930, America promulgated a new Tariff Law and made additions to dumping regulations. It still, however, included the Antidumping Act of 1921 (as its Chapter 7). The Antidumping Law of 1930 changed many aspects of the old trade laws, and defined concepts such as “tariffs”, “antidumping”, “antisubsidy”, “anti-unfair importation”, and so on. Many provisions continue to be used up to now. However, the Antidumping Act 1921 was not repealed and was implemented until 1979.<sup>195</sup>

### 3.2.4 Trade Laws of 1974 and 1979

In 1974, the U.S. Congress passed a new Trade Law (the Trade Act of 1974). It revised and added to the Antidumping Act of 1921. An International Trade Commission now replaced the old Tariff Committee’s power of determining injury.<sup>196</sup> The antidumping amendments were designed, in general, to expedite antidumping proceedings by providing time limits for administrative action and to render such proceedings more equitable by providing for the publication of relevant information, for the right to a hearing during the fair value investigation, and for judicial review of certain determinations adverse to the American industry.<sup>197</sup> Most importantly, the Trade Act of 1974 granted the President authority to participate in multilateral trade negotiations. Soon thereafter, the United States participated in the Tokyo Round of Multilateral Trade Negotiations, one purpose of which was to discuss international antidumping law under the GATT.<sup>198</sup>

During the Tokyo Round multilateral trade negotiations (MTN) of

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<sup>194</sup> Victor 1983:347.

<sup>195</sup> Shen MuZhu 2002:486; Wang JingQi 2000:147.

<sup>196</sup> See Bryan 1980:17-18. For a introduction of U.S. administrative setting, including International Trade Commission, U.S. Customs Service, and Department of Commerce, the International Trade Commission’s principal task is to determine whether or not merchandise sold in the United States at less-than-fair value or subsidized merchandise is causing material injury, the threat thereof, or the material retardation of a U.S. industry.

<sup>197</sup> Wang JingQi 2000:147-148; Bryan 1980:10; Bryan and Boursereau 1984-1985:668; Ehrenhaft 2002:378.

<sup>198</sup> Bryan and Boursereau 1984-1985:668.

the GATT (1973-1979), America revised the 1974 antidumping law. The U.S. Congress passed the Trade Agreement Act of 1979 (1979 Act) in which the first chapter considered antidumping duty and antisubsidy duty. With the 1979 agreement America changed Chapter 7 of the Tariff Law of 1930, replaced the Antidumping Law of 1921,<sup>199</sup> and incorporated most of the substantive provisions of the 1921 Act into the Tariff Act of 1930, modifying them to conform to the Antidumping Code.<sup>200</sup> The 1979 Act introduced procedural reforms designed to accelerate further the administrative determinations of dumping and injury and to increase dramatically the access to judicial review of those administrative determinations.<sup>201</sup> The 1979 Act spells out current United States antidumping law.<sup>202</sup>

According to Bryan,<sup>203</sup> the Trade Agreement Act of 1979 made substantial changes in the procedures to be followed in investigating and assessing antidumping duties. Accordingly, though many of the modifications made by the Trade Act of 1974 were kept and expanded upon, it is not possible to trace discrete provisions in most instances.<sup>204</sup>

### 3.2.5 Trade Laws of 1984 and 1988

In 1984, the U.S. Congress passed the Trade and Tariffs Law. This law again revised the concept of antidumping, it stipulated the scope of antidumping measures, increased the discretionary power of the Department of Commerce (DOC),<sup>205</sup> and reduced the complexity and cost of antidumping procedures.<sup>206</sup>

In 1988, the U.S. Congress passed Public Law No. 100-418. It was named the Omnibus Trade and Competitiveness Act of 1988. Sections 1316 to 1330 comprised antidumping regulations. The main contents were: anticircumvention measures; dealing with antidumping in non-market economy countries; jurisdiction on the

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<sup>199</sup> Victor 1983:347.

<sup>200</sup> Shen MuZhu 2002:486; Wang JingQi 2000:148; Bryan and Boursereau 1984-1985:669. Here the Antidumping Code refers to the Agreement on Implementation of the General Agreement on Tariffs and Trade of 1979.

<sup>201</sup> Bryan and Boursereau 1984-1985:669; Ehrenhaft 2002:378; Victor 1983:347-348.

<sup>202</sup> Bailey 1992:435.

<sup>203</sup> Bryan 1980.

<sup>204</sup> Bryan 1980:25.

<sup>205</sup> See Seastrum and Alagiri 1995:503-509. For a discussion of case law on determinations by the Department of Commerce.

<sup>206</sup> Wang JingQi 2000:148; Bryan and Boursereau 1984-1985:669.

third country (America could ask the third country to take an antidumping action); and expanding the scope of people qualified to complain of dumping.<sup>207</sup> The Act of 1988 contained an amendment to the antidumping statute designed to prevent circumvention of antidumping orders by means of assembly operations in the U.S. or third countries, or by modifying the merchandise in question.<sup>208</sup>

### 3.2.6 Act of 1994, supplemented in 1998

In 1994 the GATT Uruguay MTN Round passed a new Antidumping Agreement. The parties of GATT immediately took this as the main source to revise their domestic antidumping laws. Because the AD Agreement of WTO was opposed by certain special interest groups, it was at first not implemented in the U.S. Later that year the government of America did pass the Uruguay Round Agreement Act of 1994. It came into force on January 1, 1995. This Act brought important changes to antidumping laws, but it was still not sufficient.<sup>209</sup>

In 1998 the act was supplemented by decisions of the Dispute Settlement Body (DSB) of the WTO,<sup>210</sup> and the U.S. Congress' and government's statutes and laws which included "the Sunset Clause",<sup>211</sup> "providing that antidumping duties and undertakings are to lapse five years from the date on which they entered into force or were last modified or confirmed."<sup>212</sup> The sunset clause is a significant improvement over prior legislation because it prevents the perpetual application of antidumping duties or undertakings beyond the need of the industries of the importing countries.<sup>213</sup>

The present situation on antidumping in America comprises the following laws:

- the revised Tariff Law of 1930, Chapter 7, (19USC1673-1677n);
- several revisions of the Tariff Law of 1930, including the explanation about administrative action in the Uruguay Round

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<sup>207</sup> Wang JingQi 2000:148; Shang Ming 2003:75.

<sup>208</sup> Macrory ea 1991:83.

<sup>209</sup> Wang JingQi 2000:149; Shang Ming 2003:75.

<sup>210</sup> See DSU Art. 2.1. The Dispute Settlement Body publishes an annual report that provides an overview of WTO activities under the DSU. See, e.g., WTO, Dispute Settlement Body, Annual Report (1997).

<sup>211</sup> Shang Ming 2003:75.

<sup>212</sup> Macrory and Vermulst and Waer 1991:130.

<sup>213</sup> Macrory and Vermulst and Waer 1991:131.

- Agreement Act of 1994;
- the statute of the Department of Commerce of America 1997 (19 CFR).<sup>214</sup>

### 3.3 International antidumping laws

#### 3.3.1 The GATT antidumping laws

In international trade, dumping is regarded as one kind of unfair commercial competitive behavior. As early as the beginning of the 20<sup>th</sup> century, some countries, such as Australia, Canada and the U.S.A., had formulated and implemented antidumping laws to counterbalance the injury to their economies created by foreign dumped products.<sup>215</sup> The implementation of antidumping measures, however, surpassed its reasonable scope and degree, and became a kind of protective trade measure, thus hindering the normal development of international business. In order to limit antidumping measures to its reasonable scope and degree, many countries after the Second World War started to seek, in the international legislation, a way to bring antidumping into line with international trade requirements.<sup>216</sup>

##### 3.3.1.1 Article 6 of the GATT, 1947

The UN Economic and Social Council had its first meeting in London in February 1946.<sup>217</sup> America drafted a proposed Charter that became the basis for discussions at the First Session of the Preparatory Committee on the Havana Charter in London, October and November 1946.<sup>218</sup> Article 11, of the suggested charter contained five paragraphs dealing with antidumping duties, the first and fifth of which were the essential provisions.<sup>219</sup>

Paragraph 1 reads:

<sup>214</sup> Shang Ming 2003:75.

<sup>215</sup> See e.g. Australia "Industry Protection Law" in 1901 through the domestic legislation in order to resist foreign dumping; Canada "Customs Tariff Law" in 1904 stipulated for the first time antidumping measures; US "Customs Tax Law" in 1916 included for the first time antidumping provisions.

<sup>216</sup> Denton 1989-1990:243.

<sup>217</sup> Seavey 1970:17.

<sup>218</sup> The members of the Preparatory Committee were Australia, Belgium, Luxembourg, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, the Netherlands, New Zealand, Norway, South Africa, the USSR, the UK, and the United States.

<sup>219</sup> See <http://www.wto.org>.

No antidumping duty shall be imposed on any product of any Member country imported into any other Member country in excess of an amount equal to the margin of dumping under which such product is being imported. For the purposes of this article the margin of dumping shall be understood to mean the amount by which the price of a product exported from one country to another is less than a) the comparable price charged for the like or similar product to buyers in the domestic market of the exporting country, or b) in the absence of such domestic price, the highest comparable price at which the like or similar product is sold for export to any third country, or c) in the absence of a) and b), the cost of production of the product in the country of origin with due allowance in each case for differences in conditions and terms of sale, and for differences affecting price comparability.<sup>220</sup>

Paragraphs 2, 3, and 4 deal with countervailing duties for the same situation (they are substantially the same as paragraphs 3, 4, and 5 of Article 6 of the GATT). The fifth paragraph reads:

Each member undertakes that as a general rule it will not impose any antidumping duty or countervailing duty on the importation of any product of other member countries unless it determines that the dumping or subsidization, as the case may be, under which such a product is imported, is such as to injure or threaten to injure a domestic industry, or is such as to prevent the establishment of a domestic industry.<sup>221</sup>

The second session of the Preparatory Committee convened in April 1947 at the Palais des Nations in Geneva had the dual purpose of adopting the Draft Charter, which would serve as a basis of discussion at the world conference, and conducting negotiations for tariff reductions, which would then be embodied in the General Agreement.<sup>222</sup>

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<sup>220</sup> Report of the first session of the Preparatory Committee of the United Nations Conference on Trade and Employment, London, October 1946. See <http://www.wto.org>

<sup>221</sup> Report of the first session of the Preparatory Committee of the United Nations Conference on Trade and Employment, London, October 1946. See <http://www.wto.org>

<sup>222</sup> Seavey 1970:19.

In November 1947, the UN Conference on Trade and Employment convened in Havana. The antidumping article (Article 34 of the Havana Charter; now Article 6 of the GATT) was considered by the subcommittee on general commercial provisions.<sup>223</sup>

The General Agreement<sup>224</sup> and the Protocol of Provisional Application<sup>225</sup> were annexed to the Final Act of the Second Preparatory Conference dated 30 October 1947,<sup>226</sup> and came into force on 1 January 1948, for the twenty-three nations which had taken part in the initial tariff negotiations.<sup>227</sup>

The Protocol was an agreement by the original parties to apply provisionally on and after 1 January 1948, parts one and three of the GATT, and to apply part two, which included Article 6 relating to antidumping duties, to the fullest extent not inconsistent with existing legislation.<sup>228</sup>

Article 6 of the GATT 1947 is the international antidumping rule. The whole name of Article 6 of the GATT 1947 is “Antidumping duty and antisubsidy duty”. There are seven provisions in it. Besides the third provision which belongs to the antisubsidy stipulation, the other six provisions involve antidumping questions,<sup>229</sup> such as the meaning of dumping, the method of counterbalancing dumping, the relationship between antidumping duty and antisubsidy duty. In a word, Article 6 of the GATT 1947 is comprehensive, the first international regulation which unifies antidumping problems. It certainly has a positive effect on international antidumping legislation.<sup>230</sup>

However, the antidumping regulation of Article 6 of the GATT 1947, comprehensive as it might be, is not the complete answer. It cannot solve some important basic problems, such as determination of dumping and injury, the boundary between the right use of antidumping regulations and their abuse. In addition the stipulation in the “grandfather clause”, and its binding force

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<sup>223</sup> Seavey 1970:20.

<sup>224</sup> Text of the General Agreement 1958, Basic Instruments and Selected Documents, Geneva, November 1958, Vol.III.

<sup>225</sup> “Protocol of the Provisional Application of the GATT”, Analytical Index, Notes on the Drafting, Interpretation and Application of the Articles of the General Agreement, Geneva, February 1966, p171.

<sup>226</sup> United National Conference on Trade and Employment, Final Act and Related Documents.

<sup>227</sup> Seavey 1970:21.

<sup>228</sup> Seavey 1970:21.

<sup>229</sup> Wang Jingqi 2000: 34; Shen Muzhu 2002:484.

<sup>230</sup> Wang Jingqi 2000: 34; Shen Muzhu 2002:484.

was disputed strongly. After the first several rounds of negotiations GATT gave in, but the non-tariff barrier remained an important obstacle in international trade, especially the phenomenon of abusing antidumping regulations.<sup>231</sup>

### 3.3.1.2 Antidumping Code 1967

In order to improve this situation, prior to the Kennedy Round there were several years of preparatory studies, reports and discussions on antidumping procedures in the GATT. The Group on Antidumping Policies met from 1946 to 1967.<sup>232</sup> It took two years to advance from the first rough draft of a Code proposed by the U.K. to the final draft ready for ratification. At the first meeting of the working Group on Antidumping Policies, eight countries were represented: Canada, the EEC, Japan, Norway, Sweden, Switzerland, U.K. and U.S. The minority of these countries (the EEC, the Nordic countries and Japan) supported the proposal of the United Kingdom. They tried to persuade the United States, Canada, Australia and South Africa to agree to an interpretation and explanation of Article 6 that would result in the liberalization of their relatively strict antidumping laws.<sup>233</sup> During the Kennedy Round multilateral trade negotiation (1963-1967), the EEC, Japan and other contracting parties insisted that antidumping and antisubsidy measures should be on the agenda of the discussion. Finally, on 30 June 1967, they achieved an "Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1967". It is also called the "Antidumping Regulation" or the "Antidumping Code". It is the first international antidumping law in the world. It came into force on 1 July 1968.<sup>234</sup>

This agreement (1967) was the explanation, supplement and development to Article 6 of the GATT. The content was exhaustive and quite comprehensive. It included such items as the definition of dumping, the determination of injury, antidumping investigating and managing procedure, antidumping duty and temporary measures, as well as the question of adopting antidumping measures on behalf of the third country.<sup>235</sup>

According to the request of agreement (1967), some of the signatory states of agreement (1967) (such as England and

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<sup>231</sup> Wang Jingqi 2000: 35; Shen Muzhu 2002:484.

<sup>232</sup> Bhala and Kennedy 1998:1-7, for an overview of the GATT.

<sup>233</sup> Seavey 1970:95.

<sup>234</sup> Feller 1970-1971:122.

<sup>235</sup> Wang Jingqi 2000: 35-36; Shen Muzhu 2002:484-485.

Canada) carried out a subsequent revision of their domestic antidumping laws, and to a certain degree corrected conflicting procedures between their old antidumping laws and the new antidumping regulation of the GATT.<sup>236</sup> However, “Antidumping Regulation 1967” was not passed by the U.S. Congress, and was therefore not implemented in the U.S. On the question of implementing antidumping measures, the U.S. cited the “Grandfather Clause” of the GATT and used the Antidumping Act of 1921.<sup>237</sup> This Act had some procedures conflicting with the Antidumping Regulation of 1967. Accordingly, other countries criticized the action of America. Some countries adopted relevant resisting measures, and also cited the “Grandfather Clause” of the GATT agreement to motivate their domestic antidumping laws.<sup>238</sup> Consequently, the binding force of Antidumping Regulation 1967 was extremely limited.

### 3.3.1.3 Antidumping Code 1979

On 12 April 1979, the Tokyo Round multilateral trade negotiation of the GATT (1973-1979) adopted a new “Agreement on Implementation of the General Agreement on Tariffs and Trade”, called “Antidumping Regulation 1979”. It came into force for the signatories on 1 January 1980. From that day, the new Antidumping Code replaced the 1967 GATT Antidumping Code.<sup>239</sup>

The Antidumping Code 1979 consisted of three parts, sixteen articles and one addendum. The aim of the Antidumping Code 1979 is:

[...] to interpret the provisions of Article 6 of the General Agreement on tariffs and trade, and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation; and [...] to provide for the speedy, effective and equitable resolution of disputes arising under this Agreement.<sup>240</sup>

The first part reiterated the basic principles of Article 6 of the GATT, and explicated a series of important concepts that have

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<sup>236</sup> Wang Jingqi 2000: 36.

<sup>237</sup> Wang Jingqi 2000: 36-37; Shen Muzhu 2002:485.

<sup>238</sup> Wang Jingqi 2000: 36; Shen Muzhu 2002:485.

<sup>239</sup> Wang Jingqi 2000: 37; Bhala and Kennedy 1998:7-8.

<sup>240</sup> See: Agreements and Decisions of the GATT Tokyo Round. a) Agreement on Implementation of Article 6 of the GATT. April 12, 1979. GATT Publication 1979.

close correlation with the understanding and implementation of antidumping measures.<sup>241</sup> The second part elaborated the consultation, conciliation and dispute settlement procedures in an antidumping case, as well as the procedures for establishing a committee on antidumping practices.<sup>242</sup> The third part elaborated some related legal procedure, such as acceptance and accession, reservation, and the use of force.<sup>243</sup> The addendum was a response to some countries' request to explain some separate questions.<sup>244</sup>

More importantly, the Sixth Provision of Article 16 of this Agreement required that the governments of signatories and other countries might apply for the Party in question to adopt the essential measures to ensure the conformity of their laws, regulations and administrative procedures with the provisions of this Agreement.<sup>245</sup> Consequently, according to this provision, if signatories' domestic antidumping laws were incongruent with this Agreement, they could not use their domestic antidumping laws preferentially.<sup>246</sup>

As practice proved, the Antidumping Code 1979 was an important step in the development of Antidumping Regulation of the GATT.<sup>247</sup> However, it still had limitations. It could not solve the problems of implementing antidumping measures, and could also not solve new problems which arose in antidumping actions. Generally, domestic antidumping laws – on fair price, determination of injury and determination of all kinds of tenable data – lacked transparency.<sup>248</sup> This gave antidumping departments of governments too much space and discretionary power. Because the cost of antidumping lawsuits was low, adding expansion of the right of petition, encouraged producers of importing countries to abuse antidumping laws. Since the 1980's, the non-tariff barrier was abused in international trade and antidumping cases increased

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<sup>241</sup> Wang Jingqi 2000: 37.

<sup>242</sup> Wang Jingqi 2000: 37.

<sup>243</sup> Wang Jingqi 2000: 37.

<sup>244</sup> See: ADDENDUM 1 to Agreement on implementation of Article 6 of the GATT "The following statement is circulated at the request of the delegations of Austria, Brazil, Canada, Colombia, European Communities, Egypt, Finland, Japan, Norway, Romania, Sweden, Switzerland and United States."

<sup>245</sup> See: "Agreement on Implementation of Article 6 of the GATT 1979" PART III, Article 16, 6. National legislation.

<sup>246</sup> Wang Jingqi 2000: 40; Shen Muzhu 2002:485.

<sup>247</sup> Wang Jingqi 2000: 40; Shen Muzhu 2002:485.

<sup>248</sup> Wang Jingqi 2000: 40; Shen Muzhu 2002:485.

quickly. According to the statistics of the GATT,<sup>249</sup> from 1980 to 1990, twenty-four signatories instituted 1600 antidumping cases, of which 848 cases were ruled in favor of the complainants and antidumping tax levied.<sup>250</sup>

### 3.3.2 The WTO Antidumping Agreement (Antidumping Agreement 1994)

#### 3.3.2.1 A brief introduction of the WTO system

##### 3.3.2.1.1 The birth of the WTO

After seven years of negotiations beginning in 1986, the most far-reaching and comprehensive development in world trade since 1947 took place in 1994 with the successful completion of the Uruguay MTN Round.<sup>251</sup> During the last GATT round (the Uruguay Round), which led to the creation of the WTO and to the detailed Antidumping Agreement, these efforts focused on the procedural rules as well as the material conditions to be fulfilled before protective measures can be taken. Peter Sutherland, the first Director-General of the World Trade Organization, described the conclusion of the Uruguay Round as “a defining moment in modern history.”<sup>252</sup>

As part of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations signed in Marrakesh on April 15, 1994 (the Final Act),<sup>253</sup> six Understandings and Multilateral Trade Agreements were concluded that were made an integral part of the Marrakesh Agreement (the WTO Agreement). A series of Ministerial Decisions also were taken to further clarify certain provisions of the Multilateral Trade Agreement.<sup>254</sup>

The WTO Agreement states clearly that GATT 1994 and GATT 1947 are “legally distinct”.<sup>255</sup> So, when a country withdrew from GATT

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<sup>249</sup> See: <http://www.wto.org>

<sup>250</sup> Wang Jingqi 2000: 40-41.

<sup>251</sup> For additional reading on the Uruguay Round, see generally international trade law website include the WTO's website at <http://www.wto.org>, and the International Trade Law Monitor at <[http://itl.irv.uit.no/trade\\_law/](http://itl.irv.uit.no/trade_law/)>. See also Bhala 1995:5 for an introduction of the Uruguay Round.

<sup>252</sup> Evans and Walsh 1994:1.

<sup>253</sup> Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh, April 15, 1994. Bhala and Kennedy 1998:9.

<sup>254</sup> Bhala and Kennedy 1998:9.

<sup>255</sup> The WTO Agreement: 1994. Article II. 4. It states: “The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A is

1947 and took part in the WTO, it had no GATT obligations to the contracting parties that had not joined the WTO. However, although GATT 1994 and GATT 1947 are legally distinct, the WTO Agreement keeps continuity with the past. Article XVI:1 of the WTO Agreement provides that “the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.”<sup>256</sup>

### 3.3.2.1.2 The scope of the WTO Agreement

The Final Act includes all areas negotiated in the Uruguay Round. Outside of the Final Act, the most important of the Uruguay Round agreements is the Agreement Establishing the World Trade Organization.<sup>257</sup> The institutional functions of GATT 1947 are replaced by the WTO. The WTO Agreement establishes a single institutional framework that includes (a) GATT 1994, (b) a series of Understandings that amend GATT 1947, and (c) multilateral trade agreements.<sup>258</sup> The following Annexes are appended to the WTO Agreement and are an integral part of it:

- GATT 1994, as amended (Annex 1A)
- General Agreement on Trade in Services (Annex 1B)
- Agreement on Trade Related Aspects of Intellectual Property Rights (Annex 1C)
- Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2)
- Trade Policy Review Mechanism (Annex 3)
- Plurilateral Trade Agreements (Annex 4)<sup>259</sup>

The agreements listed in Annexes 1A-C, 2, and 3 include the Multilateral Trade Agreements (MTAs). The MTAs are integral parts of the WTO Agreement and are binding on all WTO Members.<sup>260</sup>

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legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified.”

<sup>256</sup> Bhala and Kennedy 1998:12.

<sup>257</sup> The Marrakesh Agreement established the World Trade Organization. All Uruguay Round legal texts are available from the WTO’s website at <http://www.wto.org>.

<sup>258</sup> Bhala and Kennedy 1998:12.

<sup>259</sup> Shen Muzhu 2002:428-430; Bhala and Kennedy 1998:12-13.

<sup>260</sup> The WTO Agreement. Article II. 1-2.

Annex 1A includes the following Understandings that amend and clarify GATT 1947:

- Understanding on the Interpretation of Article II: 1(b)
- Understanding on the Interpretation of Article XVII
- Understanding on Balance-of-Payment Provisions
- Understanding on the Interpretation of Article XXIV
- Understanding in Respect of Waivers of Obligations
- Understanding on the Interpretation of Article XXVIII<sup>261</sup>

GATT 1994 is composed of the above six Uruguay Round Understandings, GATT 1947 (as amended and modified), waivers granted under GATT 1947 and still in force on the date of entry into force of the WTO Agreement, and the Marrakesh Protocol.<sup>262</sup>

The twelve subject-specific agreements on trade in goods are also listed in Annex 1A.<sup>263</sup> They entered into force on January 1, 1995. One of these agreements is “Agreement on Implementation of Article 6 of the GATT 1994”.<sup>264</sup> It is also called “Antidumping Agreement 1994” or “WTO Antidumping Agreement”.

### 3.3.2.1.3 The functions of the WTO

Article III of the WTO Agreement lists the WTO’s five main functions:

- to facilitate the implementation, administration, and operation of the MTAs and plurilateral trade agreements;
- to provide the forum for negotiations among WTO Members concerning the MTAs;
- to administer the Dispute Settlement Understanding;

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<sup>261</sup> Bhala and Kennedy 1998:13.

<sup>262</sup> Bhala and Kennedy 1998:13.

<sup>263</sup> These agreements are Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing, Agreement on Technical Barriers to Trade, Agreement on Trade-Related Investment Measures, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [Antidumping Agreement], Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 [Customs Valuation Agreement], Agreement on Preshipment Inspection, Agreement on Rules of Origin, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures, and Agreement on Safeguards.

<sup>264</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [Antidumping Agreement], April 15, 1994 WTO Agreement, Annex 1A, at [http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)

- to administer the Trade Policy Review Mechanism; and
- to cooperate with the International Monetary Fund (IMF) and the World Bank to achieve greater coherence in global economic policy-making.<sup>265</sup>

The replacement of the WTO for GATT did not cause basic changes in the functions formerly performed by GATT and now assumed by the WTO. In addition, the WTO performs bigger and stronger than GATT in respect of trade in services and intellectual property rights protection, also with respect to the WTO dispute settlement system.<sup>266</sup>

### 3.3.2.2 The WTO Antidumping Agreement

As mentioned above, one of Agreements in the WTO Agreement is “Agreement on Implementation of Article 6 of the GATT 1994”. It is also called “Antidumping Agreement 1994” or “WTO Antidumping Agreement”.<sup>267</sup>

In particular, the revised WTO Antidumping Agreement provides for greater clarity and more detailed rules in relation to the procedures to be followed in initiating and conducting antidumping investigations, the method of determining that a product is dumped, the criteria to be taken into account in a determination that dumped imports caused injury to a domestic industry, and the implementation and duration of antidumping measures. In addition, the new Agreement clarifies the role of dispute settlement panels in disputes relating to antidumping actions taken by domestic authorities.<sup>268</sup>

## 3.4 South African antidumping laws

### 3.4.1 The Customs Tariffs Act 1914

Until the establishment of the Union of South Africa in 1910, this country had no international trade policy to speak of, also no law to control dumping. Relations with the rest of the world were

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<sup>265</sup> The WTO concluded cooperation agreements with the IMF in December 1996, and with the World Bank in April 1997. The agreements provide for the exchange and sharing of information, and accord each other observer status at meetings of the other’s decision-making bodies.

<sup>266</sup> Bhala and Kennedy 1998:16.

<sup>267</sup> See Chapter 3. Section 3.3.2.1.2.

<sup>268</sup> Agreement on Implementation of Article VI (Anti-dumping). See <http://www.wto.org>

prescribed by the political and economic ideologies of colonial powers—first the Netherlands and then Britain.<sup>269</sup>

In 1910 the new Union immediately appointed a commission, the Cullinan Commission, to investigate the desirability of establishing local industries. The commission established the following conditions in terms of which local industries could qualify for increased tariff protection:

- Local raw materials had to be used.
- Jobs for whites had to be created.
- The industry's chances of success should be high.<sup>270</sup>

The findings of the commission led to the Customs Tariffs Act of 1914. The Union of South Africa was one of the first countries to enact an antidumping law when it did so in 1914.<sup>271</sup> This

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<sup>269</sup> Smit ea 1996:455.

<sup>270</sup> Smit ea 1996:455.

<sup>271</sup> Viner 1966:209-210. The Union rule provided:

Section 8. Anything to the contrary notwithstanding in this act contained, the following provisions shall be in force in respect of the charging, levying, collection, and payment of customs duty:

(1) In the case of goods imported into the Union of a class or kind made or produced in the Union, if the export or actual selling price to an importer in the Union be less than the true current value (as defined in this act) of the same goods when sold for home consumption in the usual and ordinary course in the country from which they were exported to the Union at the time of their exportation thereto, there may, in addition to the duties otherwise prescribed, be charged, levied, collected, and paid on those goods on importation into the Union a special customs duty (or dumping duty) equal to the difference between the said selling price of the goods for export and the true current value thereof for home consumption as defined in this act: Provided, That the special customs duty (or dumping duty) shall not in any case exceed 15 per cent ad valorem.

(2) When a bounty is granted in the country of origin on any goods of a class or kind made or produced in the Union an additional customs duty equal to the amount of such bounty may be charged, levied, and collected upon the importation of those goods into the Union.

(3) The goods in respect of which there may be charged, levied, and collected any special (or dumping) customs duty under subsection (1) or any additional customs duty under subsection (2) shall be from time to time determined by the governor general and notified by him by proclamation in the Gazette, together with the date as from which such his determination shall take effect: Provided, That such date shall not be less than six weeks after the publication of the proclamation.

authorized the introduction of a number of low tariffs, largely with a view to obtaining income. This law followed the Canadian Act closely.<sup>272</sup> It contained a discretionary subsidy provision, but there is no indication in the law as to whether this provision is applicable to private as well as to official bounties, and to indirect as well as to direct bounties.<sup>273</sup> It is also not made clear whether the same imports may be subjected to both the dumping and the subsidy duties.<sup>274</sup>

In 1922, South Africa strengthened its antidumping legislation by the enactment of a provision that there could be a levy added to the actual price of sale, if imported goods were sold in the union at less than the wholesale price in the country of manufacture plus the cost of packing, board and freight charges to port of entry, and if such a sale threatened a Union industry.<sup>275</sup>

### 3.4.2 Board of Trade and Industry Amendment Act 60 of 1992<sup>276</sup>

South Africa substantially revised its antidumping law in 1992 with a view towards establishing clearer definitions of dumping and a more refined procedural application.<sup>277</sup> The 1992 amendments also extended the jurisdictional and protective reach of the statute by expanding its application to include goods imported to the Republic or the Southern African Customs Union.<sup>278</sup> Finally, the 1992 Act assigned the responsibility for investigating and enforcing antidumping regulations to the Board on Tariffs and

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Union of South Africa, Statutes, 1914, Act No.26, Sec.8.

<sup>272</sup> Viner 1966:209.

<sup>273</sup> Viner 1966:211.

<sup>274</sup> The regulations issued to govern the administration of the antidumping law are given in the Union Government Gazette, March 12, 1920.

<sup>275</sup> Board of Trade Journal, July 13, 1922, p.51; July 27, 1922, p.107.

<sup>276</sup> Board on Tariffs and Trade Act 107 of 1986, as amended by Board of Trade and Industry Amendment Act 60 of 1992, 1994 JSRSA 2-403.

<sup>277</sup> GATT Secretariat, GATT Trade Policy Review Mechanism: South Africa, World Trade Materials, July 1993, P 5, 10.

<sup>278</sup> The customs area of the South African Customs Union "means any state or territory with the government of which an agreement has been concluded under section 51 of the Customs and Excise Act of 1964." 1992 Act §1(1). The Customs Union consists of Botswana, Lesotho, Namibia, South Africa, and Swaziland. Board on Tariffs and Trade, Guide to the Policy and Procedure with Regard to Action Against Unfair International Trade Practices: Dumping and Subsidized Export 1 n.1 (Sept. 1995). [hereinafter Guide].

Trade (BTT).<sup>279</sup> The 1992 revisions serve as an appropriate reference point because the BTT began to use antidumping duties on a wider scale in 1992 than in previous years.<sup>280</sup>

An analysis of the 1992 provision provides useful background for the 1995 amendment. A comparison between the two demonstrates how little South Africa revised its antidumping regime in 1995.

### 3.4.3 Board on Tariffs and Trade Amendment Act of 1995

On August 23, 1995, the South African parliament enacted a new antidumping law to amend the Board on Tariffs and Trade Act of 1986. This was the Board on Tariffs and Trade Amendment Act of 1995 (the 1995 Act). The aims of the 1995 Act were, “to amend the definition of dumping; to define certain expressions; and to provide that the said Act shall also apply in the former homelands”. In conjunction with the 1995 amendments, the BTT issued a new guide for its antidumping investigation.<sup>281</sup> According to Petersen,<sup>282</sup>

These new guidelines set the parameters of South Africa’s antidumping law by detailing the appropriate standard to evaluate normal value, material injury, the threat of material injury, like product,<sup>283</sup> and the causal relationship. The 1995 Act and the Guide revamped South Africa’s antidumping law in order for the country to achieve compliance with the Republic’s GATT

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<sup>279</sup> 1992 Act § 4. See also Osode 2003-2004:23-25 for a discussion about the BTT.

<sup>280</sup> Petersen 1996:389. Note 75: “Prior to 1992, the Board of Trade and Industry (BTI), the predecessor to BTT, relied heavily on formula duties as a device to protect domestic manufacturers. Formula duties served as an alternative to the ad valorem duty. BTI applied formula duties whenever the imported good fell below a pre-determined reference price (for example 100 Rand per 100 kilograms). BTI’s application of formula duties changed over the years depending upon the perceived disruptive effects of below cost competition. In 1993, the GATT Goods and Policy Affairs Director said that ‘formula duties which acted as anti-dumping duties (but which in fact also protected local producers from competition from normal low-cost producing countries) would have to be converted into normal anti-dumping duties.’”

<sup>281</sup> Guide, see above note 278.

<sup>282</sup> Petersen 1996:394.

<sup>283</sup> The Guide defines “like product” as “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 investigation.”

obligations.<sup>284</sup>

#### 3.4.4 The International Trade Administration Act 2002 and the International Trade Administration Commission Antidumping Regulations

In 2002, in order to achieve compliance with the WTO Agreement, South Africa enacted a new act, the International Trade Administration Act 2002 (ITA Act). The ITA Act 2002 repeals the 1995 Act and other laws.<sup>285</sup> The Preamble of the ITA Act 2002 states as its purpose: "To establish the International Trade Administration Commission; to provide for the functions of the Commission and for the regulation of its procedures; to provide for the implementation of certain aspects of the Southern African Customs Union (SACU) Agreement in the Republic; to provide, within the framework of the SACU Agreement, for continued control of import and export of goods and amendment of customs duties; and to provide for matters connected therewith." Therefore, the ITA Act 2002 creates a new body, namely the International Trade Administration Commission (ITAC). The establishment of an independent body to regulate and administer international trade instruments arises firstly out of the drive of the Department of Trade and Industry (DTI) to enhance its delivery capacity by separating implementation functions from administrative and regulatory functions.<sup>286</sup>

The ITAC is the agency responsible for decisions on antidumping measures. The Commission is led by a full-time Chief Commissioner, assisted by a full-time Deputy Chief Commissioner, and at least two but no more than 10 other commissioners who must have appropriate qualifications in economics, accounting, law, commerce, agriculture, industry or public affairs.<sup>287</sup> The ITAC is independent and by law subject only to the Constitution and the

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<sup>284</sup> The Guide states the rationale for the new amendment and guidelines:

In terms of South Africa's obligations under the GATT, entered into by the majority of countries trading internationally, customs duties applicable to the majority of products in this Schedule [referring to Part 1 of Schedule 1 of the Customs and Excise Act] are bound against increases above specified levels. It is therefore no longer possible to use Schedule No. 1 of the Act to combat unfair international trade practices.

<sup>285</sup> See the International Trade Administration Act 2002: Schedule 3. Repeal of Laws (Section 63 (2)).

<sup>286</sup> See Memorandum on the objects of the International Trade Administration Act 2002, Section 1.

<sup>287</sup> Barral ea 2005:57.

law and any Trade Policy Statement or Directive or Notice issued by the Minister of Trade and Industry in terms of the ITA Act.<sup>288</sup>

The Commission is supported by administrative staff and teams of investigators organized in different divisions, of which one is responsible for trade remedies and hence for antidumping investigations. These investigators work in teams of two to three people on any specific antidumping case (and are usually involved in more than one case at a time) and are responsible for both the determination of dumping and the subsequent injury analysis.<sup>289</sup> There is a distinction between the functions of the Commission and those of its investigating staff. The latter investigates antidumping cases and then submits their reports (in sequence, merit assessments, preliminary decisions and final decisions) to the Commissioners who, as a body, have the statutory obligation to take decisions at periodic meetings.<sup>290</sup>

In November of 2003, in accordance with Section 59 of the ITA Act 2002, the Minister of Trade and Industry, Alec Erwin, issued a specific regulation.<sup>291</sup> It is the International Trade Administration Commission Antidumping Regulations (ADR), which is the South African Antidumping Regulations 2003. The ADR particularly stipulates the substantive and procedural antidumping matters, such as definitions, initiation procedure, reviews and refunds. The ADR gives greater guidance and transparency to antidumping investigations.<sup>292</sup>

The present situation on antidumping in South Africa comprises the following laws:<sup>293</sup>

- the WTO Antidumping Agreement;
- the International Trade Administration Act, 2002;
- the International Trade Administration Commission Antidumping Regulations.<sup>294</sup>

### **3.5 China's antidumping laws**

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<sup>288</sup> The International Trade Administration Act:Section 7.

<sup>289</sup> Barral ea 2005:58.

<sup>290</sup> Barral ea 2005:58.

<sup>291</sup> Government Gazette, 14 November 2003. General Notice, notice 3197of 2003.

<sup>292</sup> Barral ea 2005:58.

<sup>293</sup> Government Gazette, 19 March 2004. Notice 392 of 2004.

<sup>294</sup> Copies of the WTO Antidumping Agreement, the ITA Act 2002 and the ADR are available from the Commission's website at [www.itac.org.za](http://www.itac.org.za).

In recent years China has formulated its own antidumping laws.<sup>295</sup>

### 3.5.1 China's Foreign Trade Law of 1994

Because customs duty is continually being reduced and non-tariff barrier measures are limited, especially regarding licence and quota of importation, antidumping laws are an important means by which countries can safeguard fair trade and resist unfair competition.<sup>296</sup> China, as the ninth biggest trading country in the world, is indicted by other countries for dumping. For example, in August 1979, the EEC took an antidumping measure against Chinese glucide and salt. Up to September 2000, 28 states were to indict China on 378 antidumping cases. There were more than 4000 kinds of goods involved, such as minerals, chemicals, textiles, mechanical and electrical items, livestock, and so on.<sup>297</sup> During this time, a lot of foreign products were sold into China, especially electrical appliances, steel and iron, engine beds, rolls of film. These threatened and blocked the development of the relevant Chinese industries. Consequently, China had to set up new laws against these unfair imports and business practices.

China's Foreign Trade Law was publicized on May 12, 1994. It came into force on July 1, 1994. Antidumping as a special provision constituted the thirtieth provision of the Foreign Trade Law 1994. Three principles of antidumping were determined: low price import, material injury and causal relationship. These were not enough to protect China's industries and economy.<sup>298</sup>

### 3.5.2 China's Antidumping and Countervailing Statute of 1997

The thirtieth Provision of the Foreign Trade Law of 1994 did not suit antidumping practices. So on March 25, 1997 the State Council promulgated the Chinese Antidumping and Countervailing Statute. There were 6 Chapters and 42 provisions in this Statute. It filled the blank spaces of the Chinese antidumping legislation. The Statute of 1997 was based on the 29<sup>th</sup> to 31<sup>st</sup> provisions of the Foreign Trade Law of 1994. The 1997 Statutes aimed to counter the effects of dumping or subsidization of exports that result in material injury, or the threat of material injury, to an established domestic industry, or that materially retard the establishment of a

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<sup>295</sup> Shen JianMing 1997:295.

<sup>296</sup> Lei Yu 2002:305.

<sup>297</sup> Lei Yu 2002:298-299.

<sup>298</sup> Shen Muzhu 2002:489-490.

comparable domestic industry.<sup>299</sup> Although it included some countervailing measures,<sup>300</sup> the main content was antidumping provisions, including: definition of dumping, determination of normal value and injury, dumping margin, antidumping investigation and antidumping measures. China has started its own antidumping investigations and proceedings since the Statute 1997 was enacted.<sup>301</sup>

The Statute 1997 was the first Chinese antidumping law. It, however, lacked a substantial theoretical and practical basis. It made no provision for calculating prices in nonmarket economies according to prices in market economies, a practice that the U.S. and E.U. have used to the detriment of Chinese exporters in the past, despite China's vehement objections.<sup>302</sup> It is just a copy of those that exist in certain Western countries, failing to reflect the reality of China's antidumping situation.<sup>303</sup> As a source of law, the Statute 1997 is too abstract and general to be effective. It was unavoidable that it had to be found deficient.

### 3.5.3 China's Antidumping Statute 2002

Subsequent to its accession to the WTO, China, in 2002, revised the Antidumping and Countervailing Statute 1997 and promulgated the Antidumping Statute of the People's Republic of China 2002 (the China Antidumping Statute 2002).<sup>304</sup> This time antidumping and countervailing were separated.<sup>305</sup> The statute includes regulations concerning dumping and injury, antidumping investigations, antidumping measures and an antidumping duty. The newly issued statute put forward three kinds of antidumping measures: provisional antidumping measures, price undertakings and antidumping duties. According to the statute, antidumping

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<sup>299</sup> The Chinese Antidumping and Countervailing Statute 1997:Article 2. See also Ross and Ning 2000:30 for a brief description of the Chinese antidumping regulations.

<sup>300</sup> Chapter 5 of the Statute 1997 was countervailing provision. See the Chinese Antidumping and Countervailing Statute, Chapter 5.

<sup>301</sup> In July 1997, the first antidumping charge made by Chinese manufacturers took place concerning newsprint imports. The Chinese Government decided that newsprint producers in the United States, Canada, and South Korea were guilty of dumping in China in its final judgment in June 1999. Newsprint from these three countries was levied at antidumping tariffs ranging from 9 per cent to 78 per cent. See, e.g. Nation Initiates First Antidumping Case, CHINA DAILY, February 7, 2002.

<sup>302</sup> Ross and Ning 2000:30.

<sup>303</sup> Gong 2002:607.

<sup>304</sup> Li Yang 2003:2.

<sup>305</sup> The China Antidumping Statute 2002.

investigations will be conducted if imported products enter China at a price lower than their actual export value, cause injury, or pose a potential danger to domestic enterprises.<sup>306</sup>

#### 3.5.4 China's Antidumping Statute 2004

In April of 2004, the State Council revised China's Antidumping Statute 2002. The revised antidumping statute, China's Antidumping Statute 2004, closely follow the WTO Antidumping Agreement, even verbatim, in some instances.<sup>307</sup>

Based on these two statutes, the Chinese Government set up a series of departmental rules and regulations. This brought the Chinese antidumping laws in line with their counterparts in the rest of the world.<sup>308</sup>

### 3.6 Conclusion

From a brief historic overview of antidumping laws, antidumping legislation is developing in two ways: domestic and international.

In the domestic way, the U.S. has been in the forefront in the world. The U.S.'s antidumping statutes have become a model for some countries' antidumping legislations. Antidumping measures have become far more effective at shielding domestic industries in the U.S. from foreign competition than the tariff and nontariff barriers that were eliminated in multiple rounds of multilateral trade negotiations over a five-decade period.<sup>309</sup>

In the international way, from the GATT to the WTO, antidumping laws have grown from small to big. It is going to play a more important role in international trade. The GATT contracting parties have had four opportunities to develop antidumping law: (1) in 1947 when the GATT was drafted; (2) between 1964 and 1967 when the Kennedy Round Antidumping Code was produced; (3) between 1974 and 1979 when the Tokyo Round Antidumping Code was produced; and (4) between 1986 and 1994 when the Uruguay Round Antidumping Code was produced. Each time, antidumping legislation has made huge progress.

South Africa, because of its historical familiarity with antidumping

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<sup>306</sup> Lei Yu 2002:303.

<sup>307</sup> Kennedy 2005:417.

<sup>308</sup> Shen Muzhu 2002:490; Shang Ming 2003:474-475.

<sup>309</sup> Lei Yu 2002:305.

legislation, its well-developed industrial base and industrial unions, and its position as Africa's major importer and economic market, stands as Africa's primary representative in the development of antidumping law.<sup>310</sup> Therefore, South Africa will experience significant increases in the volume of its trade if its antidumping regulations are going to be more consistent with the international standards.

Since China first stipulated antidumping provision in its Foreign Trade Law 1994, Chinese antidumping legislation is developing quickly. The new dynamics of China's antidumping regulations can be best appreciated by considering its recent experience with the rules of the WTO that permit member countries to enact tariffs or other barriers to counter unfair practices of their trading partners.<sup>311</sup> Between March 1997 and March 2005, Beijing launched investigations into cases of 35 products involving 112 countries in which foreign companies were accused of injuring Chinese industry by exporting their products to China at prices below normal value.<sup>312</sup> After China's accession to the WTO, the Statutes and their implementing rules will have to conform fully to the WTO Antidumping Agreement.<sup>313</sup> China is still going to evaluate the legal changes because it undertook to bring its commercial legal regime into line with WTO obligations, but the whole process may take a long time.

<sup>310</sup> Petersen 1996:388.

<sup>311</sup> Kennedy 2005:408.

<sup>312</sup> See e.g.:

China's antidumping targets (as of 31 March 2005)

Region	Number of cases
South Korea	25
Japan	21
United States	18
EU(or member)	18
Russia	8
Taiwan	7
Other(10 countries)	15

Source: Kennedy 2005:408.

<sup>313</sup> Ross and Ning 2000:33.

## **Chapter 4**

### **Antidumping substantive laws**

#### **4.1 Introduction**

Antidumping substantive law is symmetrized to antidumping procedural law. Substantive law refers to the legal provisions that adjust each kind of legal relationship incurred in dumping and antidumping between privies.<sup>314</sup> It includes: determination of dumping, determination of injury, the cause and effect relation of dumping and injury, and basic standards for adopting antidumping measures. Not only international antidumping agreements, but also each country's antidumping laws, such as that of the European Union, the U.S.A., Japan, Canada, Australia, South Africa, and China reflect this content.

In this chapter, the constitution and nature of international antidumping regulations will be analysed. Some problems pertaining to antidumping substantive laws will be discussed. Normal value, export price, dumping margin and injury will be determined by comparing the provisions of South Africa's, China's and the US's antidumping laws, because America's antidumping laws are the most comprehensive in the world. Then the focus will shift to the domestic industry and captive production, a new controversial problem in the antidumping field.

#### **4.2 Constitution and nature of dumping**

The premise and the basis for adopting antidumping measures is that the act of dumping has occurred.<sup>315</sup> Determining whether importation is dumping or not, necessitates a definition of dumping. As indicated in the preceding chapter, international antidumping agreements include Article 6 of GATT 1947, the Antidumping Code of 1967, the Antidumping Code of 1979, and the WTO Antidumping Agreement 1994.<sup>316</sup> Because the Antidumping Code of 1967 and the Antidumping Code of 1979 only restrained the parties to the code, they did not have a universal binding force.<sup>317</sup> Only Article 6 of GATT 1994 and the WTO Antidumping Agreement of 1994 can be used in current international antidumping litigation.

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<sup>314</sup> Shen Muzhu 2002: 490.

<sup>315</sup> Shang Ming 2003:21.

<sup>316</sup> It means Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994.

<sup>317</sup> See chapter 3, section 3.3.1.2 and section 3.3.1.3, above.

The first provision of the WTO Antidumping Agreement of 1994 reads:

An antidumping measure shall be applied only under the circumstances provided for in Article 6 of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.<sup>318</sup>

These provisions govern how to implement Article 6 of GATT 1994 in practice. Article 6 of GATT 1994 is the basic provision of antidumping, but it needs a set of detailed legal rules to be implemented.<sup>319</sup> The WTO Antidumping Agreement of 1994 provides these detailed legal rules to implement antidumping laws.<sup>320</sup>

The definition of dumping was given in Chapter 2, but might be elaborated upon here. Article 6 of the GATT 1947 reads:

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.<sup>321</sup>

This definition indicates that the constitution of dumping consists of three conditions:

- The price is less than the normal value of the products;<sup>322</sup>
- There is a cause or threat of material injury to a domestic industry that produces like products, or a material retardation to the establishment of such a domestic industry;<sup>323</sup>
- There is a causal relation between sales under the normal

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<sup>318</sup> These provisions refer to determination of dumping, determination of injury, definition of domestic industry, initiation and conduct of investigation, and antidumping measures. See <http://www.wto.org>. Jackson and Vermulst 1990:9.

<sup>319</sup> Shen Muzhu 2002: 491; Shang Ming 2003:21; Ostoni 2005:408.

<sup>320</sup> The Article 6 of the GATT 1947: sec 1.

<sup>321</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994: Article 2.1. <http://www.wto.org>.

<sup>322</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994: Article 3. And Note:9.

value and injury.<sup>324</sup>

The WTO Antidumping Agreement 1994 defines dumping as follows:

“[A] product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country”.<sup>325</sup>

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

America’s antidumping law uses fair value to replace normal value. South Africa defines dumping as “the introduction of goods into the commerce of the Republic or the Common Customs Area at an export price that is less than the normal value of those goods”<sup>326</sup>. According to China, dumping refers to practices “in the ordinary course of trade, [where] products are introduced into the commerce of the People’s Republic of China at an export price that is less than the normal value of those products”.<sup>327</sup>

In summary, although each definition differs, they all show that firstly the normal value of a product should be determined; secondly the export price of the product; and thirdly both prices should be compared. If the export price is less than the normal value, dumping is constituted. The difference between the two prices is the dumping margin.

### **4.3 Determination of normal value**

The WTO Antidumping Agreement of 1994 stipulates three basic pricing methods to determine normal value: (a) comparable price, that is home market price; (b) export price for third party; and (c)

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<sup>324</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994: Article 7.1. (iii).

<sup>325</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994: Article 2.1.

<sup>326</sup> The International Trade Administration Act 2002: Chapter 1. <http://www.itac.org.za>

<sup>327</sup> People’s Republic of China Antidumping Statute 2001: sec 3.

constructed value.

#### 4.3.1 Comparable price (home market price)

Comparable price refers to the selling price that, in the ordinary course of trade, the like product when destined for consumption, is sold in the exporting country's domestic market by usual sales volume.<sup>328</sup> It is also called "home market price". Article 6 of GATT 1947, the WTO Antidumping Agreement of 1994, the antidumping laws of South Africa and China, all take comparable price as the first method to determine the normal value.

However, before the normal value can be determined by using the home market price, we have to understand three problems:

First, what is "like product"? It "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".<sup>329</sup> South Africa and China define "like product" in the same way in their antidumping laws. South Africa, however, prescribes more details concerning "closely resembling characteristics". It has seven provisions. The Regulation states:

In determining whether the product has characteristics closely resembling those of the product under consideration the Commission may consider- (i) the raw materials and other inputs used in producing the products; (ii) the production process; (iii) physical characteristics and appearance of the product; (iv) the end-use of the product; (v) the substitutability of the production with the product under investigation; (vi) tariff classification; and/or (vii) any other factor proven to the satisfaction of the Commission to be relevant.<sup>330</sup>

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<sup>328</sup> Bryan and Boursereau 1984-1985:640. See also Seastrum and Alagiri 1995:504-506 on the influence of taxation on the determination of the price of the product. In the USA the foreign taxations paid on a product in the foreign country may not be deducted to determine the home market price of the goods.

<sup>329</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.6. See also Adamantopoulos and Notaris 2000-2001:36.

<sup>330</sup> The International Trade Administration Commission Antidumping Regulation (hereinafter South Africa Antidumping Regulations): Part A. 1. <http://www.itac.org.za>

However, not only the WTO Antidumping Agreement, but also the antidumping laws of South Africa and China, does not take the problem of “captive production” into consideration. When captive production is considered in the case of “like product”, it will affect the extent and the quantities of the like product that is impacted upon by the suspected dumping product; it will also affect how to define the extent of the domestic industry. The American and European Union’s antidumping laws by contrast provide for captive production in more detail. Especially the EU has a pertinent clause on captive production.<sup>331</sup>

Second, what is “usual sales volume”? It refers to “sales of the like product destined for consumption in the domestic market of the exporting country [and] shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison”.<sup>332</sup>

Thirdly, what is the “ordinary course of trade”? Although the phrase “ordinary course of trade” is not directly defined in the Agreement,<sup>333</sup> some examples of transactions that are not considered to be in the ordinary course of trade are provided. First, if the authorities of the importing countries “determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time”, then the sales may be considered not to have been made in the ordinary course of trade.<sup>334</sup> Second, if the trading parties are associated or have entered into a compensatory arrangement with each other, then sales are considered not to have been made in the ordinary course of trade.<sup>335</sup> In addition, if there is a sale in a nonmarket economy (NME) country, it will be also looked on as a non-ordinary course

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<sup>331</sup> This will be discussed later in this chapter.

<sup>332</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2, Notes: 2.

<sup>333</sup> The Agreement refers to Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994.

<sup>334</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.2.1. See also Bryan and Boursereau 1984-1985:641.

<sup>335</sup> Bryan and Boursereau 1984-1985:641.

of trade transaction.<sup>336</sup>

South Africa's Antidumping Regulations use the same way to define "ordinary course of trade" as in Article 2.2.1 of the WTO Antidumping Agreement. The Regulations state:

Domestic sales or export sales to a third country may be considered to be not in the ordinary course of trade if the Commission determines that such sales-

- (a) took place at prices below total costs, including cost of production and administrative, selling, general and packaging costs, provided such sales took place-
  - (i) in substantial quantities equaling at least 20 per cent by volume of total domestic sales during the investigation period; and
  - (ii) over an extended period of time, which period shall normally be a year, but in no case less than 6 months;
- (b) were made to a related party; or
- (c) do not reflect normal commercial quantities.<sup>337</sup>

However, what is the "normal commercial quantities"? There is no stipulation in the Regulations. It will depend on the Commission's explanation.

The China Antidumping Statute 2002 follows the WTO Antidumping Agreement and requires that domestic sales, used in the calculation of normal value, be in the ordinary course of trade.<sup>338</sup> However the China Antidumping Statute 2002 does not offer a definition of "ordinary course of trade" as in the Article 2.2.1 of the WTO Antidumping Agreement. The absence of a definition of "the ordinary course of trade" in the Statute therefore raises the possibility that Chinese authorities may include all sales in the calculation of normal value,<sup>339</sup> a practice inconsistent with the

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<sup>336</sup> Shen Muzhu 2002: 493; Bryan and Boursereau 1984-1985:643.

<sup>337</sup> The International Trade Administration Commission Antidumping Regulations 2003:Section 8.2.

<sup>338</sup> The China Antidumping Statute 2002:Article 3.

<sup>339</sup> Before the March of 2003, there were mainly two governmental departments involved in antidumping investigations including Ministry of Foreign Trade and Economic Cooperation (MOFTEC) and State Economic and Trade Commission (SETC). Specifically, MOFTEC was responsible for calculating the margin of dumping and the determination of the appropriate remedial duties and SETC was to assess the injurious effect of the dumping on the domestic industry. However, according to a plan submitted by the State Council for streamlining government departments on the third

WTO standards.<sup>340</sup>

In the *Cold-rolled Silicon Steel Sheet* case,<sup>341</sup> Ministry of Foreign Trade and Economic Cooperation (MOFTEC) simply stated that: " ... has sufficient sales in the ordinary course of trade in domestic market, thus the price is comparable..." without any further explanations.<sup>342</sup> This creates significant uncertainty in how the Chinese law, in this respect, will be enforced.<sup>343</sup>

From 2002, Chinese authorities began to include the examination of sales "in the ordinary course of trade" in almost every case.<sup>344</sup> In the *L-Lysine HCL Feed Grade* case,<sup>345</sup> MOFTEC determined that the sales below cost made by the Indonesia ADM Company constituted 14% of its total sales in the domestic market, thus this part of sales was not excluded in the calculation of normal value.<sup>346</sup>

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plenary meeting held by the first session of the 10<sup>th</sup> National People's Congress, MOFTEC and SETC were merged into the Ministry of Commerce (MOC) on 10 March 2003. Now the newly established MOC is solely responsible for issues concerning antidumping, countervailing and safeguard measures. Inside MOC, the Bureau of Fair Trade for Imports and Exports and the Bureau of Industry Injury Investigation are responsible for the investigations of dumping and injury respectively. For more detail information, see the website of the MOC <http://english.mofcom.gov.cn/departments.shtml>.

<sup>340</sup> Li Yang 2003:5.

<sup>341</sup> See Announcement No. 13, 1999 of MOFTEC, Preliminary Determination of Antidumping Investigation on Cold-rolled Silicon Steel Sheet Originating in Russia (30 December 1999). On 8 December 1998, the only producer of silicon steel products in China, namely the Wuhan Steel Group Company filed a petition with MOFTEC against cold-rolled silicon steel products imported from Russia. The investigation was initiated on 12 March 1999 and an affirmative preliminary determination was rendered on 30 December 1999. The dumping margins were 11%-73% and were later adjusted to 6%-62% in the final determination.

<sup>342</sup> See Announcement No. 13, 1999 of MOFTEC, Preliminary Determination of Antidumping Investigation on Cold-rolled Silicon Steel Sheet Originating in Russia (30 December 1999).

<sup>343</sup> Li Yang 2003:6.

<sup>344</sup> Li Yang 2003:6.

<sup>345</sup> See Announcement No. 23, 2002 of MOFTEC, Preliminary Determination of Antidumping Investigation on L-Lysine HCL Feed Grade Originating in the U.S., Korea and Indonesia (29 September 2002). On 17 May 2001, three domestic producers filed a petition with MOFTEC against imports of L-Lysine Monohydrochloride Feed Grade from the U.S., Korea and Indonesia. MOFTEC decided to initiate investigations on 19 June 2001. The investigation was terminated on 29 September 2002 upon a negative preliminary determination.

<sup>346</sup> See Announcement No. 23, 2002 of MOFTEC, Preliminary Determination of Antidumping Investigation on L-Lysine HCL Feed Grade Originating in the U.S., Korea and Indonesia (29 September 2002).

In the *Coated Art Paper* case,<sup>347</sup> MOFTEC determined that the sales below cost of three types of papers made by Korea's Shinho Paper Mfg. Co, Ltd., constituted 58%, 77% and 82% of the total sales in the domestic market respectively, thus could not be considered as sales in the ordinary course of trade and were excluded in the calculation of normal value.<sup>348</sup>

Thus from the practices, it seems that though without explicit definition and provisions with respect to the ordinary course of trade, the Chinese authorities are following the WTO Antidumping Agreement in considering whether the sales are made in the ordinary course of trade. But it is still necessary that the Chinese authorities indicate what standards are, in fact, being followed in their investigations.<sup>349</sup>

According to the WTO Antidumping Agreement, if "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",<sup>350</sup> the normal value of the like product can be determined by using the export price for the third country or the constructed value.<sup>351</sup>

Therefore, when an authority determines the normal value by using the home market price, there are three conditions: (a) the domestic market must have a like product,<sup>352</sup> (b) the selling volume of the like product must constitute 5 per cent or more of the selling

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<sup>347</sup> See Announcement No. 45, 2002 of MOFTEC, Preliminary Determination of Antidumping Investigation on Coated Art Paper Originating in Korea, Japan, the U.S. and Finland (26 November 2002). Four major Chinese paper plants filed a petition with MOFTEC against coated art paper imported from Korea, Japan, the U.S. and Finland on 29 December 2001. The investigation was initiated on 6 February 2002. The dumping margins determined in the preliminary determination were 5.58%-71.02%.

<sup>348</sup> See Announcement No. 45, 2002 of MOFTEC, Preliminary Determination of Antidumping Investigation on Coated Art Paper Originating in Korea, Japan, the U.S. and Finland (26 November 2002).

<sup>349</sup> Li Yang 2003:7.

<sup>350</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.2.

<sup>351</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.2.

<sup>352</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.1.

volume of the importing country,<sup>353</sup> and (c) the sales of the like product must be in the ordinary course of trade.<sup>354</sup>

In summary, although there are a variety of methods to determine the normal value, the authority cannot choose freely. Legally it has to choose the home market price first. Only when there is no home market price, the export price for the third country or the constructed value can be considered.<sup>355</sup>

#### 4.3.2 The third country price

When there is no comparable price in the home market, the export price for which like products are exported to a third country can be used to determine the normal value. South Africa and China have the same provisions as the WTO Antidumping Agreement on this question. In the South African antidumping law, the export price is prescribed as: “the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative”.<sup>356</sup> But how should one understand “appropriate” and “representative”. These two terms in the International Trade Administration Act do not have a fixed and unified meaning. In practice, the determination of export price depends on the antidumping authority’s discretion. Yet the export price for the third country frequently becomes an important factor in coping with products from a nonmarket economy country.<sup>357</sup>

#### 4.3.3 Constructed value

Constructed value refers to “the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits”.<sup>358</sup> When home market price and export price for the third country do not agree with the requirements and cannot be compared, the antidumping authority can use a constructed value to determine the normal value.<sup>359</sup>

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<sup>353</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.2. Note:2.

<sup>354</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.1.

<sup>355</sup> Bryan and Boursereau 1984-1985:641-642.

<sup>356</sup> The International Trade Administration Act: Section 32 (b) (ii) (bb).

<sup>357</sup> Petersen 1996:398.

<sup>358</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.2.

<sup>359</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.2.

Constructed value consists of three parts: First, the costs of production. Production cost includes costs of raw materials, costs of process and production, wages, workshop rent, and equipment service and maintenance expense. Costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country, and reasonably reflect the costs associated with the production and sale of the product under investigation.<sup>360</sup> Secondly, reasonable amounts for administrative, selling and general costs. This consideration refers to other costs besides costs of production. It shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.<sup>361</sup> And thirdly, reasonable profits. This means the general profits realized by the exporter or producer in question, selling the like product in the domestic market of the country of origin. However, the WTO Antidumping Agreement does not set out a methodology for establishing a profit margin (i.e., it remains silent as to how to express such amounts as a margin, for example, as a percentage of turnover or on cost of production).<sup>362</sup> The reasonable profit margin in America is usually about 8 per cent;<sup>363</sup> and in the European Union it is 5 per cent. South Africa describes profit in a detailed way, but has not got an actual figure. South Africa Antidumping Regulations states:

The reasonable profit margin that is included in the constructed normal value shall normally be determined-

- (a) with reference to the actual profit realized on sales of the product under investigation; or
- (b) with reference to the actual profit realized on sales of the narrowest range of products that can be identified; or
- (c) with reference to the average such actual profit realized by other sellers on sales of the same category of products in that market if the profit margin cannot be properly isolated from the information kept by the producer under investigation; or

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<sup>360</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.2.1.1

<sup>361</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.2.2.

<sup>362</sup> Adamantopoulos and Notaris 2000-2001:50.

<sup>363</sup> Jackson and Vermulst 1990:146; Macrory and Vermulst and Waer 1991:90.

(d) on any other reasonable basis;  
provided that the profit so included shall normally be based on the actual profit realized on sales before extraordinary items, interest, tax and any other circumstances that may affect such profit margin.<sup>364</sup>

China has not got a provision to deal with it.

In order to guarantee the authenticity of the constructed value, the WTO Antidumping Agreement emphasizes that the amounts for all kinds of costs and for profits shall be incurred in the ordinary course of the trade, and “the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin”.<sup>365</sup> Otherwise, these costs cannot be the basis of determining the normal value. But without a clear methodology, these provisions still leave the discretion to administering authorities. So further specifying this procedure in Article 2 of the WTO Antidumping Agreement would greatly reduce discretion in the calculation of constructed normal value.<sup>366</sup>

#### **4.4 Two problems of determining normal value**

##### **4.4.1 Sales at price below cost of production**

The WTO Antidumping Agreement has made quite adequate provisions regarding sale at prices below cost of production, and made up for the flaw of the old agreements in this respect.

In 1974, America introduced the concept of “sale at price below cost of production” in its Trade Act.<sup>367</sup> During the Uruguay MTN Round, sale at price below cost of production was officially brought into line with in the WTO Agreement.<sup>368</sup> Article 2 reads:

Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production

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<sup>364</sup> South Africa Antidumping Regulations: Section 8.13  
<sup>365</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.2. (b) (iii)  
<sup>366</sup> Adamantopoulos and Notaris 2000-2001:51.  
<sup>367</sup> Shang Ming 2003:24; Jackson and Vermulst 1990:134.  
<sup>368</sup> Refers to Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994.

plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time.<sup>369</sup>

“Sales below per unit costs are made in substantial quantities” means that “the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.”<sup>370</sup> In this situation, the importing country needs not to consider this part of sales below the costs of production; it can just use the selling price of the other part of sales to determine the normal value. If the domestic sales below the costs of production cannot be considered to determine the normal value, authorities can use a representative price of a like product when exported to an appropriate third country to replace the normal value, or use the constructed value to calculate the normal value.<sup>371</sup>

However, at the same time the WTO Antidumping Agreement indicates that “if prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.”<sup>372</sup> This implies that the sales in this situation cannot be looked on as the sales below the costs of production.<sup>373</sup>

In addition, the WTO Antidumping Agreement prescribes more regulations about how to calculate costs, expenses and profits. From these, it is clear that the costs of production will play an

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<sup>369</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.2.1.

<sup>370</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2. Note: 5

<sup>371</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.2.

<sup>372</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.2.1.

<sup>373</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.2.1.

increasingly vital role in antidumping investigations.<sup>374</sup>

#### 4.4.2 Nonmarket economy countries

As discussed in section 4.3, each kind of price standard that can be used to determine the normal value, must be on the basis of the ordinary transaction, and must depend on merchandise supply and demand relations under fair competition. The question, however, is how to determine the normal value of products that come from a nonmarket economy country.<sup>375</sup>

Before the problem is discussed, it is necessary to determine what a “nonmarket economy country” is. The WTO Antidumping Agreement restates the content of Article 6 of GATT about this problem.<sup>376</sup> It reads:

In the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1 [hidden dumping by associated houses-MT], and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.<sup>377</sup>

But this provision of GATT just states the problem; it does not prescribe the standards to solve it, and has no other specific stipulation for the problem.<sup>378</sup>

For this problem, South Africa prescribes:

If the Commission, when evaluating an application concerning dumping, concludes that the normal value of the goods in question is, as a result of government intervention in the exporting country or country of origin, not determined according to free market principles, the

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<sup>374</sup> Shen Muzhu 2002:495.

<sup>375</sup> See Chapter4, section4.3, above.

<sup>376</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.7

<sup>377</sup> The Article 6 of the General Agreement on Tariffs and Trade: Ad Article 6. Paragraph 2.

<sup>378</sup> Shen Muzhu 2002:495-499.

Commission may apply to those goods a normal value of the goods, established in respect of a third surrogate country.<sup>379</sup>

This provision is a way to solve the problem: choose a third or surrogate country. But it raises several serious issues. First, what is “government intervention”? What are the criteria for the extent and the degree of government intervention? Second, it also does not prescribe a specific criterion to determine a nonmarket economy. It just uses the description “according to free market principles”. But what are the free market principles? The term does not appear in any listing of statutory definitions.<sup>380</sup> This provision will therefore rely on the International Trade Administration Commission (ITAC) discretion. Third, what are the criteria of establishing a third country or surrogate country? The International Trade Administration Act (the Act) and Antidumping Regulations have no stipulation on it. Fourth, when there is not an available third or surrogate country which can be used, what is the ITAC going to do? The International Trade Administration Act and Antidumping Regulations also have no stipulation on this. Therefore, it is necessary to formulate an alternative method in the Act to use when an appropriate surrogate country cannot be located.<sup>381</sup>

In practice, Russia and China are the two most notable cases subjected to nonmarket economy treatment by ITAC.<sup>382</sup> In terms of volume of trade and perceptions of competition against low price imports by South African producers, China is considered to be the most important source of unfair trade originating in a nonmarket economy. But China’s accession to the WTO and the development of bilateral relationships between South Africa and China have made the latter’s nonmarket economy status controversial. If a Chinese company is granted market economy treatment, the ITAC has a discretionary power to choose using the domestic selling price for a normal value or price build-up.<sup>383</sup>

In contrast with South Africa, the American Antidumping and Countervailing Duty Statutes (the Statutes),<sup>384</sup> while prescribing

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<sup>379</sup> The International Trade Administration Act: Section 32 (4).

<sup>380</sup> Petersen 1996:400.

<sup>381</sup> Lantz 1994-1995:1003.

<sup>382</sup> Barral ea 2005:61.

<sup>383</sup> Barral ea 2005:61.

<sup>384</sup> Antidumping and Countervailing Duty Statutes, 19 U.S.C. §§1671-1677n. (from the Tariff Act of 1930, as amended)

the determination of the normal value, have made the following four stipulations concerning products that come from a nonmarket economy country.<sup>385</sup>

First, prescribing the definition of nonmarket economy country, the Statutes state: “The term ‘non-market economy country’ means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such a country do not reflect the fair value of the merchandise.”<sup>386</sup>

Secondly, when the administering authority makes a determination of a nonmarket economy country, the Statutes name several factors that the administering authority should consider. These factors include: “the extent to which the currency of the foreign country is convertible into the currency of other countries; the extent to which wage rates in the foreign country are determined by free bargaining between labor and management; the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country; the extent of government ownership or control of the means of production; the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and such other factors as the administering authority considers appropriate.”<sup>387</sup>

Thirdly, the administering authority can use a surrogate country method.<sup>388</sup> The Statutes state:” [...] the administering authority shall determine the normal value on the basis of the price at which merchandise [...] is sold in other countries, including the United States.”<sup>389</sup> Specifically, the Statutes have two criteria to determine the merchandise which is sold in other countries or the U.S. One is that the merchandise is “comparable to the subject merchandise”.<sup>390</sup> The other is that the merchandise is “produced in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket

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<sup>385</sup> Shen Muzhu 2002:497-498.

<sup>386</sup> Antidumping and Countervailing Duty Statutes, (from the Tariff Act of 1930, as amended) 19 U.S.C. §1677. (18) (A).

<sup>387</sup> Antidumping and Countervailing Duty Statutes, 19 U.S.C. §1677. (18) (B).

<sup>388</sup> Antidumping and Countervailing Duty Statutes, 19 U.S.C. §1677b. (c) (2).

<sup>389</sup> Antidumping and Countervailing Duty Statutes, 19 U.S.C. §1677b. (c) (2).

<sup>390</sup> Antidumping and Countervailing Duty Statutes, 19 U.S.C. §1677b. (c) (2)(A).

economy country”.<sup>391</sup>

Fourthly, the administering authority can use the factors of production approach.<sup>392</sup> The Statutes state:

If-

- (A) the subject merchandise is exported from a nonmarket economy country, and
- (B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a),

the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. [...], the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.<sup>393</sup>

The Statutes stipulate four aspects for the factors of production:

[...], the factors of production utilized in producing merchandise include, but are not limited to –

- (A) hours of labor required,
- (B) quantities of raw materials employed,
- (C) amounts of energy and other utilities consumed, and
- (D) representative capital cost, including depreciation.<sup>394</sup>

An example is *Lasko Metal Products v. United States Case*.<sup>395</sup> In this case involving ceiling fans from the People’s Republic of

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<sup>391</sup> Antidumping and Countervailing Duty Statutes, 19 U.S.C. §1677b. (c) (2)(B).

<sup>392</sup> Antidumping and Countervailing Duty Statutes, 19 U.S.C. §1677b. (c) (1). See also Lantz 1994-1995:1003-1004.

<sup>393</sup> Antidumping and Countervailing Duty Statutes, 19 U.S.C. §1677b. (c) (1).

<sup>394</sup> Antidumping and Countervailing Duty Statutes, 19 U.S.C. §1677b. (c) (3).

<sup>395</sup> 16 Court of International Trade 1079 (1992).

China, the DOC applied a factor of production approach using surrogate country values to build up an estimated foreign market value.<sup>396</sup> The DOC based its calculations both on information from surrogate countries (Pakistan and/or India) and on prices paid by Chinese manufacturers for raw materials imported from market economy countries. Finally, the Court of International Trade (CIT) affirmed the DOC's "mix-and-match" methodology for valuing factors of production in an antidumping investigation involving a nonmarket economy.<sup>397</sup>

Although the U.S.'s antidumping provisions, with respect to a nonmarket economy country, are more comprehensive than South Africa's, they are still facing some difficulties, such as the problem with a nonmarket economy country in transition. And using both methods often results in a higher dumping margin for the nonmarket economy country's products.<sup>398</sup>

The Chinese Antidumping Statute does not make a provision for calculating prices in a nonmarket economy country.<sup>399</sup> The reason might be its status as a nonmarket economy. Since Russia's graduation in 2002 by the U.S. and the EC, China is now the most notable country still being considered a nonmarket economy. This has had a significant effect on the levels of dumping found in investigations of Chinese exports.<sup>400</sup>

#### **4.5 Determination of export price**

Export price is another important aspect to judge dumping and the dumping margin. Export price means the price actually paid or payable for goods, which are exported to another country by an exporter or producer.<sup>401</sup> It is, then, the price for goods that are sold to the importer by the exporter.<sup>402</sup>

In determining the export price, the WTO Antidumping Agreement has inherited the methods of the Antidumping Code of 1979. The

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<sup>396</sup> 16 Court of International Trade 1080 (1992).

<sup>397</sup> 16 Court of International Trade 1079 (1992). See also Seastrum and Alagiri 1995:510. For a discussion of the DOC using both market economy and nonmarket economy information to value the factors of production needed to calculate foreign market value.

<sup>398</sup> For detailed explanation, see Lantz 1994-1995a:1004-1008; 1994-1995b:1030-1050.

<sup>399</sup> Ross and Ning 2000:30.

<sup>400</sup> Barral ea 2005:33.

<sup>401</sup> Bryan and Boursereau 1984-1985:644.

<sup>402</sup> Corr 1997:80.

export price can be:

- The actual price paid to the exporter.
- The selling price at which the imported products are first resold to an independent buyer. If there is an association or a compensatory arrangement between the exporter and the importer or a third party, the authorities concerned deem that the export price is unreliable.<sup>403</sup>
- Another price determined on a reasonable basis. This only happens if the products are not resold or not resold in the condition as imported.<sup>404</sup> The question is how to understand “reasonable basis”. The WTO Antidumping Agreement has no prescription.

These three methods must be used in turn. The U.S.A., the E.U., South Africa and China have the same content as the WTO Antidumping Agreement in their antidumping laws.<sup>405</sup>

#### **4.6 Determination of the dumping margin**

After the normal value and the export price are determined, they must be compared with each other to establish the size of the dumping margin, if there is one. The dumping margin is the difference between the normal value and the export price.<sup>406</sup> As part of the dumping determination, dumping margin must be calculated as accurately as possible to assess an antidumping duty equal to the amount by which the normal value exceeds the export price.<sup>407</sup> This is an indication of how serious the dumping is. The dumping margin also serves as an upper limit to the antidumping measures.<sup>408</sup> In order to make a fair comparison, what has to be considered in this context is price adjustment and the adopting of the methods of comparison.

##### **4.6.1 Price adjustment**

In early Canadian antidumping practices, the authority merely

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<sup>403</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994: Article 2.3.

<sup>404</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.3.

<sup>405</sup> Bryan and Boursereau 1984-1985:644-645.

<sup>406</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994: Article 2.4.2. See also Bhala 1995:10.

<sup>407</sup> Lantz 1994-1995:998; Oudsten 1989:328.

<sup>408</sup> Oudsten 1989:328.

compared the export and import invoice prices which are submitted to customs.<sup>409</sup> But comparison of normal value and export price is not a simple matter. To compare the price figures from two different markets needs to be fair. The normal value and the export price are two different selling prices in two markets. They differ not only in trade links, but also in the levels and channels of trade.<sup>410</sup> For example: When home market price is used as the normal value, this price does not include the related expense of exportation. But for export price, it may include not only the related expense of exportation, but also the related expense of importation. Therefore, the authority must make some adjustment to these prices and make them comparable. In many antidumping cases, particularly those involving consumer products or sophisticated industrial products, the identification, verification, and computation of these adjustments becomes extremely important.<sup>411</sup>

#### 4.6.2 Methods of comparison

The WTO Antidumping Agreement prescribes detailed regulations about this problem. After the normal value of the product under consideration and the export price are determined and adjusted, the WTO Antidumping Agreement distinguishes three methods of comparison:

- A comparison between a weighted average normal value with a weighted average of prices of all comparable export transactions;
- A comparison between normal value with export price on a transaction-to-transaction basis; and
- A normal value established on a weighted average basis that may be compared to prices of individual export transactions.<sup>412</sup>

The last method pertains to situations where the authorities find a pattern of export prices that differ significantly among different purchasers, regions or time periods, and where an explanation is provided as to why such differences cannot be taken into account

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<sup>409</sup> Liang HuiXing 2000:18-19.

<sup>410</sup> Bryan and Boursereau 1984-1985:675; Macrory and Vermulst and Waer 1991:93.

<sup>411</sup> Bryan and Boursereau 1984-1985:675; Macrory and Vermulst and Waer 1991:93.

<sup>412</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.4.2.

appropriately by the use of the former two methods.<sup>413</sup>

Finally, normal value and export price shall be compared at “as nearly as possible the same time.”<sup>414</sup>

#### 4.6.3 *De minimis* rule

If after a comparison under the above fair principle consideration and employing the comparison methods, the export price is found to be lower than the normal value, dumping is constituted. The difference between export price and normal value is the dumping margin.<sup>415</sup> If the export price is equal to or higher than the normal value, dumping is not constituted. The dumping margin is then considered as zero. If dumping is constituted, and dumping margin is less than two per cent, the margin of dumping is regarded as *de minimis*.<sup>416</sup> America, the European Union, South Africa and China all accept this *de minimis* consideration in their antidumping laws.

### 4.7 Injury

Even if export products constitute dumping, the authority of the importing country cannot immediately institute antidumping measures unless the dumping causes injury to a domestic industry of the importing country.<sup>417</sup> The aim of adopting antidumping measures is not to punish the action of dumping; it is a remedy for injury to the domestic industry.<sup>418</sup> The scale of this injury has thus to be determined.<sup>419</sup>

According to Article 3 of the WTO Antidumping Agreement,<sup>420</sup> the injury to the importing country’s industry can take on three forms: First, dumping causes material injury to an established industry. Secondly, it threatens material injury to an established industry. Thirdly, it materially retards the establishment of a domestic

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<sup>413</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.4.2.

<sup>414</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 2.4. See also Bryan and Boursereau 1984-1985:647.

<sup>415</sup> Bryan and Boursereau 1984-1985:639.

<sup>416</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 5.8.

<sup>417</sup> Bryan and Boursereau 1984-1985:648; Li Yang 2003:8.

<sup>418</sup> Liang HuiXing 2000:19; Oudsten 1989:329.

<sup>419</sup> Jackson and Vermulst 1990:9.

<sup>420</sup> It is Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994.

industry.<sup>421</sup> As long as the authority can confirm one of these three situations caused by dumping, an antidumping measure can be legally adopted.

The WTO Antidumping Agreement also specifies that a determination of injury 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.<sup>422</sup>

Specifically, an injury determination involves reviewing many different factors, “[n]o one or several of these factors can necessarily give decisive guidance”.<sup>423</sup> According to Bryan and Boursereau, these factors fall within three categories. First, the investigating authorities shall consider whether a significant increase in the volume of dumped imports has occurred.<sup>424</sup> Second, the investigating authorities shall consider whether the price of the dumped imports has undercut significantly the price of a like product sold in the importing country.<sup>425</sup> Third, the investigating authorities shall consider the actual and potential impact the dumped products have or will have on the domestic industry, according to a variety of factors.<sup>426</sup> Such factors may include “actual and potential decline in sales, profits, output, market share, productivity, return on investment, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or

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<sup>421</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade. Article 3. Note:9. See also Bryan and Boursereau 1984-1985a:648; 1984-1985b:679-680; Li Yang 2003:8.

<sup>422</sup> The WTO Antidumping Agreement:Article 3.1

<sup>423</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade. Article 3.2

<sup>424</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade. Article 3.2. In particular, authorities consider whether there has been a significant increase in the volume of dumped imports, either in absolute terms or relative to the production or consumption in the importing country.

<sup>425</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade. Article 3.2. According to Article 3.2, the text states other two situations: the investigating authorities shall consider “[...]whether the effect of such imports is otherwise to depress price to a significant degree or prevent price increase, which otherwise would have occurred, to a significant degree.”

<sup>426</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade. Article 3.4.

investments.”<sup>427</sup> Thus, the concept of injury apparently is so broad that it might include any negative effect found in the importing country.<sup>428</sup>

Comparing the Chinese Antidumping Statutes and the South African Antidumping Regulations with the WTO provisions in respect of determination of injury, it becomes clear that the Chinese Antidumping Statutes are far from being consistent with the WTO Antidumping Agreement and the South African Antidumping Regulations are strictly consistent with the WTO provisions.<sup>429</sup> One defect in the Chinese Antidumping Statutes is that there are no separate criteria for the determination of the existence of material injury, a threat of material injury or a retardation of establishment of industry. Article 8 of the Chinese Antidumping Statutes only enumerates five factors that must be examined in determining whether dumping has caused injury.<sup>430</sup> There are no stipulations with respect to a threat of material injury or a retardation of the establishment of an industry.

In contrast, the South African Antidumping Regulations stipulate detailed standards for three kinds of injuries. Section 13 contains material injury. Section 14 contains threat of material injury. And Section 15 is about material retardation of the establishment of an industry.<sup>431</sup>

#### 4.7.1 Determination of the domestic industry

In all cases, the injury determination is made in reference to a domestic industry.<sup>432</sup> So in the determination of injury, the first step is to define the extent of the domestic industry. Defining this will become increasingly important in international antidumping practices. Although the WTO Antidumping Agreement uses the whole of Article 4 to explain this problem, it is still not sufficient for practical purposes. The next section will consequently focus on this problem.

Article 4 of the WTO Antidumping Agreement retains the definition of domestic industry which was formulated in the Tokyo Round

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<sup>427</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade. Article 3.4.

<sup>428</sup> Bryan and Boursereau 1984-1985:650.

<sup>429</sup> Li Yang 2003:12; Barral ea 2005:61.

<sup>430</sup> The Chinese Antidumping Statutes:Article 8.

<sup>431</sup> The South African Antidumping Regulations:section13-15.

<sup>432</sup> Bryan and Boursereau 1984-1985:650.

Antidumping Regulation of 1979. Article 4 reads: "The term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products." South African antidumping law adheres to this definition. In South African antidumping law, the domestic industry does not only include South African industries, but also the industry of the Southern African Customs Union (SACU).<sup>433</sup> This inclusive meaning is based on the meaning of Article 4.3 of the WTO Antidumping Agreement.<sup>434</sup> But because of the dominating position of South Africa in the SACU market, antidumping investigations are *de facto* concerned with the South African market and South African firms seeking contingent protection.<sup>435</sup>

Remarkably, South Africa does not just define the concept of domestic industry in its Antidumping Regulations. Section 13.4 of the Antidumping Regulations, also indirectly comments on the extent of the domestic industry. Section 13.4 reads:

Each of the factors mentioned in subsection 1 and 2 shall be considered for the product under investigation only or, where such analysis is not possible, for the narrowest group of products for which such analysis can be made. Only if no such information is available will the Commission consider the information for the company as a whole, and then with special circumspection.<sup>436</sup>

This provision raises a serious issue.

According to this provision, the South African International Trade

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<sup>433</sup> The Southern African Customs Union came into existence on 11 December 1969 with the signature of the Customs Union Agreement between South Africa, Botswana, Lesotho, Namibia and Swaziland. It entered into force on the 1<sup>st</sup> of March 1970, thereby replacing the Customs Union Agreement of 1910. On 15 July 2004, a new SACU Agreement came into force that will in time bring about a fairly dramatic change in the way that tariff decisions, including antidumping decisions, are taken. <http://www.dfa.za/foreign/Multilateral/africa/sacu.htm>

<sup>434</sup> The WTO Antidumping Agreement, Article 4.3 states: "Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1."

<sup>435</sup> Barral ea 2005:58.

<sup>436</sup> The South African Antidumping Regulations:section 13.4.

Administration Commission (ITAC) can under certain conditions declare a domestic company or producer as a whole domestic industry. This provision is obviously contrary to the WTO definition of a domestic industry. It is also inconsistent with the definition of a domestic industry in South Africa's own Antidumping Regulations.<sup>437</sup>

The extent of the domestic industry has an important influence on the determination of injury. In general, if the extent of the domestic industry is determined narrower, the possibility of injury to the domestic industry is bigger. Contrarily, if the extent is determined wider, the possibility is smaller. This leads to the conclusion that this provision is not fair to the exporters or foreign producers of the products under investigation.

One balancing provision is that when the Commission takes a company or producer to represent the whole domestic industry, it must indicate that the production of the like product of the company or producer should constitute a major proportion of the total domestic production of the like products.<sup>438</sup> The Commission should use the provision of sole manufacturing with restraint.

In international antidumping practices, each country's authority tries to implement a narrow definition of the extent of the domestic industry, in order to achieve the goal of protecting the domestic industry from injury. For example, in the antidumping case of America against the Japanese beeper machine, the American International Trade Commission, strictly according to physical characteristics, determined that the digital beeper machine and the common beeper machine are not like products. The domestic industry in this case then only consisted of the Motorola Company.

Two exceptions must be noted. First, if some domestic producers are associated with the exporters or importers, or if they themselves are the importers of dumped products, such producers may be excluded from the domestic industry.<sup>439</sup> Second, in

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<sup>437</sup> South Africa Antidumping Regulations: Part A- Definitions.

<sup>438</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade. Article 4.1

<sup>439</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 4.1 (i). Also see Bryan and Boursereau 1984-1985:651. For a more specific interpretation, Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade, Article 4.1 (i). Note 11 states: "For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or

exceptional circumstances, "the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory."<sup>440</sup>

In practice, the use of the regional market imposes a more rigorous standard of determining material injury or threat of material injury. When using a regional industry analysis, the authorities of an importing country must find material injury or threat of material injury with respect to all or almost all of the domestic production within the region, while it must find injury or threat thereof to only a major proportion of producers when the industry spans the whole country. A regional industry injury analysis permits an affirmative injury determination even when the domestic industry as a whole is not injured, but requires a higher incidence of injury.<sup>441</sup>

#### 4.7.2 Captive production and the determination of the domestic industry

In recent years, the captive production problem has become increasingly prominent in international antidumping practice. Examples are the 1991 Gimelec case (European Union),<sup>442</sup> the 1992 Tomato product case (Canada),<sup>443</sup> the 1999 U.S.-Japan Hot-Rolled Steel Products case (America),<sup>444</sup> and the 2000 Hot-Rolled Coils Products case (European Union).<sup>445</sup>

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indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter."

<sup>440</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 4.1 (ii). Also see Bryan and Boursereau 1984-1985a:651; 1984-1985b:679.

<sup>441</sup> Bryan and Boursereau 1984-1985:679.

<sup>442</sup> See E.U. Court. No.C-315/90. 1991.

<sup>443</sup> NQ-92-006.

<sup>444</sup> See USITC Publication 1999:3202.

<sup>445</sup> See E.U. CD. No.283/2000/ECSC. and CD. No.284/2000/ECSC. ECSC refers to the European Coal and Steel Community.

Captive production refers to the practice where a producer internally directs a part of a semifinished product to a downstream manufacturing process. In general, captive production has three characteristics:

- It must be the result of an associated transaction between the different production departments of an enterprise, or between the different affiliated enterprises of a corporation.
- The price of captive production is rarely affected by market price rules.
- The part of a semifinished product has been transformed into a distinct product.

This semifinished product typically circulates between associated production departments or affiliated enterprises. Canada calls it “inside production”, and America and the European Union call it a “captive market”. But in fact, it is not an unalloyed market. Opposite to a captive market, the European Union calls it a “free market” for the semifinished product. America calls it a “merchant market”. This implies that the semifinished product does not circulate between associated production departments or affiliated enterprises, but enters circulation links where price is calculated under market price rules to be sold to independent buyers.

Captive production is considered as a category of like product. It will not only affect the extent and quantity of the like product, but also the determination of the extent of the domestic industry. Therefore, it directly relates to: (a) whether the applicant represents the domestic industry,<sup>446</sup> and (b) whether dumping harms the domestic industry of the like product. In general, if the captive production is considered in the category of the like product, the extent of the domestic industry is bigger. The possibility of the injury which dumping causes to the domestic industry is therefore smaller. Contrarily, if the captive production is not considered in the category of like product, the extent of domestic industry is smaller, and the possibility of the injury is bigger.<sup>447</sup> In practice, the application parties often ask the authority not to consider the “captive market”, but only use the “free market” or “merchant market”. The appellee parties often make the request to use both. The authorities in turn, often prefer

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<sup>446</sup> Jackson and Vermulst 1990:148.

<sup>447</sup> See above section 4.3.1

not to use captive production in order to safeguard their domestic industry.

An authority cannot selfishly adopt a protectionist attitude. Investigations must progress under the requirements of the WTO. These requirements of the WTO and the decisions of the WTO Dispute Settlement Body (DSB) on how to treat captive production fall into two categories: the American mode and the European Union mode.

The American Tariff Act of 1930 reads:

If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that-

- (1) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product,
- (2) the domestic like product is the predominant material input in the production of that downstream article, and
- (3) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article,

then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii) [impact on affected domestic industry-MT], shall focus primarily on the merchant market for the domestic like product.<sup>448</sup>

If the International Trade Commission investigates injury to the domestic industry - for example if they find some vertically-integrated American producers selling significant volumes of like product in the merchant market, and at the same time they also internally transfer a significant volume of like product to a downstream link to process into a distinct article - then the Commission will use the Captive Production Clause.<sup>449</sup>

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<sup>448</sup> Antidumping and Countervailing Duty Statutes, 19 U.S.C. §1677. ( 7) (C) (iv). See also Chung 1994-1995:512.

<sup>449</sup> See The first bill of defense: U.S.-Japan hot-rolled steel products case. 1999. pA-197-200.

According to Wang Hengtao, the Captive Production Clause is subject to four requirements:<sup>450</sup>

First, the International Trade Commission should determine that there is a significant volume of like products sold in the merchant market by domestic producers. At the same time, there should be a significant volume of like products used to process into a distinct downstream article in the captive market by domestic producers themselves. (However, the International Trade Commission has not given an explanation for “significant volume”. What quantities are significant? To decide this the authority has a discretionary power.)

Second, the International Trade Commission should determine whether the domestic like products that are internally produced as a downstream article did enter the merchant market.

Third, the International Trade Commission should determine that the domestic like product, which is sold in the merchant market, is not used to process a downstream article.

Fourth, the International Trade Commission should determine whether the domestic like product is the main raw and processed material in the production of a downstream article.<sup>451</sup>

After the above four requirements are met, the International Trade Commission can focus primarily on the merchant market for the domestic like product to determine market share and the factors affecting financial performance.

The decision of the International Trade Commission in the case of the Japan Exports of Hot-Rolled Steel Products reflects the actual modus of the American authority. When the International Trade Commission analysed the whole market data, they focused primarily on the merchant market, but did not analyse the captive market. On this point, Japan reacted by contending that when the International Trade Commission implemented the Captive Production Clause, and did not implement the requirement to “focus primarily on the merchant market”, the Commission actually changed the regulation into one focusing “only” on the merchant

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<sup>450</sup> Wang Hengtao 2003 Preliminary study of legal problem of captive production. See <http://www.law-ck.com/textbox.asp?action=new>

<sup>451</sup> Wang Hengtao 2003 Preliminary study of legal problem of captive production. See <http://www.law-ck.com/textbox.asp?action=new>

market. Japan then took this dispute to the WTO Dispute Settlement Body.

Similar to America, the European Union's Statutes do not have a special provision for captive production. The European Union has only a Basic Antidumping Regulation, No. 2423/88. In European Union's Case Law, however, there are more than one prejudications, such as the 1991 Gimelec case.

The European Union Court stated that:

Under Article 4 (2) (a) of the Basic Antidumping Regulation, No. 2423/88, the volume of imports must be examined to determine in particular whether there has been a significant increase, either in absolute terms or relative, to production or consumption in the Community. It follows that, if the increase in imports is not expressed in absolute terms, the market share covered by the imports alleged to have been dumped must in principle be assessed in relation to the whole of Community production or consumption, that is, by reference to the volume of the "whole market". An exception to this rule can be justified in so far as the market concerned shows a clear separation between a "captive market" and the "free market", since in such a case sales on the "captive market" do not come into competition with products sold on the "free market" and cannot therefore be subject to the effects of any dumping.<sup>452</sup>

The European Union Court also formulates the standards for three basic issues to be decided: (a) whether the product under investigation is sold in the same market and for the same goal; (b) whether European Union producers sold the product under investigation to associated organizations or the non-associated clients, and whether the selling prices were approximately the same or not; and (c) whether the producers of the downstream product purchased the product under investigation not only from the associated suppliers of the European Union, but also from the importers or other non-associated producers.

Two examples of actual cases where the European Union dealt with the problem of captive production are:

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<sup>452</sup> Gimelec 1991 EU, Recital 3.

- the 1991 Gimelec Case and<sup>453</sup>
- the 2000 Hot-Rolled Coils Products Case<sup>454</sup>

In the Gimelec Case the European Union Commission made a decision on 26 July 1990, to end an antidumping investigation into procedure in an electrical machine importation.<sup>455</sup> The appellee countries were Bulgaria, Romania and Czechoslovakia. The representatives of the European Union industry were not satisfied with this decision, and asked the European Union Court for a judicial review.<sup>456</sup>

The representatives of the European Union industry argued that the Commission should not have refused their claim. They grounded their argument on the “free market system”. In their opinion, a part of European Union production could be sold in the captive market of affiliated enterprises. This part of sales should not be looked on as an ordinary trade. So the imported product did not affect the captive market system.

On 27 November 1991, the European Union Court decided: (a) that the electrical machines under investigation, either imported or local, were all sold in the same market, and were used for the same aim, that is to produce a washing machine. The electrical machine producers who are associated with the washing machine producers also sold their product to other non-associated washing machine producers, and the price was approximately the same as the price for which the product was sold in the captive market. Furthermore, the washing machine producers not only purchased the imported electrical machine, but also purchased the electrical machine produced by two independent European Union producers, and (b) that because there was not a clear distinction between a “captive market” and the “free market”, the European Union Commission used the principle of “the products relation to the volume of the whole market”.<sup>457</sup>

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<sup>453</sup> See E.U. Court. No.C-315/90. 1991.

<sup>454</sup> See E.U. CD. No.283/2000/ECSC. and CD. No.284/2000/ECSC.

<sup>455</sup> For an introduction of European Union Community institution, see Oudsten 1989:332-333. The article states: “The Community institution most involved in anti-dumping proceedings is the Commission. The Commission enjoys nearly complete autonomy in anti-dumping matters. ... The role of the EU Council is limited to the formal imposition of definitive duties. ... The EU Advisory Committee is made up of representatives of member states. Its function is to act as a forum for consultation of member states by the Commission...”

<sup>456</sup> See E.U. Court. No.C-315/90. 1991.

<sup>457</sup> See E.U. Court. No.C-315/90. 1991.

In the 2000 Hot-Rolled Coils Products Case, the European producers applied in January 1999 for a hot-rolled coils products antidumping investigation regarding Bulgaria, India, South Africa, Taiwan and Yugoslavia. In this case, the Commission did not follow the principle which the European Union Court enunciated in the Gimelec Case. The Commission determined that the captive production under investigation did not compare with the other production of the European Union. Thus, they argued, the captive market and the free market can be distinguished clearly. The Commission then used the data of the free market.<sup>458</sup>

In summary: the American and European Union's legislation and practices indicate that although they all divide the domestic industry of the like product into the captive and the free or merchant market, their practices differ. America only evaluates the whole market and the merchant market, but does not evaluate the captive market clearly. The American system is against the principles of the WTO. The European Union evaluates and analyses both the captive and free market clearly, and according to the real facts of each case, makes a determination on the final and precise extent of the domestic industry in like products.

In consequence, for the development of South African and Chinese antidumping laws, the European Union mode will be the better option.

#### **4.8 Conclusion**

Antidumping substantive law, as an important part of antidumping law, is continually amended and developed by the WTO. It still has some shortcomings which are discussed in this chapter, such as the problem of nonmarket economy countries and the problem of captive production. The development of each country's antidumping law is different, and in some places each country's comprehension of the WTO Antidumping Agreement also differs.

South Africa, as a country which had enacted an antidumping law earlier, effectively uses its antidumping substantive law, which can solve some problems in practice, but still needs to be improved. For some problems, such as nonmarket economy country and captive production, South Africa needs to enact more specific provisions to address them.

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<sup>458</sup> See E.U. CD. No.283/2000/ECSC and CD. No.284/2000/ECSC.

China is a young member of the international antidumping community. Obviously, there are a lot of provisions in its antidumping substantive law which need to be amended.

Ultimately, in this chapter, it has been made clear that South Africa's antidumping substantive law still has some way to go to keep up with other countries, such as the USA's and the European Union's antidumping laws. Similarly China still has a long way to go to achieve this same standard in international antidumping law.

## **Chapter 5**

### **Antidumping Measures**

#### **5.1 Introduction**

According to antidumping procedures, when the importation of a product under investigation is determined to constitute dumping, and thus to cause injury to the domestic industry of the importing country, the authority of the importing country can take appropriate antidumping measures. In this chapter, the international antidumping measures (WTO antidumping agreements) will be introduced first. Then South Africa's and China's antidumping measures will be compared with that of the European Union and the U.S.A. The main focus will be on price undertakings, because, in practice, price undertakings are used frequently by both authorities of the importing countries and exporters.<sup>459</sup> For example: Of a total of 356 cases processed in the U.S. from 1955 to 1966, there were only 11 findings of actionable dumping, whereas 81 cases ended in price revision or termination of sales. During the first 9½ years under the United Kingdom Dumping Act of 1957, about 100 cases were advertised as being accepted for full investigation by the Board of Trade; of these 100 cases, duties were imposed in 12 and about 15 were resolved by voluntary undertakings.<sup>460</sup>

#### **5.2 WTO antidumping measures**

Although price undertakings are important, firstly we need to know all about antidumping measures. The WTO antidumping measures include provisional measures, price undertakings, definitive antidumping duties, and retroactive application of antidumping duties.<sup>461</sup>

##### **5.2.1 Provisional measures**

Provisional measures have two forms: one is imposing provisional antidumping duty; and the other is taking a security – by cash deposit or bond – equal to the amount of the antidumping duty

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<sup>459</sup> Bryan and Boursereau 1984-1985:658. See also Oudsten 1989:321-381 for a detailed discussion on price undertakings in EEC antidumping law.

<sup>460</sup> Seavey 1970:131

<sup>461</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994.

provisionally estimated.<sup>462</sup> However, whatever kind of measure, the amount may not be greater than the provisionally estimated margin of dumping.<sup>463</sup>

Provisional antidumping measures can be taken if:

- (a) An antidumping investigation has been initiated and a public notice has been given;<sup>464</sup>
- (b) Interested parties have been given adequate opportunity to submit information and make comments;<sup>465</sup>
- (c) A preliminary affirmative determination has been made that dumping caused an injury to the domestic industry;<sup>466</sup>
- (d) The authority concerned has decided that it is necessary to adopt such measures to prevent the continued injury during the investigation;<sup>467</sup> and
- (e) Sixty days from the date of initiation of the investigation have expired.<sup>468</sup>

In order to prevent the authorities from lengthening the investigative procedure indefinitely after they have decided on a provisional antidumping measure, or in order to prevent them dealing with a provisional antidumping measure unreasonably, the WTO Antidumping Agreement of 1994 prescribes:

- (a) The application of provisional measures shall be limited to as short a period as possible.<sup>469</sup>
- (b) The period of a provisional measure shall not exceed four months. Upon request by exporters representing a significant percentage of the trade involved, this can be extended by a period not exceeding six

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<sup>462</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Part 1: Article 7.2

<sup>463</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 7.2

<sup>464</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Part 1: Article 7.1 (i)

<sup>465</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Part 1: Article 7.1 (i)

<sup>466</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Part 1: Article 7.1 (ii)

<sup>467</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Part 1: Article 7.1 (iii)

<sup>468</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Part 1: Article 7.3

<sup>469</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Part 1: Article 7.4

months.<sup>470</sup>

- (c) When authorities, in the course of an investigation, determine that a duty lower than the margin of dumping would be sufficient to remove injury, the periods may be six and nine months respectively.<sup>471</sup>

### 5.2.2 Price Undertaking

Price undertaking refers to an agreement between exporters and the authority of the importing country,<sup>472</sup> that exporters will voluntarily raise their prices so as to eliminate the margin of dumping or cease to export to the area in question at dumped prices, so that the authority is satisfied that the injurious effect of the dumping is removed.<sup>473</sup> Then the authorities will suspend or terminate an antidumping investigation.<sup>474</sup> The authorities of the importing country, the protected domestic industries and the exporters can all benefit from the proper use of price undertakings.<sup>475</sup>

In practice, price undertakings have been used often.<sup>476</sup> For instance, from 1982 to 1986 the total number of investigations concluded in the EU was 230.<sup>477</sup> The investigations show the following: (i) Imposition of duties: 1982, 7; 1983, 20; 1984, 5; 1985, 8; 1986, 4; (ii) Acceptance of undertakings: 1982, 35; 1983, 27; 1984, 27; 1985, 4; 1986, 25; and (iii) Terminated for other reasons: 1982, 9; 1983, 11; 1984, 10; 1985, 20; 1986, 18.<sup>478</sup> 118 cases of anti-dumping investigations were terminated by using the price undertaking method during that time.

More than 50% of all investigations were concluded by price undertakings, and except for 1985,<sup>479</sup> price undertakings always

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<sup>470</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Part 1: Article 7.4

<sup>471</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Part 1: Article 7.4

<sup>472</sup> Oudsten 1989:321.

<sup>473</sup> Seavey 1970:130; Bryan and Boursereau 1984-1985:657.

<sup>474</sup> Shen MuZhu 2002: 504; Tharakan 1991:17.

<sup>475</sup> Oudsten 1989:321. A detailed discussion will be given in next section 5.3.

<sup>476</sup> Bryan and Boursereau 1984-1985:658; Oudsten 1989a:321; 1989b:330. See also Section 5.1 introduction.

<sup>477</sup> In 1982 it was 51; 1983, 58; 1984, 42; 1985, 32; 1986, 47.

<sup>478</sup> Oudsten 1989:350.

<sup>479</sup> Possible reason is the sudden change of practice in 1984 by the EU Commission. See Oudsten 1989:378 for an explanation. "In 1984, the Commission withdrew its acceptance and re-opened the investigation. This time, it used a different method of calculation, and came to the conclusion that the undertakings had not

outnumbered definitive duties.

A provision was inserted in the WTO Antidumping Agreement to protect exporters who give such undertakings: when a case is settled by an undertaking, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so desire.<sup>480</sup> In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse; if an affirmative determination of dumping and injury is made, the undertaking shall continue, consistent with its terms and the provisions of the WTO Antidumping Agreement.<sup>481</sup>

A price undertaking measure should comply with the following conditions:

- (a) Exporters must voluntarily accept a price undertaking. The authority of the importing country may suggest it.<sup>482</sup>
- (b) A price undertaking only can be sought or accepted by exporters after the authority of the importing country has made a preliminary affirmative determination of dumping and injury caused by such dumping.<sup>483</sup>
- (c) The authority of the importing country must consider the acceptance of a price undertaking as practicable.<sup>484</sup>

Price undertakings can be offered voluntarily.<sup>485</sup> If exporters offer a price undertaking voluntarily to raise their prices or cease exports to the area in question at dumped prices, and the authority is satisfied with this undertaking, the authority can accept it. Otherwise it will be refused. Reasons for the refusal can be: (a) the rising prices cannot offset the injury to the domestic industry, (b) the number of actual or potential exporters is too great, and (c)

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eliminated the injury to the EEC industry, and imposed anti-dumping duties.”

<sup>480</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Part 1: Article 8.4. See also Seavey 1970:130.

<sup>481</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Part 1: Article 8.4.

<sup>482</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 8.5

<sup>483</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 8.2

<sup>484</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 8.3

<sup>485</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 8.1

other reasons, including reasons of general policy.<sup>486</sup>

All of above provisions have been incorporated in to the South African Antidumping Regulation of 2003 currently in force.

However, some terms are vague.<sup>487</sup> In particular, it is very hard to understand what is meant by “the satisfaction of the authority” and “the other reasons”. The WTO Antidumping Agreement of 1994 does not explain them further, nor does the South African Antidumping Regulation of 2003. These stipulations give WTO Members a great deal of discretionary power, and leave leeway to the administering authorities to interpret it in an unduly protectionist manner.<sup>488</sup>

China stipulates some provisions on price undertakings. But these provisions are in compliance with the WTO Antidumping Agreement just superficially. For instance, Section 33 of the China Antidumping Statute 2002 only stipulates that the Ministry of Commerce shall provide to the exporter the reason when it decides not to accept a price undertaking.<sup>489</sup> The provision does not list the conditions for refusing the price undertaking and does not state that the authorities shall give the exporter an opportunity to make comments. So the investigative authorities will have to make more adequate disclosures about their decision-making rationale after China became a WTO member. Therefore, China will have to provide for a much higher level of transparency in the application of its antidumping regulations.<sup>490</sup>

### 5.2.3 Definitive antidumping duties

Definitive antidumping duties are different from provisional antidumping duties. Definitive antidumping duties refer to the authorities of the importing country making a final determination that the imported products constitute dumping. The authorities could then decide to impose special import customs duties on such imported products.<sup>491</sup> This kind of special duty is generally imposed on the importers by the importing country’s customs. The amount of the antidumping duty equals the margin of dumping, or

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<sup>486</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 8.3

<sup>487</sup> Adamantopoulos and DE Notaris 2000-2001:34.

<sup>488</sup> Oudsten 1989:351; Adamantopoulos and Notaris 2000-2001:34.

<sup>489</sup> The China Antidumping Statute:Section33.

<sup>490</sup> The China Business Review. May-June 2001:43

<sup>491</sup> Chen Xiaoying 2003: 242.

can be less than the margin, but cannot exceed it.<sup>492</sup> The WTO prescribes refunding if the duty exceeds the margin.<sup>493</sup>

According to Article 9 of the WTO Antidumping Agreement, when the importing members decide to impose antidumping duties, they should consider:

- (a) Whether or not to impose an antidumping duty in cases where all requirements for the imposition have been fulfilled, and whether the amount of the antidumping duty to be imposed shall be the full margin of dumping or less;<sup>494</sup>
- (b) Whether it is desirable that the duty is less than the margin, such lesser duty should be adequate to offset the injury to the domestic industry;<sup>495</sup> and
- (c) A non-discriminatory principle.<sup>496</sup>

The WTO Antidumping Agreement also prescribes strict conditions for imposing antidumping duties, in order to prevent the importing member from abusing antidumping measures. These conditions include:

- (a) The imported products should constitute dumping legally, except when the margin of dumping is *de minimis*<sup>497</sup>, or the volume of dumped imports is negligible;
- (b) There should be a causal relation between dumping and injury;<sup>498</sup>
- (c) When there is not a price undertaking between exporters and the authority of the importing country, an antidumping duty can be imposed.<sup>499</sup>

#### 5.2.4 Retroactive application of antidumping duties

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<sup>492</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 9.1; 9.3

<sup>493</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 9.3.1

<sup>494</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 9.1

<sup>495</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 9.1

<sup>496</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 9.2

<sup>497</sup> See Chapter 4, section 4.6.3, above.

<sup>498</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 5.2

<sup>499</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 8.1. See also Bryan and Boursereau 1984-1985:659.

Retroactive application of antidumping duties refers to measures imposed late on previous dumping practices.<sup>500</sup>

Ordinarily, antidumping duties may not be applied retroactively to products that already have entered an importing country.<sup>501</sup> However, according to Article 10 of the WTO Antidumping Agreement, following particular circumstances apply:

- (a) 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, antidumping duties may be imposed retroactively from the date of the application of provisional measures.<sup>502</sup>
- (b) If, in the final determination, a dumped product is determined to have a history of dumping which caused injury, or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, a definitive antidumping duty may be imposed on that product which was imported for consumption not more than 90 days prior to the date of application of provisional measures.<sup>503</sup>
- (c) If “the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive antidumping duty.”<sup>504</sup> The date of imposing an antidumping duty should not be earlier than 90 days prior to the date of application of provisional measures.<sup>505</sup>
- (d) If a product is subject to antidumping duties in an importing member country, the authorities shall promptly carry out a review of any exporter or producer in the exporting country in question who has

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<sup>500</sup> Chen Xiaoying 2003: 243.

<sup>501</sup> Bryan and Boursereau 1984-1985:661.

<sup>502</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 10.2

<sup>503</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 10.6. (I)

<sup>504</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 10.6. (II)

<sup>505</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 10.6. (II)

not exported the product to the importing country during the period of investigation and is not related to any of the exporters or producers in the exporting country who are subject to the antidumping duties on the product. If such a review results in a determination of dumping in respect of such producers or exporters, antidumping duties can be imposed retroactively to the date of the initiation of the review.<sup>506</sup>

- (e) If an undertaking is broken, the authorities may impose provisional duties immediately; subsequent definitive duties may have a retroactive effect for up to 90 days before imposition of provisional duties.<sup>507</sup>

For (b) and (c) circumstances, however, no duties shall be levied retroactively on products imported for consumption prior to the date of initiation of the investigation.<sup>508</sup>

### **5.3 Analysis of the use of price undertakings in practice**

While section 5.2 dealt with international antidumping measures, this section will concentrate on price undertakings in particular. It will describe the practices of the European Union with regard to the use of price undertakings in antidumping law, and compare it with the practices in South Africa.

The discussion is divided into three sections: The first section will describe reasons why price undertakings are preferred by both WTO Members and the dumping firms (the dumping exporters, producers, and importers). The second section will describe the factors which influence the decision to accept or reject an offer of price undertaking. In this section, four factors will be emphasized, the controllability of the undertakings, trade relations, the public interests of the importing member, and anticompetitive effect. Finally, the third section will describe the advantages and disadvantages of price undertaking for South Africa.

#### **5.3.1 Reasons for price undertakings**

As was shown in section 5.2.3, an importing country faces strict

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<sup>506</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 9.5

<sup>507</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 8.6

<sup>508</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 10.8

requirements and conditions before using antidumping duties. Even if antidumping duties are imposed, the result may not be satisfactory to the importing country,<sup>509</sup> because the aim of antidumping measures is not to punish the dumping, but to protect the domestic industries of the importing country.<sup>510</sup> In addition, when an antidumping duty is imposed, exporters, in practice, often give up or are driven out of the importing country's market by the higher duty. The decreased competitiveness in the importing country's market is not good for the development of domestic industry. Contrarily, adopting a price undertaking will still keep exporters entering the importing market and keep the balance of the competitiveness in the importing country.<sup>511</sup> Importing members, therefore, usually give preference to price undertakings instead of duties.<sup>512</sup>

Dumping firms – the exporters, producers and importers of the allegedly dumped product –also prefer price undertakings.<sup>513</sup> With the imposition of duties, firstly the exporters, producers and concerned importers will lose money,<sup>514</sup> especially if the case carries on and has an affirmative final determination. Contrarily, by reaching a price undertaking, they will benefit financially, and also save time.<sup>515</sup> Secondly, they will lose their share in the importing country's market.<sup>516</sup>

Antidumping duties could, therefore, be avoided by adopting a more “consensual approach”.<sup>517</sup> The dumping firms can offer forward price undertakings, or the authorities of the importing country may suggest price undertakings instead of imposing duties.<sup>518</sup> It should not be too difficult for the authorities of the importing country to convince the exporters or producers to raise their prices voluntarily, with the threat of duties in the background.<sup>519</sup> Price undertakings can, thus, be taken as agreements between the dumping firms and the importing members. The firms agree to raise

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<sup>509</sup> Oudsten 1989a:344; 1989b:346.

<sup>510</sup> Oudsten 1989:329.

<sup>511</sup> Petersen 1996:381.

<sup>512</sup> Romero 1999:446.

<sup>513</sup> Tharakan 1991:20.

<sup>514</sup> Petersen 1996:381.

<sup>515</sup> Oldekop and Van Bael 1979:234. “It normally saves time, and, of course, it is also financially more beneficial for the exporters than is the imposition of antidumping duties.” Also see Patenode 1980:216.

<sup>516</sup> Stegemann and Tharakan(Editors) 1991:251.

<sup>517</sup> Oudsten 1989:346; Oldekop and Van Bael 1979:234.

<sup>518</sup> See section 5.2.2

<sup>519</sup> Oudsten 1989:346-347.

their prices or to cease exports to the area in question at dumped prices, and in return they are not subjected to antidumping duties.<sup>520</sup>

Additionally, according to Adamantopoulos and Notaris, the provision of Article 15 of the WTO Antidumping Agreement concerning the application of antidumping duties to developing country members could be further specified.<sup>521</sup> The most diligent administering authorities normally interpret Article 15 as an obligation of the exporters of developing countries to explore possibilities of price undertakings or at least communicate to developing country exporters availability to consider undertakings.<sup>522</sup> For example, EU used this provision in its practices, such as “Certain Sodium Carbonate from Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union Case”,<sup>523</sup> to accept price undertakings. It will be discussed in section 5.3.2.3 of this chapter.

However, Article 15 of the WTO Antidumping Agreement is drafted in an extremely vague and laconic fashion. Article 15 states as follows:

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.<sup>524</sup>

How to understand “special situation” and “essential interests” of developing countries? The provision needs to specify them. Therefore, providing more specific language concerning obligations and price undertakings under Article 15 could be a contribution to the WTO Antidumping Agreement. But it could be to introduce a specific obligation exclusively upon administering authorities of developed countries.<sup>525</sup>

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<sup>520</sup> See section 5.2.2; also Oudsten 1989:346-347.

<sup>521</sup> Adamantopoulos and Notaris 2000-2001:59.

<sup>522</sup> Adamantopoulos and Notaris 2000-2001:59.

<sup>523</sup> Notice of Termination, 22 Office Journal European Commission(No. C 303) 5,5 (1979).

<sup>524</sup> The WTO Antidumping Agreement: Article 15.

<sup>525</sup> Adamantopoulos and Notaris 2000-2001:59.

### 5.3.2 Factors influencing the decision to accept or reject a price undertaking

The WTO Antidumping Agreement of 1994 states:

Proceedings may be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertaking from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated.<sup>526</sup> [And] undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy.<sup>527</sup>

Therefore, once an undertaking has been offered, the authorities of the importing country can accept it and take no further measures, or reject it and impose antidumping duties. In practice, there are four factors (the controllability of the undertakings, trade relations, the public interests of the importing member, and anticompetitive effect) in particular which influence the decision to accept or reject an offer of undertaking.

#### 5.3.2.1 The controllability of price undertakings

The first factor is the controllability of price undertakings.<sup>528</sup> The second is trade relations. And the third is the interests of the importing country.<sup>529</sup>

The extent and content of price undertakings can be monitored by the authorities of the importing country.<sup>530</sup> The number of exporters, the authorities' workload, and even trade relations, are all factors which can influence the controllability of the undertaking. Any undertaking related to a case involving one exporter and one product is of course generally easier to monitor

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<sup>526</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 8.1

<sup>527</sup> Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade: Article 8.3  
Oudsten 1989:363.

<sup>528</sup> Bryan and Boursereau 1984-1985:686.

<sup>530</sup> Oudsten 1989:363.

than those involving many exporters and many products.<sup>531</sup>

Table 1 sums up information on the number of products and exporters that were monitored from 1980-1985, indicating the number and percentage of those regarded as monitorable and the degree of acceptability attained.

Table 1. Monitorability and acceptability of antidumping cases against East European trading exporters.

Year	Cases <sup>1</sup>	Monitorability <sup>2</sup>	Acceptability <sup>3</sup>
1980	25	11 (44%) <sup>4</sup>	23 (92%)
1981	3	0	3 (100%)
1982	25	15 (60%)	25 (100%)
1983	11	6 (55%)	11 (100%)
1984	16	10 (63%)	16 (100%)
1985	2	2 (100%)	2 (100%)
1986	13	7 (54%)	12 (92%)
1987	4	1 (25%)	4 (100%)
1980-1987	99	52 (53%)	96 (97%)

1. Number of undertakings of the East European Exporters accepted by the E.C.
2. Number of cases in which the undertakings concerned involved only one product.
3. Number of cases in which the undertakings concerned involved only one exporter.
4. The percentage number of undertakings concluded by the East European exporters with the E.C., given in column 2.

Source: Adapted from Tharakan 1991:282.

Therefore, the possibilities for monitoring undertakings seem to be an increasingly important factor in deciding whether or not an undertaking is acceptable. This is probably related to the increasingly heavy workload of the authorities of the importing country.<sup>532</sup> For instance, this point of view was proved by the fact that, beginning in 1985, the European Commission decisions accepting undertakings, began to contain statements that the undertakings can be effectively monitored.<sup>533</sup>

### 5.3.2.2 Trade relations

<sup>531</sup> Tharakan 1991:281.

<sup>532</sup> Oudsten 1989a:364; 1989b:367.

<sup>533</sup> Oudsten 1989:367.

Trade relations is the second important factor.<sup>534</sup> This is illustrated by the Hydraulic Excavators Case (Japan).<sup>535</sup> In that case, the European Commission had originally recommended accepting an undertaking. However, the Council imposed a final duty instead:

Moreover, the Council considers that, in this particular case, in view of the remaining doubts on the possibilities to effectively monitor price undertakings in this particular market and in the light of the present trade relations with Japan, it is not in the interests of the Community to have recourse to price undertakings as an appropriate remedy for the injury resulting from the dumped imports.<sup>536</sup>

However, the European Council is probably not saying that the trade relations themselves were a factor in deciding against undertakings. The Council has, in fact, taken trade relations into account when assessing the possibilities for monitoring. The undertakings have been refused because they were unmonitorable due in part to special circumstances in that particular market and to the trade relations with Japan.<sup>537</sup>

Furthermore, from the data in section 5.2.2,<sup>538</sup> Le Lièvre and Van Houben show another reason for the low number of undertakings in 1985.<sup>539</sup> They maintain that the refusal of several undertakings offered by Japanese firms that year was part of a change in the Commission's policy towards Japan.<sup>540</sup> As a result of the continuing trade problems and relationship with Japan, the Commission would have adopted a hard-line policy, and would have underlined this by refusing a number of undertakings. Therefore, trade relations can be a factor that influences the decision of accepting or refusing an undertaking.

### 5.3.2.3 The public interests of the importing country

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<sup>534</sup> Oudsten 1989:365-366.

<sup>535</sup> EEC Council Regulation 1877/85 (Official Journal. 1985, L176/1)

<sup>536</sup> EEC Council Regulation 1877/85 (Official Journal. 1985, L176/1)

<sup>537</sup> Oudsten 1989:366.

<sup>538</sup> See Chapter 5, section 5.2.2, above.

<sup>539</sup> Le Lièvre and Houben 1987:439-441.

<sup>540</sup> See e.g.: Miniature Ballbearings Case (Japan), EEC Council Reg. 2089/84 (Official Journal 1984, L193/1); Glycine Case (Japan), EEC Council Reg. 2322/85 (Official Journal 1985, L128/1); Hydraulic Excavators Case (Japan), EEC Council Reg. 1877/85 (Official Journal 1985, L176/1); Electronic Scales Case (Japan), EEC Council Reg. 1008/86 (Official Journal 1986, L97/5).

Whether or not accepting an undertaking, does not only depend on the controllability of the undertaking, but also depends on the public interests of the importing members.<sup>541</sup> The advisability of adopting a national interest test is strongly advocated by Hoekman and Leidy in these words:

Incorporation of a national interest clause in antidumping procedures would be a major improvement. It would imply that before an affirmative finding can be made, a cost/benefit analysis should indicate that for the nation as a whole protection of an industry is worthwhile. A weaker version of this idea would be to allow consumer interests to have a greater voice in antidumping proceedings than is presently the case. If it were required that all users of the products (both final consumers, if any, and firms using the affected products as inputs) be offered a voice, the likelihood of affirmative actions might diminish.<sup>542</sup>

The aspect of legislation, for instance, E.U., has not a legal definition of "Community interest".<sup>543</sup> However, in the Commission's Guide to the European Communities' antidumping and countervailing legislation of November 1984, the commission stated that the community interest might cover a wide range of factors.<sup>544</sup> In the current regulation, Council Regulation (E.C) No.384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (the EU Antidumping Regulation 1996), before imposing antidumping measures, the Commission will determine whether the Community interest calls for intervention "based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers."<sup>545</sup> Although these interests are not defined in the EU Antidumping Regulation, the EU Antidumping Regulation has a

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<sup>541</sup> Kennedy 2005:422.

<sup>542</sup> Hoekman and Leidy 1989:41.

<sup>543</sup> Bryan and Boursereau 1984-1985:651.

<sup>544</sup> Rycken 1991:214;Wellhausen 2000-2001:1033.

<sup>545</sup> Council Regulation (E.C) No.384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (hereinafter the EU Antidumping Regulation 1996). Article 21.1. <http://europa.eu.int/com/trade/issue/respectrules/anti-dumping>. See also Wellhausen 2001:1027-1082 for a detailed discussion of the Community interest test in antidumping proceedings of the European Union.

special article to stipulate “community interest”.<sup>546</sup> If accepting an undertaking accords with the interests of E.U., the E.U. will accept it. If not, the E.U. will reject it, such as with the Hydraulic Excavators Case (Japan).

Before the Commission authorities decide whether or not to take an antidumping measure (including price undertaking), the Commission must draw a distinction between the interests of the Community industry bringing the antidumping complaint, on the one hand, and industrial users and consumers on the other.<sup>547</sup> In applying the Community interest test, the Commission must evaluate these competing interests and adopt measures only if, on balance, intervention would be in the Community’s interest. For the Community authorities to decide not to impose antidumping measures, including price undertakings, they must “clearly conclude that it is not in the Community interest to apply such measures.”<sup>548</sup> Furthermore, the Regulation requires the Community authorities to give special consideration to the need to eliminate the trade distorting effects of injurious dumping and the need to restore effective competition.<sup>549</sup> Wellhausen indicates that the provisions of Community interest still favour the Community industry. In balancing the competing interests, the Community industry is still given special weight, and so there is still a presumption in the language of the provisions of Community interest in favour of the introduction of antidumping measures.<sup>550</sup> Because the EU Antidumping Regulation 1996 lacks detailed substantive guidelines explaining how the Commission should balance the different competing interests, the Commission continues to retain considerable discretion in applying the Commission interest principles on a case-by-case basis.<sup>551</sup>

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<sup>546</sup> Council Regulation (E.C) No.384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (the EU Antidumping Regulation 1996). Article 21. It provides the basic statement of Community interest test.

<sup>547</sup> Wellhausen 2001:1046-1047. See also Kennedy 2005:422-424 for a discussion on the factors that affect antidumping case outcomes.

<sup>548</sup> Council Regulation (E.C) No.384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (the EU Antidumping Regulation 1996). Article 21.1.

<sup>549</sup> Council Regulation (E.C) No.384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (the EU Antidumping Regulation 1996). Article 21.1.

<sup>550</sup> Wellhausen 2001:1047.

<sup>551</sup> Wellhausen 2001:1047.

In practice, both economic and political interests seem to be considered.<sup>552</sup>

Economic interests may include the interests of the intermediate consumers of the dumped products, the processing industries, whose costs of production are increased effectively by antidumping duties. However, priority is generally given to the interests of the injured Community industry rather than to the processing industries.<sup>553</sup> Economic interests also may include the interests of the Community exports and exporters, the level of employment in the Community industry producing the like products, as well as the interests of final consumers.<sup>554</sup>

A notable example is the termination of antidumping investigations in *Disc-changers from Japan, Korea, Malaysia, Taiwan, and Thailand*.<sup>555</sup> In this case, the Commission examined the likely costs and benefits that the imposition of measures would have on the economic operators concerned. The Commission held that the imposition of duties would limit consumer choice, thereby encouraging many exporters, particularly those with high duties, to withdraw from the Community market.<sup>556</sup> The Community industry could not compensate this loss of choice in the foreseeable future.<sup>557</sup> The Commission, though, also took several other factors into account. First, while the market share of the Community industry was zero percent in 1996, it had reached 1.4 percent by the investigation period.<sup>558</sup> Second, about eighty-one percent of

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<sup>552</sup> Bryan and Boursereau 1984-1985:651; Kennedy 2005:423.

<sup>553</sup> Notice of Termination, 22 Office Journal European Commission(No. L303) 5,5 (1979).

<sup>554</sup> The interests of the final consumers are likely to be given priority over the interests of Community industries only in exceptional cases, such as where the interests of a relatively insignificant Community industry are balanced against the price of a basic food stuff. The consideration given to the interests of processing industries may indirectly benefit final consumers by lowering domestic production costs.

<sup>555</sup> See Commission Decision 1999/55 of 21 December 1999. Terminating the Antidumping Proceeding Concerning Imports of Certain Laser Optical Reading Systems, and Main Constituent Elements Thereof, for use in Motor Vehicles, Originating in Japan, Korea, Malaysia, the People's Republic of China, and Taiwan, 1999 O.J. (L 18) at 62 (opting against the adoption of antidumping measures against imports of disc changers from concerned countries).

<sup>556</sup> See Commission Decision 1999/55 of 21 December 1999. O.J. (1999) at 65.

<sup>557</sup> See Commission Decision 1999/55 of 21 December 1999. O.J. (1999) at 65.

<sup>558</sup> See Commission Decision 1999/55 of 21 December 1999. O.J. (1999) at 64.

the disc-changers sold in the Community originated in the countries under investigation.<sup>559</sup> Third, the level of employment in the relevant Community industry was low.<sup>560</sup> Ultimately, the Commission considered that the imposition of antidumping measures would disproportionately affect importers, traders, and consumers of the product concerned.<sup>561</sup>

Although this decision represents a positive application of cost-benefit analysis by the Commission, it also suggests that consumer interests will never be given the same weight as the Community industry, and only in the exceptional case might consumer interests play a bigger role.<sup>562</sup>

The authorities might consider political interests such as the need to foster special relations with developing countries, because Article 15 of the WTO Antidumping Agreement requires the importing country to consider the individual economic situation of developing countries when implementing antidumping measures.<sup>563</sup> For example, in “Certain Sodium Carbonate from Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union Case”,<sup>564</sup> the decision not to impose duties on exports from East Germany, Poland, Romania, and Bulgaria was examined thoroughly from a political position.

Therefore, the EC authorities enjoy considerable discretionary power in the assessment of the Community interests and in the decision of taking a price undertaking or an antidumping duty.<sup>565</sup>

South African regulations are silent on the aspect of “public interest”. So it is necessary to enact a provision to address this

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<sup>559</sup> See Commission Decision 1999/55 of 21 December 1999. O.J. (1999) at 64.

<sup>560</sup> See Commission Decision 1999/55 of 21 December 1999. O.J. (1999) at 64. (explaining that resulting Community industry gains would be minimal due to the low employment level).

<sup>561</sup> See Commission Decision 1999/55 of 21 December 1999. O.J. (1999) at 64. (acknowledging that the interests of consumers are of higher importance than the interests of the Community industry).

<sup>562</sup> Wellhausen 2001:1077.

<sup>563</sup> The WTO Antidumping Agreement:Article 15. See also Wellhausen 2001:1078. Indeed, Article 15 of the WTO Antidumping Agreement provides that the special situation of developing countries should be taken into account.

<sup>564</sup> Notice of Termination, 22 Office Journal European Commission(No. C 303) 5,5 (1979).

<sup>565</sup> Bryan and Boursereau 1984-1985:652. See also Wellhausen 2001:1050 for a discussion how the Commission applies the Community interest test.

question. In practice, the broader economic impact of antidumping measures on consumers and downstream industries, i.e. the broader public interest, is not considered. Although South Africa is a prolific user of antidumping investigations and has applied measures against a wide range of products over a long period, no systematic analysis has been undertaken on the economy-wide impact of these measures.<sup>566</sup> Therefore, when the ITAC is applying antidumping measures, not only price undertakings, the emphasis falls mainly on the injury suffered by the domestic producers of like products, with little attention given to the broader impact on the economy as a whole.<sup>567</sup>

China recently included a “public interests” clause in Section 33 of the Antidumping Statutes 2004. When the Ministry of Commerce (MOC) deems that the price undertaking of exporters can be accepted and conform with the public interests, the MOC can make a decision to suspend or terminate an antidumping investigation without the imposition of provisional measures or antidumping duties.<sup>568</sup> The effect of such a public interest clause is dependent on how the investigating authorities take into account the concerns of the domestic users and consumers who might oppose a certain antidumping measure.<sup>569</sup> However, there is no definition of public interests in the Statutes, and also no further explanations or any substantive and procedural provisions as well.<sup>570</sup> Therefore, it creates difficulties for the MOC on how to conduct public interests test, and also raises the problem of non-transparency in its proceeding of determination.

One example, where three important steel producers (Taiyuan Steel, Shaanxi Precision Steel, and Pudong Specialty Steel) initiated an antidumping case against Japanese and South Korean stainless steel products in June of 1999,<sup>571</sup> can be a description of how Chinese administering authorities consider public interests in their use of price undertakings. In this case, Japanese and South Korean stainless steel producers achieved a partial victory. In the 1990s, despite China being the world’s largest producer of steel, it also became a large importer of high-quality stainless steel that its firms could not produce themselves. Finally, although several Japanese respondents paid antidumping duties, one Japanese and

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<sup>566</sup> Barral ea 2005:62.

<sup>567</sup> Barral ea 2005:62.

<sup>568</sup> The China Antidumping Statutes:Section 33.

<sup>569</sup> Barral ea 2005:74.

<sup>570</sup> Kennedy 2005:423.

<sup>571</sup> Kennedy 2005:425.

six South Korean firms agreed to a price undertaking in which they raised the prices of their goods by an amount equal to the dumping margin. The compromise was reached because the respondents persuaded their Chinese customers to submit briefs to MOFTEC and the SETC in their defence. They argued that the domestic stainless steel producers did not produce precisely the same goods as the foreigners (the width and quality of the steel sheets were different) and that the imported goods were critical to the final products, which were to be exported. In addition to the vital role of these products to their businesses, the end-users who complained were famous large home appliance and auto manufacturers who could gain the ear of senior trade officials and who could also mobilize local and national officials to carry their banner.<sup>572</sup> Therefore, from this case, Chinese administering authorities, in practice, took a price undertaking for economical and political reasons.

Noteworthy, China experiences a similar situation with the East European Countries in the international trade market. And China's foreign trade is increasing. Therefore, China will face more problems with respect to antidumping measures, especially price undertakings.

#### 5.3.2.4 Anticompetitive effects

Finally, an undertaking can be refused by the authorities of the importing country for anticompetitive reasons.<sup>573</sup> A disadvantage of price undertaking is that it limits the competition of prices in the importing country.<sup>574</sup> In certain circumstances, the authorities can take anticompetitive effects of undertakings into consideration when they need to make a decision in an antidumping investigation. For instance, the Glycine Case (Japan),<sup>575</sup> concerned the importation of glycine from Japan. This product was only made by two Japanese producers, both accused of dumping, and by one European producer. The two Japanese producers claimed that an antidumping duty would be against the interests of the Community.<sup>576</sup> The duty would enable the European producer to undercut their prices and drive them out of the European market. So the Japanese producers offered price undertakings instead.

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<sup>572</sup> Kennedy 2005:425.

<sup>573</sup> Oudsten 1989:374-375.

<sup>574</sup> This feature of price undertakings will be discussed later in Chapter 5, section 5.3.3.

<sup>575</sup> EEC Council Regulation 2322/85 (Official Journal 1985, L218/1)

<sup>576</sup> EEC Council Regulation 2322/85 (Official Journal 1985, L218/1)

The undertakings were refused because of their potential anticompetitive effect:

The decision to impose the same anti-dumping duty on both companies was based on a thorough analysis of the nature of the price undertaking offered and of the glycine market. In a market where only a limited number of companies are competing with each other an alignment of prices resulting from undertakings of the kind offered by the Japanese companies, i.e. to respect the same minimum price, would reduce competition. This effect ... would be less likely to occur as a result of the imposition of the same anti-dumping duty, because existing differences in the prices charged ... would continue.<sup>577</sup>

In this case, the price undertakings were explicitly refused because of their anticompetitive effects. Yet, this case shows that antidumping measures can influence the competitive situation in a common market. It also shows that price undertakings are more anticompetitive than antidumping duties.<sup>578</sup>

This case can be a good example for South African antidumping authority, when the decision-makers of the ITAC meet some circumstances similar to this case.

Therefore, not only the interests of the importing country, but also the controllability, trade relations, and anticompetitive effects, all need to be considered in the decision-making on price undertaking for the authorities of the importing country.

### 5.3.3 Advantages and disadvantages of price undertaking for South Africa

If price undertakings can be properly used by the authority of South Africa or the exporters, it will offer considerable advantages to all parties involved: the undertaking firms, the South African industries that need protection, and the ITAC that administer the antidumping law of South Africa.

Firstly, for South African importers or exporters, adopting a price undertaking does not constitute a financial penalty.<sup>579</sup> South

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<sup>577</sup> EEC Council Regulation 2322/85 (Official Journal 1985, L218/1)

<sup>578</sup> Oudsten 1989:375.

<sup>579</sup> Oudsten 1989:348.

African importers or exporters raise the price of the product under investigation and this decreases the volume of sales. The higher prices of the product will possibly offset the costs of the importers in the domestic market,<sup>580</sup> and as well as exporters. This advantage is the main incentive for dumping firms or the South African importers to offer undertakings.

Secondly, price undertakings affect the South African domestic prices directly and rapidly.<sup>581</sup> Price undertakings can quickly stop the exporters from exporting goods to South Africa at the dumped prices, and prevent the imported goods impacting on the local market. If a price undertaking is not accepted, the decision on a final antidumping duty still takes time. A provisional antidumping duty cannot affect the domestic market prices directly. Therefore, this is an incentive for the authorities of South Africa and the domestic industries to encourage the use of price undertakings.<sup>582</sup>

Thirdly, according to Oudsten,<sup>583</sup> “undertakings provide a way to end an anti-dumping proceeding quickly and with a minimum of legal and administrative costs.”<sup>584</sup> For this reason, all parties in question prefer price undertaking, especially for the ITAC,<sup>585</sup> because it bears the lion’s share of the costs of an investigation. The acceptance of an undertaking by the ITAC is seen as a form of termination. An antidumping investigation can be terminated when there is no dumping and no injury. Undertakings are required to eliminate either the dumping or the injury,<sup>586</sup> so it is no longer in the interest of the ITAC to impose antidumping duties. In other words, undertakings create the circumstances under which an investigation can be terminated quickly.

However, this cost advantage in the investigation is offset by the cost of monitoring possible violations of price undertakings.<sup>587</sup>

Fourthly, adopting a price undertaking can somewhat keep the equitableness of the competitiveness in the South African market

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<sup>580</sup> Oldekop and Van Bael 1979:234; Oudsten 1989:348.

<sup>581</sup> Patenode 1980:216

<sup>582</sup> Oudsten 1989:348; Patenode 1980:216.

<sup>583</sup> Oudsten 1989:348.

<sup>584</sup> Oudsten 1989:348.

<sup>585</sup> The International Trade Administration Commission. It established in terms of section 7 of the International Trade Administration Act, 2002 (Act No.71 of 2002).

<sup>586</sup> The South African Antidumping Regulations:section 39.1. See also the WTO Antidumping Agreement:article 8.1.

<sup>587</sup> This point will be further discussed in following paragraph in this section.

by preventing unfair forms of competition.<sup>588</sup> It is consistent with the principles of the WTO Antidumping Agreement. Because the Agreement does not qualify dumping as unfair trade practice *per se*, it does provide for rules restricting the use of antidumping. Such restrictive rules should be designed to enhance competition.<sup>589</sup> In an antidumping case, if ITAC could adopt a price undertaking, the foreign exporters would possibly still enter the South African market. The domestic industry would still face competitiveness from foreign products. This is good for the development of the domestic industry. Otherwise, the foreign exporters would give up the South African market because of higher antidumping duties. For this reason, although the South African industry benefits in a short time, it will lose its competitive ability in the international market. To explain the importance of this point of view, Van Niekerk (the chief executive of Iscor Steel) said: "It is critical that Iscor's cost of production and service levels become globally competitive. If we cannot achieve this, it will be fatal for the SA steel industry."<sup>590</sup>

At the same time, price undertakings have four disadvantages:

Firstly, a price undertaking may be violated, i.e. its obligations can be dodged.<sup>591</sup> This does not necessarily mean that the firm concluding the undertaking is deliberately cheating. It may mean that the firm has insufficient control over its product and cannot prevent parallel imports or discounts by individual importers. According to Oudsten, this risk can be kept at a minimum by the following measures: (1) by allowing quick replacement of violated price undertakings by normal antidumping duties, limiting the damages when they occur;<sup>592</sup> (2) by a system of penalties for firms that willfully violate their price undertakings; (3) by building a control system into the price undertaking, such as the undertaking

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<sup>588</sup> See Chapter 5, section 5.3.1, above. See also Oudsten 1989:344.  
<sup>589</sup> Adamantopoulos and Notaris 2000-2001:34. See also the WTO Antidumping Agreement: Article 9.2 (providing that antidumping duty shall be imposed and/or collected on a non-discriminatory basis, in the appropriate amount in each case, on imports of the like product from all sources found to be dumped and causing injury).

<sup>590</sup> See: SA furnaces stoked to meet global challenge. <http://www.btimes.co.za/98/0628/survey/survey.htm> (last view on May 15, 2006). Iscor Steel, now called Mittal Steel SA, is South Africa's largest producer of steel.

<sup>591</sup> Oudsten 1989:348.

<sup>592</sup> Oudsten 1989:349. See also the South African Antidumping Regulations 2003:section 39.4

firm must submit periodic reports on its compliance with the provisions of the price undertakings.<sup>593</sup>

Secondly, price undertakings must be monitored to prevent violations. The undertaking exporters must submit periodic reports on their compliance with the provisions of the undertaking.<sup>594</sup> The ITAC has to verify the reports. In this circumstance, the South African Antidumping Regulations have no provision to stipulate it. The ITAC can use the provision of the WTO Antidumping Agreement to conduct it.<sup>595</sup> By contrast, an antidumping duty implies less effort for once it has been imposed, it is administered by the South Africa Customs Department.<sup>596</sup>

Thirdly, there is a great risk that the provisions of the price undertaking may become outdated, due to inflation, changes in exchange rates, or market development,<sup>597</sup> especially for South Africa. So these factors undermine the remedial effect of the undertakings. Table 2., indicates the consumer price index and inflation in South Africa, between 1998-1999.

Table 2. The consumer price index and inflation in S.A. (1998-1999)

Month	Consumer price index (1995=100)		Inflation rate ( % )
	1998	1999	
January	119.7	130.4	8.9
February	120.0	130.3	8.6
March	120.8	130.4	7.9
April	121.4	130.7	7.7
May	121.9	130.5	7.1
June	122.3	131.2	7.3
:	:	:	:
November	129.4	131.9	1.7
December	129.4	132.3	2.2
Average for year	124.6	131.1	5.2

Source: Mohr 2003:109.

This risk can be minimized by the use of inflation or currency

<sup>593</sup> Oudsten 1989:348-349. See also The WTO Antidumping Agreement:Article 8.6

<sup>594</sup> The WTO Antidumping Agreement:Article 8.6

<sup>595</sup> The WTO Antidumping Agreement:Article 8.6

<sup>596</sup> Oudsten 1989:349.

<sup>597</sup> Oudsten 1989:349. Patenode 1980:217.

adjustment systems, or by defining prices in basket currencies,<sup>598</sup> or by doing periodic reviews of the undertaking.<sup>599</sup> But there is a gap in South African Antidumping Regulations with respect to price undertaking review.<sup>600</sup>

Fourthly, price undertakings also limit the competition of prices in the South Africa market, especially undermining the competitive ability of South African enterprises.<sup>601</sup> Price undertakings, in fact, limit the freedom of the undertaking firms to lower their prices in response to their competitors' price cuts. So it prevents price competition in the South Africa market. In this circumstance, South African domestic industries can account for themselves. If they enter the international market, they, however, will be unable to compete. At the same time, it would be unreasonable to force a firm to stand by while its competitors take over its market share. So, few would be willing to offer price undertakings under such circumstances.<sup>602</sup>

As with everything, price undertakings has its advantages and disadvantages. When a price undertaking is designed and used properly, the firm can withdraw from the price undertaking after proper notification, then the advantages will outweigh the disadvantages.<sup>603</sup>

#### **5.4 Conclusion**

In this chapter, international antidumping measures were discussed, with special emphasis on price undertaking. The reasons why price undertakings should be preferred, the factors which influence the decision to accept or reject a price undertaking, and the advantages and disadvantages of price undertakings were analysed. It was concluded that price undertaking is the best way to solve antidumping cases.

With regard to the legislation of price undertaking, the provisions of South African Antidumping Regulations are consistent with the WTO Antidumping Agreement. The provisions of the China Antidumping Statutes are in compliance with the WTO Antidumping

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<sup>598</sup> Oudsten 1989:349.

<sup>599</sup> Seavey 1970:131; Oudsten 1989:349. See also Chapter 6, for a detailed discussion about price undertaking review.

<sup>600</sup> See Chapter 6, section 6.3, below.

<sup>601</sup> See Chapter 5, section 5.3.3, the fourth advantage above. See also Oudsten 1989:344.

<sup>602</sup> Oudsten 1989:349.

<sup>603</sup> Oudsten 1989:349.

Agreement just superficially. Therefore, China still needs to improve its antidumping regulations.

Noteworthy about the discussion of this chapter is that price undertakings give an obligation to both the authorities of the importing countries and also exporters. There is some evidence that the authorities of the importing countries are feeling the burden of monitoring all the price undertakings.<sup>604</sup> So the ability to be efficiently monitored might play an increasingly important role in the authorities' decision to accept or reject a price undertaking.

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<sup>604</sup> Oudsten 1989:382.

## Chapter 6 Price undertakings in administrative reviews

### 6.1 Introduction

The end purpose of imposing an antidumping duty or a price undertaking is to offset the injury which dumping caused. No punishment or sanction is envisioned.<sup>605</sup> Therefore, once there is information that confirms that the injury cannot be offset or decreased, or there are new circumstances which affect the margin of dumping, antidumping duties or price undertakings should be reviewed.<sup>606</sup>

The WTO Antidumping Agreement gives interested parties the right to apply for a review to the authorities of the importing country.<sup>607</sup> An interested party may request a review provided that a reasonable period of time has elapsed since the conclusion of the investigation,<sup>608</sup> and provided that the interested party submits evidence of a change in circumstances substantiating the need for review.<sup>609</sup> Certainly, the authorities of the importing country can also review on their own initiative.<sup>610</sup> In general, the international community calls these proceedings “administrative reviews”.<sup>611</sup>

Administrative reviews have many forms, such as interim reviews, new shipper reviews, changed circumstances reviews, sunset reviews (five-year reviews), price undertaking reviews and anticircumvention reviews.<sup>612</sup> The WTO Antidumping Agreement does not prescribe clearly what kind of reviews the member countries should adopt in their antidumping laws.<sup>613</sup> The proceeding of an administrative review is the same as the proceeding of an antidumping investigation. In fact, the review procedure is a

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<sup>605</sup> Shang Ming 2003:39; Oudsten 1989:329.

<sup>606</sup> Oudsten 1988-1989:353; Wang Jingqi 2000:129.

<sup>607</sup> Agreement on implementation of Article 6 of the GATT 1994. Article 11.2

<sup>608</sup> Most WTO Members stipulate a reasonable period of time is one year, such as South Africa and the EU.

<sup>609</sup> Agreement on implementation of Article 6 of the GATT 1994. Article 11.2

<sup>610</sup> Agreement on implementation of Article 6 of the GATT. Article 11.2

<sup>611</sup> Comparing with judicial review. See Agreement on implementation of Article 6 of the GATT. Article 13

<sup>612</sup> See South Africa's Antidumping Regulations 2003. Part D, Section 40-64. Also see American Antidumping and Countervailing Duty Statutes. 19 U.S.C. §1675.

<sup>613</sup> Agreement on implementation of Article 6 of the GATT. Article 11.

re-opening of the original investigation.<sup>614</sup> Normally the limitation of a review is 12 months.<sup>615</sup>

According to the discussion in Chapter 5, price undertakings play an important role in solving antidumping cases.<sup>616</sup> The WTO Members pay a good deal of attention to price undertakings and use it often.<sup>617</sup> From the legislative angle, it should be remarked that although the WTO Antidumping Agreement and the majority of WTO Members' antidumping laws prescribe detailed provisions about administrative reviews, such as interim reviews and sunset reviews, they do not comment thoroughly enough on price undertaking reviews. South Africa's Antidumping Regulations also have a gap where price undertaking reviews are concerned. The American Antidumping Statutes, however, have some detailed provisions with regard to suspension agreement (price undertaking) reviews.<sup>618</sup> China's Antidumping Statute also has provisions on price undertaking reviews.<sup>619</sup>

In this chapter, an analysis of the GATT Antidumping Agreements and the WTO Antidumping Agreement on price undertaking reviews will be done. The emphasis will be on South Africa's antidumping regulations. The U.S.'s Antidumping Laws, China's Antidumping Statute and South Africa's Antidumping Regulation will be compared.

## **6.2 The GATT Antidumping Agreement and the WTO Antidumping Agreement**

The first unified international antidumping agreement, that is Article 6 of the GATT 1947,<sup>620</sup> has nothing with respect to price undertaking. So Article 6 of GATT 1947 is a general antidumping provision.

The first mention of price undertaking is in the Antidumping Code 1967, that is the Agreement on Implementation of Article 6 of the

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<sup>614</sup> Oudsten 1989:377.

<sup>615</sup> Agreement on implementation of Article 6 of the GATT. Article 11.4

<sup>616</sup> See Chapter 5.1

<sup>617</sup> Bryan and Boursereau 1984-1985:658; Oudsten 1989:321-381.

<sup>618</sup> The American Antidumping Statute uses the term of suspension agreement to replace price undertaking. See Bryan and Boursereau 1984-1985:690; Schnerre 1993-1994:500-501. Also see the U.S.A.'s Antidumping and Countervailing Duty Statutes. 19 U.S.C. §1675.

<sup>619</sup> China's Antidumping Statute of 2001. Section 49-50.

<sup>620</sup> See Chapter 3.3.1

GATT of 1967.<sup>621</sup> Article 7 of the Antidumping Code 1967 makes two provisions regarding price undertaking.<sup>622</sup> Article 7 states:

- (a) Anti-dumping proceedings may be terminated without imposition of anti-dumping duties or provisional measures upon receipt of a voluntary undertaking by the exporters to revise their prices so that the margin of dumping is eliminated or to cease to export to the area in question at dumped prices if the authorities concerned consider this practicable, e.g. if the number of exporters or potential exporters of the product in question is not too great/or if the trading practices are suitable.<sup>623</sup>
- (b) If the exporters concerned undertake during the examination of a case, to revise prices or to cease to export the product in question, and the authorities concerned accept the undertaking, the investigation of injury shall nevertheless be completed if the exporters so desire or the authorities concerned so desire. If a determination of no injury is made, the undertaking given by the exporters shall automatically lapse unless the exporters state that it shall not lapse. The fact that exporters do not offer to give such undertakings during the period of investigation, or do not accept an invitation made by the investigating authorities to do so, shall in no way be prejudicial to the consideration of the case. However, the authorities are of course free to determine that a threat of injury is more likely to be realized if the dumped imports continue.<sup>624</sup>

In addition, terms of review also appear in Article 9 (b) of the Antidumping Code 1967. It States:

- (b) The authorities concerned shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if interested suppliers or importers of the product so request and submit information substantiating the need for review.<sup>625</sup>

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<sup>621</sup> See Chapter 3.3.2

<sup>622</sup> Agreement on Implementation of Article 6 of the GATT of 1967: Article 7. <http://www.wto.org>.

<sup>623</sup> Agreement on Implementation of Article 6 of the GATT of 1967: Article 7(a).

<sup>624</sup> Agreement on Implementation of Article 6 of the GATT of 1967: Article 7(b).

<sup>625</sup> Agreement on Implementation of Article 6 of the GATT of 1967. Article 9 (b).

No clear procedures for reviews are given in Article 9. Consequently it does not solve the practical legal problems. The Antidumping Code 1967, however, was a big step forward as for the first time it made provisions on price undertaking and reviews.

In 1970, Seavey remarked<sup>626</sup>: "There is no provision, however, for the review or revision of price undertakings given in settlement of actionable dumping cases. It would be useful, in my opinion, to add a provision to Article 7 to the effect that the authorities shall review a voluntary undertaking at reasonable intervals, either at the request of the exporter or on their own initiative, and terminate or revise it where enforcement of the original terms under altered circumstances would work an unreasonable hardship on the exporter. The provision should apply equally to undertakings to revise prices and to limit the volume of imports."<sup>627</sup> This remark indicates that during the 70's, some scholars woke up to the importance of price undertaking reviews.

Along with the development of the world economy, the international trade legislations were developing rapidly. In the Antidumping Code 1979, that is the Agreement on Implementation of Article 6 of the GATT of 1979,<sup>628</sup> just as Seavey indicated in 1970, the number of provisions on Article 7 had increased from two to seven.<sup>629</sup> Noteworthy is the fact that the Antidumping Code 1979 has a special provision on price undertaking reviews.<sup>630</sup> The Article 7.6 states:

Undertakings shall not remain in force any longer than anti-dumping duties could remain in force under this Code. The authorities of an importing country shall review the need for the continuation of any price undertaking, where warranted, on their own initiative or if interested exporters or importers of the product in question so request and submit positive information substantiating the need for such review.<sup>631</sup>

From this time onwards, price undertaking reviews have a legal

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<sup>626</sup> Seavey 1970:131.

<sup>627</sup> Seavey 1970:131.

<sup>628</sup> See Chapter 3.3.3

<sup>629</sup> In this Article 7, the content is still about price undertaking.

<sup>630</sup> Agreement on Implementation of Article 6 of the GATT of 1979. Article 7.6

<sup>631</sup> Agreement on Implementation of Article 6 of the GATT of 1979. Article 7.6

basis. Article 7.6 describes the eligibility of petitioners and what petitioners need to do. But, only one provision for price undertaking reviews is not enough. These reviews need more provisions prescribing standards and results of review.

In 1994, the GATT Members reached a new agreement, the Agreement on Implementation of Article 6 of the GATT 1994 (WTO Antidumping Agreement).<sup>632</sup> Article 11 of this agreement prescribes administrative reviews in detail. Price undertakings are prescribed in Article 8. However, the provision of price undertaking review prescribed in Article 7 of the Antidumping Code 1979 was deleted. Instead, Article 11.5 of the WTO Antidumping Agreement states that the provisions of this Article “shall apply *mutatis mutandis* to price undertakings accepted under Article 8”. The problem is what “*mutatis mutandis*” entails legally? The agreement has no explanation of this.

Price undertakings are as important as antidumping duties in antidumping cases. In truth, in practice, price undertakings are used more often than antidumping duties.<sup>633</sup> Therefore, price undertaking reviews should receive more attention and be prescribed in an individual manner. In this respect, the U.S.’s and China’s Antidumping Statutes are better than South Africa’s.<sup>634</sup>

### 6.3 South Africa

South Africa’s Antidumping Regulations make separate provision for reviews.<sup>635</sup> Reviews are classified as: Interim reviews, New shipper reviews, Sunset reviews, Anticircumvention reviews and Judicial reviews.<sup>636</sup>

However, there are no stipulations on price undertaking reviews. Section 39.2 simply prescribes that:

The Commission may decide on the information to be submitted in respect of the offering and maintenance of undertaking and may terminate an undertaking if the

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<sup>632</sup> See Chapter 3.3.4

<sup>633</sup> See Chapter 5.1; also see Oudsten 1988-1989:350.

<sup>634</sup> See this Chapter 6.4 and 6.5

<sup>635</sup> See South Africa’s Antidumping Regulations 2003. Part D - Reviews. This Act is available from the International Trade Administration Commission’s (ITAC) website at [www.itac.org.za](http://www.itac.org.za)

<sup>636</sup> See South Africa’s Antidumping Regulations 2003. Part D. Section 40-64. See also Osode 2003-2004:27-29 for a discussion of South African Judicial review of antidumping duty determinations.

conditions are not met.<sup>637</sup>

But what does the “condition” imply? The provision does not explain it.

Furthermore, there are no prescriptions on the eligibility of petitioners of price undertaking reviews, standards of reviews and results of reviews. The South African ITAC thus has considerable discretionary power.<sup>638</sup>

Additionally, the provision of Section 45.1 is noteworthy. It states:

The Commission will only initiate an interim review if the party requesting such interim review can prove significantly changed circumstances.

The term, “changed circumstances”, used in this provision might include the original intention of price undertaking legislators. But, the final recommendation says nothing about price undertakings.<sup>639</sup> It just comments on antidumping duties. It is clear that the South African Antidumping Regulations have little relationship with price undertaking reviews.

There are also no price undertaking reviews in the South African ITA Act. Section 46(1) of the ITA Act only provides that a person affected by a determination, recommendation or decision of ITAC, may apply to a High Court for a review of that determination, recommendation or decision.<sup>640</sup>

Therefore, although South Africa’s Antidumping Regulations have a special Part D for reviews, it is still incomplete. Matters would improve if price undertaking reviews could be included, together with, for instance, interim and anticircumvention reviews.

## 6.4 U.S.A.

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<sup>637</sup> See South Africa’s Antidumping Regulations 2003. Section 39.2

<sup>638</sup> See Chapter 3, section 3.4.4, above.

<sup>639</sup> See South Africa’s Antidumping Regulations 2003. Sub-Part II. Interim reviews. Section 47. The Regulations state: “[t]he Commission’s final finding, in the form of a recommendation to the Minister, may result in an increase, decrease, the withdrawal or the reconfirmation of the existing anti-dumping duty”, and “[t]he Commission may increase, decrease or confirm the scope of the application of such anti-dumping duty.”

<sup>640</sup> The International Trade Administration Act:Section 46.1. See also Barral ea 2005:59-60, for a discussion on appeal process of an antidumping case in South African laws.

In the U.S.'s Antidumping Statutes, the provisions for annual administrative reviews group suspension agreement (price undertaking) and antidumping duty orders.<sup>641</sup> The Statute states:

At least once during each 12-month period beginning on the anniversary of the date of publication of ..., an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall-

- (A) review and determine the amount of any net countervailable subsidy,
- (B) review, and determine..., the amount of any antidumping duty, and
- (C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review ... or dumping margin involved in the agreement,

and shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.<sup>642</sup>

It provides for administrative review of antidumping duty orders or suspension agreements at the request of an interested party,<sup>643</sup> but only where sufficiently changed circumstances are shown.<sup>644</sup>

In addition, the U.S.'s Statute grants the Commission discretion to conduct a review based upon changed circumstances.<sup>645</sup> The U.S.'s Statute prescribes detailed rules for administrative reviews, including suspension agreement (price undertaking) review. As

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<sup>641</sup> The U.S.A.'s Antidumping and Countervailing Duty Statutes. (From the Tariff Act of 1930, as amended) 19 U.S.C. §1675(a)(1).

<sup>642</sup> The U.S.A.'s Antidumping and Countervailing Duty Statutes. (From the Tariff Act of 1930, as amended) 19 U.S.C. §1675(a)(1).

<sup>643</sup> The U.S.A.'s Antidumping and Countervailing Duty Statutes. (From the Tariff Act of 1930, as amended) 19 U.S.C. §1675(a)(1).

<sup>644</sup> Jefford 1987:113; Bryan and Boursereau 1984-1985:690. Also see the U.S.A.'s Antidumping and Countervailing Duty Statutes. (From the Tariff Act of 1930, as amended) 19 U.S.C. §1675(b)(1).

<sup>645</sup> The U.S.A.'s Antidumping and Countervailing Duty Statutes. (From the Tariff Act of 1930, as amended) 19 U.S.C. §1675(b). Here the term "Commission" means the United States International Trade Commission.

review standards, in conducting a suspension agreement review, the Commission shall determine whether the suspension agreement continues to eliminate the injurious effects of imports of the subject merchandise completely.<sup>646</sup> And, during a review conducted by the Commission, the party seeking termination of a suspension agreement shall have the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant such termination.<sup>647</sup>

As a result of a suspension agreement review, if the Commission makes a negative determination, the suspension agreement shall be treated as not accepted. The administering authority and the Commission shall proceed as if the suspension agreement had been violated.<sup>648</sup>

Although the U.S.'s Antidumping Statute does not make individual provision for suspension agreement reviews, it still prescribes suspension agreement reviews clearly and in detail. The eligibility of petitioners, standards of reviews and results of reviews are well stipulated. Comparing with South African Antidumping Regulations, some provisions of the U.S.'s Anti-dumping Statute are worthy to be used for reference.

## 6.5 China

China's Antidumping Statute has similar provisions on price undertaking reviews as the U.S.A. China also groups antidumping duty and price undertaking reviews.<sup>649</sup> But these provisions are not as detailed as the U.S.'s. Section 49 of the Statute states:

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<sup>646</sup> The U.S.A.'s Antidumping and Countervailing Duty Statutes. (From the Tariff Act of 1930, as amended) 19 U.S.C. §1675(b)(2)(B).

<sup>647</sup> The U.S.A.'s Antidumping and Countervailing Duty Statutes. (From the Tariff Act of 1930, as amended) 19 U.S.C. §1675(b)(3)(B).

<sup>648</sup> The U.S.A.'s Antidumping and Countervailing Duty Statutes. (From the Tariff Act of 1930, as amended) 19 U.S.C. §1675(f)

“Determination that basis for suspension no longer exist: If the determination of the Commission under subsection (b)(2)(B) of this section is negative, the suspension agreement shall be treated as not accepted, beginning on the date of publication of the Commission's determination, and the administering authority and the Commission shall proceed, under section 1671c(i) or 1673c(i) of this title [section 704(i) or 734(i) of this Act], as if the suspension agreement had been violated on that date, except that no duty under any other subsequently issued shall be assessed on merchandise entered, or withdrawn from warehouse, for consumption before that date.”

<sup>649</sup> The China Antidumping Statute. Article 5. section 48-52.

[...] when a price undertaking goes into effect, the department of Commerce shall review the need for the continued implementation of the price undertaking, where warranted, on its own initiative or, after a reasonable period of time, upon request by any interested party which submits relevant information, and such information should be checked by the department of Commerce.<sup>650</sup>

For results of price undertaking reviews, section 50 states:

According to the determination of the review, [...] the department of Commerce shall proceed, under this statute, to make a decision to continue or amend or terminate the price undertaking and publish the decision.<sup>651</sup>

These provisions of price undertaking reviews in China's Antidumping Statute, especially the provision which prescribes results of a price undertaking review, are also worthy to be used for reference.

However, the China's Antidumping Statute lacks detailed provisions for new shipper reviews, sunset reviews and anticircumvention reviews. Judicial reviews are only described in a short sentence in its section 53. Section 53 states:

[...] for dissatisfaction with the decision of review made under Article 5 of this statute, can be applied in an administrative reconsideration or a complaint to the People's Court can be lodged.<sup>652</sup>

## **6.6 Conclusion**

From the above discussion on price undertaking reviews, it is clear that the WTO Antidumping Agreement just prescribes a leading rule. In compliance with that rule, the U.S.'s and China's Antidumping Statutes prescribe special and detailed provisions for price undertaking reviews. South Africa's Antidumping Regulation, although it has a substantial Part D for reviews, still has a gap regarding price undertaking reviews.

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<sup>650</sup> The China Antidumping Statute. Article 5. section 49

<sup>651</sup> The China Antidumping Statute. Article 5. section 50

<sup>652</sup> The China Antidumping Statute. Article 5. section 53.

In comparison with the provisions of the U.S., if the ITAC faces a price undertaking review, there are no provisions for standards and results of review in its regulations. The ITAC's discretionary powers for such a review are therefore greater than normal in an antidumping duty review proceeding.

## Chapter 7 Anticircumvention measures

### 7.1 Introduction

Article 6 of GATT 1994 and the rules set out under the WTO Antidumping Agreement seek to arm Members with the tools for confronting dumping practices. They are, however, still inadequate in the face of international trade practices. In fact, the provisions do not contemplate strategies such as the circumvention of antidumping measures, a trade process for exporting products into an importing country by which exporters disguise their dumping activities to avoid the antidumping duties of the importing country.<sup>653</sup> Circumvention of antidumping duties can be a major problem in providing effective relief under the WTO Antidumping Agreement.<sup>654</sup> To prevent circumvention, the E.U.<sup>655</sup> was the first to make a legislative provision in June 1987, followed by the U.S. in 1988.<sup>656</sup>

The practices of anticircumvention measures are controversial in the international antidumping realm.<sup>657</sup> Because anticircumvention is a double-edged sword, it has a dual effect.<sup>658</sup> On the one hand, anticircumvention measures can effectively prevent circumventing antidumping duties in international trade. It therefore safeguards the remedial effect of antidumping duties and assures the domestic industries in the importing countries of the reasonable benefits. On the other hand, if anticircumvention measures are not used appropriately or are abused, it can disadvantage international trade and international investment.<sup>659</sup>

Currently, the international community has not reached a unified

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<sup>653</sup> Ostoni 2005:408-409.

<sup>654</sup> Stewart 1999:729.

<sup>655</sup> Council Regulation No. 1761/87 of June 1987 amending Regulation No. 2174/84 of 23 July 1984 ("parts amendment"). Prior to Uruguay Round Antidumping Agreement the provision appeared as Article 13 (10) of Council Regulation No. 2423/88 of 11 July 1988.

<sup>656</sup> Tariff Act of 1930. § 781 as amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 § 1321, 102 Stat 1107, 1192-95. Section 781 has been further amended although no definitive agreement on anticircumvention was reached at the Uruguay Round. See also Corr 1997-1998:95 for a brief discussion about anticircumvention.

<sup>657</sup> Corr 1997-1998:95.

<sup>658</sup> YiLi 2003:21.

<sup>659</sup> Vermulst 1989:777.

agreement on circumvention and anticircumvention measures.<sup>660</sup> The U.S.A. and the E.U. regard the behavior that circumvents an antidumping duty as transformed dumping. It seriously weakens the remedial effect of the antidumping duty in the importing country. But Japan and Korea see the anticircumvention measure as the extensive application of an antidumping duty. It is therefore an example of trade protectionism.<sup>661</sup>

Because of these differences in perspective, the Uruguay Round of multilateral trade negotiations could not reach an agreement with respect to the anticircumvention problem.<sup>662</sup> Consequently, the only reference to anticircumvention in the WTO Agreement (the GATT Agreement 1994) is a simple ministerial decision:

Noting that while the problem of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on specific text,

Mindful of the desirability of the applicability of uniform rules in this area as soon as possible,

[The Ministers] [d]ecide to refer this matter to the Committee on Anti-Dumping Practices established under

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<sup>660</sup> Adamantopoulos and Notaris 2000-2001:56; Corr 1997-1998:95-96; Vermulst 1989:775-776; Ostoni 2005:416.

<sup>661</sup> Corr 1997-1998:95-96.

<sup>662</sup> Anticircumvention provisions were deleted from the WTO Antidumping Agreement ultimately. The reason is that all member countries have a big divarication on this problem. They could hardly reach a consensus during that time. Especially Article 12 of the "Dunkel Draft", it stipulates the using conditions and the procedure of anticircumvention measure strictly. It, therefore, weakens the flexibility and punishing strength of anticircumvention measure. So, it was opposed strongly by the U.S. and E.U. Article 12 of the Dunkel Draft refers to one of the final drafted versions with regard to the GATT anticircumvention provisions which was put forward by Dunkel, a coordinator of the Uruguay Round negotiations, in December of 1991. This draft absorbed the anticircumvention provisions of the U.S.'s and E.U.'s antidumping laws. But, because there was a big divarication about the anticircumvention problem between some countries, like the U.S. and E.U., and another members of the GATT, like Japan and Korea. This Dunkel Draft was not included in the end text of the GATT Antidumping Agreement 1994. See also Adamantopoulos and Notaris 2000-2001:56; Corr 1997-1998:95-96; Vermulst 1989:775-776.

that Agreement for resolution.<sup>663</sup>

In April 1997 (three years after the finalization of GATT 1994), the WTO Committee on Antidumping Practices established an Informal Group on Anticircumvention in order to promote the discussion and make recommendations with respect to this issue. Then, WTO Members decided to address again the unresolved issue of antidumping circumvention at the Fourth WTO Ministerial Conference that took place in Doha, Qatar in November 2001.<sup>664</sup> The activities of the Informal Group on Anticircumvention continued regularly during 2001 to 2003, and the WTO Members continued to discuss the definition of circumvention, and analyze the domestic provisions related to the issue.<sup>665</sup> The collapse of the Fourth and Fifth WTO Ministerial Conference in Cancun in September 2003 further stalled the process of a successful negotiation of antidumping regulation. Presently it seems unlikely that the Informal Group on Anticircumvention will be able to propose and draft new multilateral anticircumvention provisions in the near future.<sup>666</sup>

From the Dunkel Draft of the Uruguay Round negotiations as well as from the on going legislation in different countries, it can be seen that the Ministerial Decision did not solve the problem and anticircumvention legislation remains a trend in the world.<sup>667</sup> The U.S. and E.U. are broadening their legislations. South Africa follows this trend. China has no special provision for the problem of circumvention. The U.S. and E.U. legislation on anticircumvention, might influence the discussions within the

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<sup>663</sup> Statement on Anticircumvention, Dec. 15, 1993. Ministerial Decisions and Declarations Agreement on Implementation of Article 6 of GATT 1994. <http://www.wto.org>.

<sup>664</sup> The Ministerial Conference in Doha was surrounded by many factors, which had negative effects on the possibility that the WTO Members would find a common agenda (e.g., the geopolitical crisis following 9/11; the pressure due to the critical attitude of some leading opinion movements concerning international trade; the relevant position that developing countries claimed in the negotiating process). The Conference was affected by a general lack of spirit of cooperation and the individual WTO Members preferred to focus on specific instances inspired by individual needs. In particular, in view of its imminent enlargement, the EU insisted on the issues of agricultural subsidies, while the US affirmed the necessity to strengthen antidumping and antisubsidiaries measures.

<sup>665</sup> USTR(United States Trade Representative) Annual Report – World Trade Organization:2003, available at <http://www.ustr.gov> (last visited March 20, 2006).

<sup>666</sup> Ostoni 2005:416.

<sup>667</sup> YiLi 2003:21; Shang Ming 2003:48; Wang Jingqi 2000:49.

Informal Group. This is because of their importance in the international trade context.<sup>668</sup> Therefore, in this chapter, the process of deciding on anticircumvention provisions in the U.S., E.U., South Africa and China will be compared. The deficiencies in South African legislation will be discussed.

## 7.2 Definition of circumvention

The European Union's approach to the issue of antidumping circumvention is embodied in Article 13 of Regulation (EC) No 461/2004 of 8 March 2004.<sup>669</sup> The definition of circumvention in the European Union Antidumping Regulation reads:

Circumvention shall be defined as a change in the pattern of trade between third countries and the Community or between individual companies in the country subject to measures and the Community, which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like product, and where there is evidence of dumping in relation to the normal values previously established for the like product, if necessary in accordance with the provisions of Article 2.[determination of dumping – MT]<sup>670</sup>

The definition of circumvention in South Africa's Antidumping Regulation is similar to the E.U.'s. Section 60.1 states:

Other than circumvention contemplated in subsection 2(a) [improper declaration – MT] and (b) [absorption of the antidumping duty – MT], circumvention shall be deemed to take place if one or more of the following conditions are met:

(a) a change in the pattern of trade between third countries and South Africa or the common customs area of the Southern African Customs Union;

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<sup>668</sup> Ostoni 2005:417. See also Osode 2003-2004:21, note 10.

<sup>669</sup> Council Regulation (E.C) No.461/2004 of 8 March 2004 amending Regulation (E.C) No.384/96 on protection against dumped imports from countries not members of the European Community. Article 13 See also

<sup>670</sup> <http://europa.eu.int/comm/trade/issue/respectrules/anti-dumping>.  
The EU Antidumping Regulation: Article 13.1.

- (i) which results from a practice, process or work;
- (ii) for which there is no or insufficient cause or economic justification other than the imposition of the anti-dumping duty;
- (b) remedial effects of the anti-dumping measure are being undermined in terms of the volumes or prices of the products under investigation;
- (c) dumping can be found in relation to normal values previously established for the like or similar products.<sup>671</sup>

China's Antidumping Statute does not clearly define circumvention. It only states:

The Department of Commerce can adopt measures to prevent the behavior of circumventing an antidumping duty.<sup>672</sup>

Along with the development of international trade, antidumping and countervailing measures became the legal means to protect domestic industries and prevent the entrance of foreign products. The number of antidumping cases are increasing world-wide: in the 1980s, there were 138; in the 1990s 237; and from 1999 to 2001 there were 330.<sup>673</sup>

South Africa adopted antidumping measures in 1994. There were 160 antidumping cases during 1995~2002. This exceeds Australia's and Canada's, the traditional antidumping countries.<sup>674</sup>

### **7.3 The forms of circumvention**

According to Ostoni,<sup>675</sup> the circumvention of antidumping measures is a trade strategy for exporting complex manufactured products into an importing country when the country applies or is likely to apply antidumping duties for protecting a domestic industry that produces like products.<sup>676</sup> Circumvention strategies are based on hiding the origin of the dumped product by confusing the customs authorities of the importing country, as well as the

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<sup>671</sup> South Africa Antidumping Regulations:Section 60.1.

<sup>672</sup> China's Antidumping Statute of 2002, Chapter 6, Section 55.

<sup>673</sup> Shang Ming 2004:14.

<sup>674</sup> Shang Ming 2004:14. See also [www.wto.org](http://www.wto.org).

<sup>675</sup> Ostoni 2005:409.

<sup>676</sup> Ostoni 2005:409.

trade players and consumers.<sup>677</sup> The methods which exporters adopt to circumvent an antidumping duty vary.

More specifically, in the South African Antidumping Regulation, it stipulates seven types of circumvention. The Regulation states:

For purposes of anti-circumvention the following types of circumvention shall be treated separately:

- (a) improper declaration of -
  - (i) the value of the product;
  - (ii) the origin of the product; or
  - (iii) the nature or classification of the product.
- (b) minor modifications to the product subject to anti-dumping duty;
- (c) the export of parts, components and sub-assemblies with assembly in a third country or within the common customs area of the Southern African Customs Union;
- (d) absorption of the anti-dumping duty by either the exporter or the importer;
- (e) country hopping, [...];
- (f) declaration under a different tariff heading, even where such different tariff heading does provide for the clearance of that product;
- (g) any other form of circumvention as may be submitted for the Commission's consideration.<sup>678</sup>

Chinese Antidumping Statute 2004 has no stipulations with respect to forms of circumvention.

In current anticircumvention legislation, there are three distinct types of antidumping circumvention strategies that should be given more attention: (a) assembling imported subject product in the importing country or a third country; (b) altering the product in a minor way; and (c) developing a different product.<sup>679</sup>

### 7.3.1 Assembling the imported subject product in the importing country or a third country.

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<sup>677</sup> Ostoni 2005:409.

<sup>678</sup> South Africa Antidumping Regulations:Section 60.2.

<sup>679</sup> See the U.S.'s, E.U.'s and South Africa's Antidumping Laws. See also Bhala and Kennedy 1998:641; Bhala 1995-1996:54; Holmes 1995:16; Wang Jingqi 2000:49-50; Shen Muzhu 2002:506-507; Shang Ming 2003:48; Vermulst 1989:775-776; Ostoni 2005:409-411; Macrory ea 1991:84.

This method utilizes the classificatory dissimilarity in customs tariffs between the finished product and the parts of the product in each country.<sup>680</sup> On this aspect, provisions differ from country to country.

In the United States' Antidumping Duty Statutes, the provisions on assembling imported product in the United States and a third country are separated in two sections.<sup>681</sup> For considering imported parts or components subsequently assembled in the United States, U.S.'s antidumping law empowers the Department of Commerce (DOC) to expand the scope of an extant order to include such components. In doing so, the DOC must determine that:

- (A) merchandise is sold in the United States [...] is the same as merchandise that is subject to an antidumping [...] order;
- (B) merchandise is completed or assembled in the United States from parts or components produced in the foreign country to which the antidumping order applies; and
- (C) the difference between the value of the merchandise sold in the United States and the value of the imported parts and components is small.<sup>682</sup>

The third condition implies that the value of the foreign parts or components is a "significant portion of the total value of the merchandise",<sup>683</sup> and conversely, that the assembly operation in the United States is "minor or insignificant".<sup>684</sup> If little value is added in the United States, then it is reasonable to conclude that the respondent is "dumping finished merchandise in an unfinished form".<sup>685</sup>

The question is how does the DOC determine whether the American assembly operation is "minor or insignificant". The

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<sup>680</sup> YiLi 2003:21.

<sup>681</sup> The United States Antidumping Duty Statutes, 19 U.S.C. §1677j (a) and (b).

<sup>682</sup> The United States Antidumping Duty Statutes, 19 U.S.C. §1677j (a) (1).

<sup>683</sup> The United States Antidumping Duty Statutes, 19 U.S.C. §1677j (a) (1) (D).

<sup>684</sup> The United States Antidumping Duty Statutes, 19 U.S.C. §1677j (a) (1) (C).

<sup>685</sup> Bhala and Kennedy 1998:642; Bhala 1995-1996:54; Ostoni 2005:422-423.

provisions are not clear. The key term “small” is not defined in the statute, and the legislative history merely states that “small” is not to be interpreted as “insignificant”. According to Bhala, one solution would be to use quantitative tests for defining “minor or insignificant” assembly operations and “significant” added value to provide greater discipline.<sup>686</sup> The Department of Commerce, in practice, has indicated that the question of what is “small” is to be decided on a case-by-case basis.<sup>687</sup> In *Certain Internal-Combustion, Industrial Forklift Trucks From Japan*,<sup>688</sup> the DOC held that the assembly of forklift trucks in the U.S. using Japanese components was not covered by the anticircumvention provision where between 25 percent and 40 percent of the value of the trucks was non-Japanese.<sup>689</sup> Another example, portable electric typewriters from Japan, after the U.S. imposed duties on its typewriters in 1980, Brother Industries, the Japanese exporter, modified them to avoid the duties and later moved assembly to a plant in Bartlett, Tennessee.<sup>690</sup> Finally, the DOC decided that sufficient value was added to the parts.<sup>691</sup> So an anticircumvention penalty was not used.

For the factors of consideration, according to the United States Antidumping Statute, with respect to the American operation, the DOC can examine:

- (A) the level of investment in the United States,
- (B) the level of research and development in the United States,
- (C) the nature of the production process in the United States,
- (D) the extent of production facilities in the United States, and
- (E) whether the value of the processing performed in the United States represents a small proportion of the value of the merchandise sold in the United States.<sup>692</sup>

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<sup>686</sup> Bhala 1995-1996:115.

<sup>687</sup> Macrory ea 1991:84. See also Bhala 1995:111-115 for a discussion of anticircumvention in Post-Uruguay Round Antidumping Law in the USA.

<sup>688</sup> Federal Register 1990:55 (6028).

<sup>689</sup> Macrory ea 1991:84.

<sup>690</sup> Novack 1992:48.

<sup>691</sup> Novack 1992:48.

<sup>692</sup> The United States Antidumping Duty Statutes, 19 U.S.C. §1677j (a) (2).

The DOC also needs to consider the following factors:

- (A) the pattern of trade, including sourcing patterns,
- (B) whether the manufacturer or exporter of the parts or components is affiliated with the person who assembles or completes the merchandise sold in the United States from the parts or components produced in the foreign country with respect to which the order or finding described in paragraph (1) [antidumping duty order or a finding – MT] applies, and
- (C) whether imports into the United States of the parts or components produced in such foreign country have increased after the initiation of the investigation which resulted in the issuance of such order or finding.<sup>693</sup>

The DOC has similar powers with respect to imported merchandise assembled from components in a third country. In considering this, before expanding an order to include this merchandise, the DOC must determine that:

- (A) merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject of an antidumping duty order,
- (B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which is subject to such order or is produced in the foreign country with respect to which such order applies,
- (C) the process of assembly or completion in the foreign country referred to in subparagraph (B) is minor or insignificant,
- (D) the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States, and
- (E) the administering authority determines that action is appropriate under this paragraph to prevent evasion of such order.<sup>694</sup>

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<sup>693</sup> The United States Antidumping Duty Statutes, 19 U.S.C. §1677j (a) (3).

<sup>694</sup> The United States Antidumping Duty Statutes, 19 U.S.C. §1677j (b) (1).

The fourth condition is crucial. It may indicate that the exporter is dumping products assembled in a third country. The same criteria discussed above to determine whether an operation is “minor or insignificant”, are used to evaluate whether a foreign operation is “minor or insignificant”.<sup>695</sup> For an example, a U.S. company, Zenith Electronics Corp., complained Japan, Korea, Singapore and Canada were dumping color picture tubes in the U.S.<sup>696</sup> Since 1988 the U.S. had imposed dumping duties on color picture tubes from these four countries. The tubes were shipped to Mexico, where TVs were assembled and exported to the U.S.-without dumping duties. In 1991, the Department of Commerce turned down a request by U.S. television makers’ unions that dumping duties be imposed on non-U.S. tubes in Mexican TVs imported into this country. So in this case, DOC said sufficient value was added to the product to escape penalties.<sup>697</sup>

The E.U. Antidumping Regulation, Article 13.2 stipulates more concrete and detailed conditions which the investigating authority of the E.U. can use to determine whether an assembly operation in the Community or a third country shall be considered to circumvent the measures in force.

Article 13.2 (a) stipulates provisions on time, that is whether:

[t]he operation started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation and the parts concerned are from the country subject to measures.<sup>698</sup>

This provision is particularly important. In practice, it means that any new processing factory which started since the initiation of the antidumping investigation, or just prior to the initiation, and any operation which purchased the parts from the exporter who is subject to the antidumping duty, can both be suspected to circumvent the measures.

The E.U. antidumping legislation, however, has no explanation on what is meant by “just prior to” the initiation. This makes the

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<sup>695</sup> The United States Antidumping Duty Statutes, 19 U.S.C. §1677j (b) (2).

<sup>696</sup> Novack 1992:48.

<sup>697</sup> Novack 1992:48.

<sup>698</sup> Council Regulation (E.C) No.384/96 on protection against dumped imports from countries not members of the European Community. Article 13.2 (a).

provision flexible.<sup>699</sup> The European Commission is given a large discretionary power to decide on individual cases.

A further provision is on the proportion of the parts to the total value of the assembled product.

The E.U. Anticircumvention Law establishes a basic criterion that the parts “constitute 60% or more of the total value of the assembled product”.<sup>700</sup> If the value of the parts does not exceed 60% of the total value no circumvention took place. Otherwise, this product shall be considered to circumvent the antidumping duty.

The third stipulation is on the increment of the value.<sup>701</sup>

If only “the value added to the parts brought in, during the assembly or completion operation, is greater than 25% of the manufacturing cost”, this product shall not be considered to circumvent the antidumping duty.<sup>702</sup> So the E.U. Commission cannot take an anticircumvention measure against it.

But this condition is quite restrictive, since the test takes into account the value added during the assembly operation.<sup>703</sup>

The fourth provision considers the price history of the product. There is a circumvention if “the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the assembled like product and there is evidence of dumping in relation to the normal values previously established for the like or similar products”.<sup>704</sup>

In the South African Antidumping Regulations, there are similar provisions with regard to anticircumvention. There are two insufficiencies with respect to the problem of assembling imported subject product in the importing country or a third country, when comparing the U.S.’s and E.U.’s anticircumvention provisions.

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<sup>699</sup> YiLi 2003:23.

<sup>700</sup> Council Regulation (E.C) No.384/96 on protection against dumped imports from countries not members of the European Community. Article 13.2 (b). See also Vermulst 1989:776.

<sup>701</sup> Macrory ea 1991:135.

<sup>702</sup> Council Regulation (E.C) No.384/96 on protection against dumped imports from countries not members of the European Community. Article 13.2 (b).

<sup>703</sup> Ostoni 2005:419.

<sup>704</sup> Council Regulation (E.C) No.384/96 on protection against dumped imports from countries not members of the European Community. Article 13.2 (c).

Firstly, there is no stipulation on time. The South African Antidumping Regulation does not stipulate when the circumvention behavior occurred, after the initiation of the antidumping investigation, or prior to the initiation. In practice, some importers (exporters) abuse this omission. Before the initiation of the formal investigating procedures, they changed the patterns of production or trade to circumvent the investigation.<sup>705</sup>

Secondly, there is no stipulation on the proportion of the parts to the total value of the assembled product. It only states that production “does not constitute a major transformation process.”<sup>706</sup> How should “major transformation process” be understood? The law needs a clear standard to operate. The lack of provisions of this standard gives the ITAC too much discretionary power.

### 7.3.2 Altering the product in a minor way

After an antidumping duty by the importing country is imposed, exporters may alter the product in a minor way or make some formal or apparent changes. They then export the changed product to the importing country. So this means that the changed product will not be the same as the products subject to antidumping duty.<sup>707</sup>

With respect to this kind of circumvention, the U.S.’s Antidumping Statute includes such slightly altered products in the scope of the existing order,<sup>708</sup> unless the DOC determines that it is unnecessary to include the product in the order.<sup>709</sup>

In the South African Antidumping Regulations, the anticircumvention provisions stipulate this behavior in detail. It has four criteria to determine the minor modifications of the product: (a) whether the production processes are materially the same, (b) whether the same raw materials are used, (c) whether the product has the same physical appearance or characteristics, and (d) whether it is a substitute for the real product.<sup>710</sup> These clear criteria make the ITAC determinations on circumvention easy and apparent.

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<sup>705</sup> YiLi 2003:21.

<sup>706</sup> South Africa’s Antidumping Regulations. Section 60.5

<sup>707</sup> Wang Jingqi 2000a:50; 2000b:181.

<sup>708</sup> The United States Antidumping Statute. 19 U.S.C. §1677j (c) (1).

<sup>709</sup> The United States Antidumping Statute. 19 U.S.C. §1677j (c) (2).

<sup>710</sup> South Africa’s Antidumping Regulations. Section 60.4 (a) (b).

The U.S.'s anticircumvention provisions also have similar stipulations, but they are considered under the heading of developing different products.

### 7.3.3 Developing different products (Later-developed products)

When an antidumping duty by the importing country is imposed, the exporter may develop a new product on the basis of the subject product, and export the new product to the importing country. Because the new product has a new function, it will not be subjected to the antidumping duty order.<sup>711</sup>

In the U.S.'s anticircumvention provisions, there are five criteria to assess the later-developed product:

- (A) the later-developed merchandise has the same general physical characteristics as the merchandise with respect to which the order was originally issued (hereafter in this paragraph referred to as the "earlier product"),
- (B) the expectation of the ultimate purchasers of the later-developed merchandise are the same as for the earlier product,
- (C) the ultimate use of the earlier product and the later-developed merchandise are the same,
- (D) the later-developed merchandise is sold through the same channels of trade as the earlier product, and
- (E) the later-developed merchandise is advertised and displayed in a manner similar to the earlier product.<sup>712</sup>

According to Bhala and Kennedy,<sup>713</sup> two circumstances might suggest that a later-developed product is not already covered by an existing order. First, the later-developed product may not fall under the same tariff heading as the earlier product. Second, the later-developed product "permits the purchaser to perform additional functions that are not the primary use of the merchandise, and the cost of the added functions is not a significant proportion of the total cost of the merchandise."<sup>714</sup>

However, the U.S. anticircumvention law has a specific provision

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<sup>711</sup> Wang Jingqi 2000:50.

<sup>712</sup> The United States Antidumping Statute. 19 U.S.C. §1677j (d) (1).

<sup>713</sup> Bhala and Kennedy 1998:644.

<sup>714</sup> Bhala and Kennedy 1998:644.

that addresses both circumstances. The provision states:

- The administering authority may not exclude a later-developed merchandise from a countervailing or antidumping duty order merely because the merchandise-
- (A) is classified under a tariff classification other than that identified in the petition or the administering authority's prior notices during the proceeding, or
  - (B) permits the purchaser to perform additional functions, unless such additional functions constitute the primary use of the merchandise and the cost of the additional functions constitute more than a significant proportion of the total cost of production of the merchandise.<sup>715</sup>

According to this provision, the DOC is forbidden from concluding that the later-developed product falls outside the scope of the existing order.

With regard to later-developed products, South Africa's anticircumvention provisions stipulate seven types of circumvention.<sup>716</sup>

#### **7.4 Anticircumvention measures**

In practice, each country's antidumping law empowers its authority to expand the scope of an existing antidumping duty to deal with the circumvention problem. Examples of these countries are the U.S. and E.U.<sup>717</sup>

According to South Africa's anticircumvention provisions, there are three ways to deal with circumvention:

- (a) the increase of anti-dumping duties to compensate for absorption of anti-dumping duties;
- (b) the extension of the scope of the anti-dumping duties to apply to parts, components or substitute like products, new models and the like;

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<sup>715</sup> The United States Antidumping Statute. 19 U.S.C. §1677j (d) (2).

<sup>716</sup> See chapter 7, section 7.3, above.

<sup>717</sup> The United States Antidumping Statute. 19 U.S.C. §1677j. Council Regulation (E.C) No.384/96 on protection against dumped imports from countries not members of the European Community. Article 13.1.

- (c) the extension of the anti-dumping duties, at the required level, to the supplier in the country from which the product is exported subsequent to the imposition of the original provisional payments or anti-dumping duties or the initiation of the original investigation, including to parts, components or substitute like product, new models and the like.<sup>718</sup>

China has no detailed provision on anticircumvention measures. It simply states: “The Department of Commerce can adopt adequate measures to prevent the behaviors of circumventing antidumping duty.”<sup>719</sup> How to understand “adequate measures” is not clear. There is no explanation in the Statute.

## 7.5 WTO inconsistency

Because of the absence of multilateral agreement to deal with these circumventions, from the first anticircumvention provision enacted by the EEC in June 1987,<sup>720</sup> anticircumvention provisions have received a lot of opposing voices.<sup>721</sup>

Firstly, anticircumvention instrument is inconsistent with the WTO Antidumping Agreement.<sup>722</sup> Because anticircumvention measures are not provided for in the WTO Antidumping Agreement.<sup>723</sup> There is no provision permitting anticircumvention measures or the imposition of antidumping duties on products which have not been fully investigated and found to be dumped and causing injury. The finding does not constitute the standards of determination of dumping required by the WTO Antidumping Agreement.<sup>724</sup> Likewise, the finding that the remedial effects of the duty are being undermined by circumvention does not equate to an injury determination.<sup>725</sup> Indeed, Article 18.1 of the WTO Antidumping Agreement forbids a WTO member from taking action against dumping except in accordance with the Agreement. Article 18.1

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<sup>718</sup> South Africa's Antidumping Regulations. Section 63.

<sup>719</sup> China's Antidumping Statute, Section 55.

<sup>720</sup> See Chapter 7, section 7.1, above.

<sup>721</sup> Macrory et al 1991:135; Bhala 1995-1996:113; Corr 1997-1998a:95; 1997-1998b:96. See also Norio Komuro 1996a:2-3; 1996b:9-10 for a discussion about EC anticircumvention measures.

<sup>722</sup> Bhala 1995-1996:113; See also Norio Komuro 1996a:2-3; 1996b:9-10.

<sup>723</sup> Vermulst 1989:775-776; Norio Komuro 1996:9; Corr 1997-1998:95-96; Adamantopoulos and Notaris 2000-2001:56; Ostoni 2005:416.

<sup>724</sup> Norio Komuro 1996:10.

<sup>725</sup> Norio Komuro 1996:10.

states:

No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.<sup>726</sup>

Furthermore, Article VI of the GATT 1947 provides that antidumping duties cannot be imposed without a finding of dumping and injury with respect to a like product from the country subject to investigation.<sup>727</sup> Thus, anticircumvention instrument is a unilateral modification, without foundation in the Agreement, of the importing countries' antidumping laws.<sup>728</sup>

Secondly, anticircumvention instrument is inconsistent with the national treatment principle of the GATT 1947.<sup>729</sup> Article III of the GATT 1947 stipulates the national treatment on internal taxation and regulation.<sup>730</sup> Article III states:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.<sup>731</sup>

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic

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<sup>726</sup> The WTO Antidumping Agreement: Article 18.1

<sup>727</sup> Article VI of the GATT 1947:section 6 (a). Article VI.6 (a) states: "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."

<sup>728</sup> Bhala 1995-1996:114.

<sup>729</sup> Norio Komuro 1996:3. See also Macrory ea 1991:135.

<sup>730</sup> The General Agreement on Tariffs and Trade 1947: Article III.

<sup>731</sup> The General Agreement on Tariffs and Trade 1947: Article III. 1.

products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.<sup>732</sup>

For the circumstance of like products assembled in the importing country, anticircumvention measure is to expand the scope of an existing antidumping duty to the like products which are assembled in the territory of the importing country.<sup>733</sup> So it is inconsistent with Article III of the GATT 1947. For example, Norio Komuro indicated that: "The GATT Panel stated in its report of March 1990 that the EC anticircumvention duties on products assembled within the EC constituted a discriminatory internal tax inconsistent with the national treatment principle (Article III:2 of the GATT)".<sup>734</sup>

Thirdly, for the circumstance of the application of antidumping duties to like products assembled from subject parts or components in a third country, this anticircumvention measure is inconsistent with customs origin rules and the WTO Agreement on Rules of Origin.<sup>735</sup> For example, in a U.S. case involving dumping duties on certain Korean semiconductors,<sup>736</sup> the United States applied the duty to Korea-fabricated dies that were encapsulated in non-subject third countries and exported to the U.S., even though the U.S. Customs Service origin rules deemed the imported semiconductors to be the products of the third countries, not products of Korea.<sup>737</sup>

Because anticircumvention instrument has these WTO inconsistencies, it would seem to be advisable and in the interest of all WTO Members to set out uniform rules on circumvention and antidumping.<sup>738</sup> Such rules should limit the discretion of administering authorities in applying anticircumvention measures and also prevent certain exporters from evading the antidumping laws.<sup>739</sup>

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<sup>732</sup> The General Agreement on Tariffs and Trade: Article III. 2.

<sup>733</sup> See Chapter 7, section 7.4, above.

<sup>734</sup> Norio Komuro 1996:3. See also Macrory *et al.* 1991:135.

<sup>735</sup> Corr 1997-1998a:95; 1997-1998b:96. See also Uruguay Round Multilateral Agreements on Trade in Goods: Agreement on Rules of Origin.

<sup>736</sup> See 58 Feb. Reg. 15467, 15468 (1993), as amended by 58 Feb. Reg. 27520 (1993).

<sup>737</sup> See *Dynamic random access memory semiconductors of one megabit and above from the Republic of Korea*, 58 Feb. Reg. 15467, 15468 (1993), as amended by 58 Feb. Reg. 27520 (1993).

<sup>738</sup> Vermulst 1989:778.

<sup>739</sup> Adamantopoulos and Notaris 2000-2001:56; Vermulst 1989:778.

## 7.6 Conclusion

Until now, the negotiations on multilateral anticircumvention legislation have not led to any tangible result. Indeed, not only has the Informal Group on Anticircumvention been unable to draft any proposal, but it has also been unable to define the related concepts and strategies of circumvention.<sup>740</sup>

Because the WTO Antidumping Agreement evades the anticircumvention problem, measures are currently only stipulated in some countries' antidumping laws.<sup>741</sup> Countries such as the U.S. and E.U., have established anticircumvention legislations and can implement their anticircumvention regulations and measures unrestrictedly.<sup>742</sup> If anticircumvention measures are abused, it will influence the normal international trade relationships and worsen international trade and the investment environment.<sup>743</sup> Therefore, it is necessary to formulate a set of universal regulations for anticircumvention and include it in the WTO Antidumping Agreement. Such regulations should strike a balance between allowing legitimate business practices and obstructing clear attempts to evade the antidumping measures. It would be advisable to limit the discretion of administering authorities in applying anticircumvention measures.

For South Africa, it still needs to formulate some concepts with regard to circumvention, such as a major transformation process.<sup>744</sup> Time stipulation on the process of investigating circumvention also needs to be taken into consideration.

For China, it needs to enact more detailed provisions to address the problem of circumventions. It is necessary to do so because of China's antidumping situation.<sup>745</sup>

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<sup>740</sup> Ostoni 2005:437.

<sup>741</sup> Australia, Canada, Japan, Mexico, New Zealand, South Africa, as well as the E.U. and the U.S. have adopted anticircumvention measures.

<sup>742</sup> Neumann 1998:385; Wang Jingqi 2000:49; Shen Muzhu 2002:508.

<sup>743</sup> Wang Jingqi 2000:52-53; Vermulst 1989:776; Shen Muzhu 2002:508.

<sup>744</sup> See Chapter 7, section 7.3.1, above.

<sup>745</sup> See Chapter 1, section 1.1, above.

## **Chapter 8**

### **Recommendations and conclusion**

#### **8.1 Introduction**

In 1904 the world's first antidumping law was adopted by Canada,<sup>746</sup> and up to now, we still cannot say that international antidumping laws or national antidumping laws are perfect. This study provided the background information about dumping and antidumping laws, a brief history of international and national antidumping laws (including the GATT, the WTO, the U.S.A., South Africa and China), and also set out to examine some issues of antidumping regulations internationally and nationally, with specific reference to the legal framework in South Africa and China. Principally, five issues were discussed: nonmarket economy countries, captive production, price undertaking, price undertaking review and anticircumvention.

In this final chapter, firstly, the basic theories and present practices about dumping and antidumping laws, and the development of history about antidumping legislations are concluded. Secondly, those main problematic issues of antidumping rules as apparent from the previous chapters are summarised and certain conclusions are drawn. In the third place specific recommendations are suggested for the reform of the South African and Chinese antidumping regulations. Finally, as a result of this study a conclusion will be drawn.

#### **8.2 Theory and practices**

In economics, dumping is defined as price discrimination between national markets.<sup>747</sup> It has two different forms: reverse dumping and obverse dumping. Because only obverse dumping can injure and threaten the industries of the importing country, it is regulated by the national and international legislations.<sup>748</sup> Three kinds of obverse dumping situations were discussed in this study: sporadic dumping, short-term dumping and long-term dumping.<sup>749</sup> Conditions of dumping were analysed. Dumping can cause serious problems in the countries directly involved, especially for the importing country.<sup>750</sup> Because dumping can cause serious prob-

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<sup>746</sup> Kennedy 2005:412; Krishna 2001:14.

<sup>747</sup> See Chapter 2, section 2.2.1, above.

<sup>748</sup> See Chapter 2, section 2.2.1 and section 2.2.2, above.

<sup>749</sup> See Chapter 2, section 2.2.4, above.

<sup>750</sup> See Chapter 2, section 2.2.6, above.

lems for countries, antidumping measures were used extensively.<sup>751</sup> In addition, because the tariff barriers and quantitative restrictions are decreased or prohibited by the WTO Agreements, the antidumping instrument itself is more advantageous than other nontariff measures, and given its relationship with economic performance, the antidumping instrument is preferred by all countries.<sup>752</sup>

A brief history of development about antidumping legislation is also discussed in this study.<sup>753</sup> Because the U.S.A played a major role in leading the legal campaign against dumping, the development of the American antidumping laws was also discussed.<sup>754</sup> At the international level, antidumping legislation has grown from small to big from the GATT to the WTO.<sup>755</sup> South Africa is an important representative of Africa in the development of antidumping law.<sup>756</sup> China enacted antidumping provisions in 1994. So, China is yet to bring its antidumping regime into line with WTO obligations.<sup>757</sup>

### **8.3 Problematic issues of antidumping rules**

#### **8.3.1 Nonmarket economy countries**

The problem of a nonmarket economy country is always controversial between developed states and developing countries in the international community. The WTO Antidumping Agreement only defines a nonmarket economy country, but it does not prescribe the ways to address it.

The South African Antidumping Regulations only suggest one way to solve this problem, using a third or surrogate country method.<sup>758</sup> It is still simple, and this solution is not adequate enough in practice. Firstly, the provision itself is vague: for example, what is “government intervention”, or the criteria for determination of a nonmarket economy, and the criteria for choosing a third country or surrogate country. Secondly, if the South African antidumping authority cannot find a third country or surrogate country, what can be done to solve this problem?

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<sup>751</sup> See Chapter 2, section 2.4, above.

<sup>752</sup> See Chapter 2, section 2.4, above.

<sup>753</sup> See Chapter 3, above.

<sup>754</sup> See Chapter 3, section 3.2, above.

<sup>755</sup> See Chapter 3, section 3.3, above.

<sup>756</sup> See Chapter 3, section 3.4, above.

<sup>757</sup> See Chapter 3, section 3.5, above.

<sup>758</sup> See Chapter 4, section 4.4.2, above.

The U.S.'s Antidumping Statutes hold a leading position in the historical context of international antidumping legislation. Not only do they prescribe the third or surrogate country method, but also the factors of production approach. The U.S. has set up a set of standards to address it,<sup>759</sup> such as hours of labor required, quantities of raw materials employed, amounts of energy and other utilities consumed, and representative capital cost, including depreciation.

The Chinese Antidumping Statute has no stipulation on a nonmarket economy country.<sup>760</sup> Therefore, China needs to add the provisions with respect to a nonmarket economy country. It is necessary to protect Chinese domestic industries.

Although the U.S.'s antidumping provisions, with respect to a nonmarket economy country, are more comprehensive than South Africa's, the U.S. still faces some legislative difficulties, such as the problem with a nonmarket economy country in transition. Furthermore, using both methods often results in a higher dumping margin for the nonmarket economy country's products.<sup>761</sup>

### 8.3.2 Captive production

Captive production is a new concept in South African and Chinese antidumping legislation. Two models, the American and the European Union model, were discussed in Chapter 4.<sup>762</sup> The analysis and comparison of the two models indicated that the European Union model should be recommended to the South African and Chinese lawmakers, because it is more rational and consistent with the principles of the WTO.<sup>763</sup>

### 8.3.3 Price undertaking

The provisions of price undertaking are problematic because it is, in practice, frequently used for different purposes and goals by both authorities of the importing country and exporters.<sup>764</sup> Although the WTO Antidumping Agreement has provisions on price

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<sup>759</sup> See Chapter 4, section 4.4.2, above.

<sup>760</sup> See Chapter 4, section 4.4.2, above.

<sup>761</sup> See Chapter 4, section 4.4.2, above.

<sup>762</sup> See Chapter 4, section 4.7.2, above.

<sup>763</sup> See Chapter 4, section 4.7.2, above.

<sup>764</sup> See Chapter 5, section 5.1, above.

undertaking, they are vague,<sup>765</sup> in terms of “the satisfaction of the authority” and “the other reasons”.

The South African Antidumping Regulations followed the stipulations of the WTO Antidumping Agreement with respect to price undertaking. The problem of vagueness thus continues.<sup>766</sup>

The Chinese Antidumping Statutes with respect to price undertaking, are only superficially compliant with the WTO Antidumping Agreement, in the provision of the refusal of a price undertaking.<sup>767</sup> So China has to provide for a much higher level of transparency in the application of its price undertaking provisions.

The special position of price undertaking in an antidumping case was analysed in Chapter 5. Factors (such as the controllability of the undertakings, trade relations, the interests of the importing member, and anticompetitive effect) influencing the decision to accept or reject a price undertaking by the importing authorities were discussed.<sup>768</sup> Advantages and disadvantages of South Africa using price undertaking as an antidumping measure, were outlined.<sup>769</sup>

#### 8.3.4 Price undertaking reviews

Because of the essentiality of price undertakings, administrative reviews of price undertakings are necessary in antidumping legislation. The South African Antidumping Regulation leaves a gap with respect to price undertaking reviews. The U.S. and China have definite provisions for price undertaking reviews, such as 19 U.S.C. §1675(a)(1) of the U.S.A.’s Antidumping and Countervailing Duty Statutes (From the Tariff Act of 1930, as amended) and section 49 of the China Antidumping Statute 2004.

#### 8.3.5 Anticircumvention

Because the WTO Antidumping Agreement has no provision for anticircumvention, it is a controversial issue in the international antidumping field. As traditional antidumping countries, the U.S. and E.U.’s anticircumvention provisions are more comprehensive. When comparing the U.S. and E.U. anticircumvention legislation

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<sup>765</sup> See Chapter 5, section 5.2.2, above.

<sup>766</sup> See Chapter 5, section 5.2.2, above.

<sup>767</sup> See Chapter 5, section 5.2.2, above.

<sup>768</sup> See Chapter 5, section 5.3.2, above.

<sup>769</sup> See Chapter 5, section 5.3.3, above.

with South Africa and China's legislation, the latter countries lack measures, such as time limitation in initiation of anticircumvention, and clear definition of concepts, such as: "major transformation process".<sup>770</sup>

The Table 3 below summarizes a comparison of the issues relating to antidumping which are discussed in this study.

Table 3: Comparison of rules governing antidumping.

	WTO	South Africa	China	The U.S.A.
The ordinary course of trade provisions	Yes	Yes	No (but used in practice)	Not discussed in this study
Profit margin provision	Yes	Yes	No	Yes (8%)
Injury provisions	Yes	Yes	Yes (but too simple)	Not discussed
Domestic industry provisions	Yes	Yes	Yes	Not discussed
Nonmarket economy country provisions	Yes (it has definition but no solution)	Yes (no definition, one solution)	No	Yes (it has definition and two solutions)
Captive production provisions	No	No	No	Yes (but the EU's is better)
Price undertaking provisions	Yes	Yes	Yes	Yes
Price undertaking reviews provisions	Yes (but not clear)	No	Yes	Yes
Anticircumvention provisions	No	Yes	Yes (no detailed rules)	Yes

Source: Information drawn from this study.

## 8.4 Recommendations

### 8.4.1 Recommendations for South Africa

<sup>770</sup> See Chapter 7, section 7.3.1, above.

South Africa has had a long history of antidumping legislation,<sup>771</sup> but its antidumping regulations are not as comprehensive as that of the U.S. or the E.U. This study discusses the issues of antidumping law in South Africa by comparing them with the WTO Antidumping Agreement and the U.S. or E.U.'s antidumping laws. Although the South African antidumping laws satisfy the requirements of the applicable WTO rules and principles,<sup>772</sup> they still need to be improved as regards issues which are discussed in this study, such as a nonmarket economy country, captive production, price undertaking review and anticircumvention, because of the complexity of antidumping practice. In this way, the South African authorities will address the issues of its present antidumping framework in order to reach more transparency and accountability in its future system.<sup>773</sup> A more refined regime will help South African industries to improve their global competitiveness while simultaneously ensuring that foreign manufacturers do not view the region as a dumping ground.<sup>774</sup>

#### 8.4.2 Recommendations for China

China can be seen as a new member in the international antidumping field.<sup>775</sup> The reality is that China has become one of the most significant targets, and also one of the most distinctive victims of the worldwide antidumping campaign.<sup>776</sup> This situation will be sustained in a continuous trend, and will not be remedied in a short time. Facing such a situation, China and its industries are working closely to develop adequate and effective strategies and legislation to challenge the campaign. A positive attitude is important, while the right approaches are necessary.<sup>777</sup>

Though the Chinese Antidumping Statutes are designed to follow the WTO Antidumping Agreement, and its efforts are recognized and applauded by other WTO members, China needs to improve its Antidumping Statutes and make significant changes in its current practices and legislation, such as profit margin provision, captive production provision and anticircumvention provision, in order to follow the international norms. It is insufficient to bring the

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<sup>771</sup> See Chapter 3, section 3.4, above. See also Osode 2003-2004:32.

<sup>772</sup> Osode 2003-2004:32.

<sup>773</sup> Osode 2003-2004:22.

<sup>774</sup> Petersen 1996:376.

<sup>775</sup> See Chapter 3, section 3.5, above.

<sup>776</sup> See Chapter 1, section 1.1, above.

<sup>777</sup> Gong 2002:609.

Chinese Antidumping Statutes into superficial compliance with the WTO Antidumping Agreement.<sup>778</sup> WTO-consistency has to be secured substantially through its actual implementation as well.

## **8.5 Conclusion**

Today, South Africa and China are increasingly becoming part of the global economy. Trade relations between South Africa and the international trade community, as well as with China, will continue to strengthen and expand to a new level. It is necessary to improve their antidumping laws, and use them accurately. It is hoped that this study will contribute to the improvement of the legal framework of antidumping regulation in South Africa and China.

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<sup>778</sup> See Chapter 5, section 5.2.2, above.

## Appendix

### Summary

From 1904 the world's first antidumping law was enacted by Canada, South Africa followed in 1914, the GATT in 1947, and China in 1994. Over time, antidumping law has become a potent weapon in most countries of the world.

South Africa and China, as member states of the WTO, increasingly participate in international trade and must remain aware of their legal right in respect of antidumping law.

The purpose of this study is to identify and analyse some problematic issues of antidumping regulations, with specific reference to the legal framework in South Africa and China. With this purpose in mind, firstly, the background information and a brief history of the development of antidumping legislations by the international community, South Africa and China are discussed. Then, the issues of antidumping substantive law (including normal value, export price, dumping margin, injury, and domestic industry), especially with the problem of a nonmarket economy country and captive production, price undertaking, price undertaking reviews, and anticircumvention are analysed. In order to come to a clear understanding of the problems and solutions, the antidumping laws of the U.S., the E.U., South Africa and China are compared.

This study resulted in the following conclusions:

- The provision for a nonmarket economy country in the South African Antidumping Regulation is not adequate. China has no stipulation about this problem.
- Both South African and Chinese antidumping regulations have no captive production provisions. The E.U. model is recommended.
- With respect to price undertaking, the South African Antidumping Regulation followed the stipulations of the WTO. The Chinese Antidumping Statute is only superficially compliant with the WTO Antidumping Agreement.
- The South African Antidumping Regulation leaves a gap with regard to price undertaking reviews. China has definite provisions on it.
- With respect to anticircumvention, both countries' antidumping regulations are not adequate, especially for China.

Recommendations are made with regard to South African and China's antidumping laws. This research is hoped to contribute to the improvement of the legal framework of antidumping regulations in South Africa and China.

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