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Highlighting the major weaknesses of the WTO anti-dumping agreement which cause international market distortion

Ahmed Abo Elnour

The American University in Cairo

School of Humanities and Social Sciences

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A Thesis Submitted to the

Department of Law

in partial fulfillment of the requirements for the LL.M. Degree in International and Comparative Law

By

Ahmed Rabie Ahmed AboElnour

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has been approved by

Dr. Christine Eleanor Anderson _____
Thesis Supervisor
Affiliation _____
Date _____

Dr. Lama Abu Odeh _____
Department Chair
Date _____

Dr. Ann Lesch _____
Dean of HUSS
Date _____

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ABSTRACT

Article VI of the General Agreement on Tariffs and Trade (hereinafter "GATT") and the World Trade Organization (hereinafter "WTO") Anti-dumping Agreement (hereinafter "ADA") permit WTO members to impose anti-dumping duties as a result of an anti-dumping investigation if any member concludes that a certain product, imported to its territory, has caused or threatens to cause a serious injury to its domestic industry. Accordingly, this member may increase tariffs on this imported product by a specific amount calculated through certain methodologies for each foreign exporter/producer whose imports are subject to the concluded investigation. However, Article VI of GATT and the ADA do not condemn dumping as price discrimination but condemn the product dumping situations causing or threatening to cause material injury to the domestic industry. Consequently, the dumping practice itself is not the only reason for allowing any party to impose anti-dumping duties. The most important factor in the anti-dumping investigation process is to provide clear analysis that dumped imports have indeed caused or threaten to cause serious injury to the domestic industry. Unfortunately, the ADA does not provide members with clear provisions on how to reach this conclusion. In addition, and according to Article 11.1 of the ADA, the imposition of "anti-dumping duty shall remain in force only as long as and to the extent necessary to counter dumping which is causing injury." The ADA provisions also do not provide clear and objective analysis guidelines to determine whether a member should eliminate anti-dumping duties. The weaknesses of this Agreement, which exist in significant and crucial provisions, such as those relating to injury and causality determinations, or the review of the anti-dumping duties with respect to their level and duration, encourage WTO members to abuse these rules by overprotecting their domestic industries. The extensive use of this tool destroys the main purpose of this Agreement, to stop or hinder injury that is caused by dumped imports. These weaknesses, which undermine the objectivity of the anti-dumping investigations, distort international trade by imposing various anti-dumping duties on numerous foreign products, which are not necessarily causing or threatening to cause material injury.

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I. Introduction

The World Trade Organization (hereinafter "WTO") was established on 1 January 1995 as a result of a multinational agreement created by the Uruguay Round Negotiations (1986-1994). The WTO "is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business."[1] At the conclusion of the Uruguay Round Negotiations, the Legal Text was concluded with the Marrakesh Agreement establishing the WTO, and four different Annexes. This paper will focus primarily on Annex 1A of the 1994 General Agreement on Tariffs and Trade, which is also known as "GATT 1994" and contains its Agreement on the Implementation of Article VI or the Anti-dumping Agreement (hereinafter "ADA")[2].

The GATT/WTO system was mainly created to eliminate trade barriers including tariff reductions. All WTO members provide tariff concessions to other WTO parties by entering in various bilateral negotiations with one another. Consequently, and to ensure that these tariff reductions would be applied without discrimination between the parties, the Most Favored Nation Rule (hereinafter "MFN") was embedded in Article I of GATT 1994. The purpose of this rule is to oblige the WTO member to apply the same treatment to all other WTO members without discrimination. However, the GATT Agreement permits any member to depart from this rule as a result of an anti-dumping investigation and if the member concludes that a certain

[1] http:/wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Dec. 2, 2008).

[2] Agreement on Implementation of Article VI of the General Agreement on Tariffs in and Trade, the Legal Text, the Results of the Uruguay Round of Multilateral Trade Negotiations, 147 (1994).

product imported to its territory has caused or threatens to cause a serious injury to its domestic industry. Accordingly, this member may increase tariffs on the imported product in question by a specific amount calculated through certain methodologies for each foreign exporter/producer.

In fact, anti-dumping rules were not originally introduced by the GATT/WTO multilateral negotiations. These rules were previously enacted by some developed countries, Canada in 1904, Australia in 1906, the US in 1916, and New Zealand and the United Kingdom in 1921. All the aforementioned developed countries used anti-dumping rules to protect their domestic industries against imported products by increasing their tariffs on foreign products. This inevitably led to an increase in the prices of these very products relatively to their like domestic products. These measures provide the domestic products with a competitive advantage over the imported foreign products.

The fear of international trade liberalization and the consequences of tariff reductions resulting from GATT/WTO agreements, led the WTO contracting parties to provide legal tools within the GATT/WTO Agreement that restrict international trade in the case where a specific product caused or threatened to cause damages in the domestic industry of any member. These regulatory tools were provided under Article VI of GATT 1994 and the WTO ADA. Although these rules do not condemn dumping as price discrimination, they condemn the product dumping situations causing or threatening to cause material injury to the domestic industry. Consequently, the dumping practice itself is not the only reason that allows any party to impose anti-dumping duties. The most important factor in the anti-dumping investigation process

is to provide clear analysis that dumped imports have indeed caused or have threatened to cause serious injury to the domestic industry.

Unfortunately, the ADA does not give members clear provisions for how to reach these conclusions. In addition and according to Article 11.1 of the ADA, the imposition of "anti-dumping duty shall remain in force only as long as and to the extent necessary to counter dumping which is causing injury." Moreover, ADA provisions did not provide clear and objective analysis to determine whether a member should eliminate anti-dumping duties. The weaknesses of this Agreement, which exist in significant and crucial provisions such as those relating to injury and causality determinations or the review of anti-dumping duties with respect to their level and duration, encourage WTO members to exploit these rules by overprotecting their domestic industries. The extensive use of anti-dumping measures undermines the main purpose of this Agreement, which is primarily to stop or hinder injury that is caused by dumped imports. These weaknesses, which undermine the objectivity of the anti-dumping investigations, distort international trade as they impose various anti-dumping duties by WTO members on numerous foreign products which are not necessarily causing or threatening to cause material injury.

This thesis is organized as follows: the introduction in chapter one leads to chapter two which provides a simple explanation of the WTO anti-dumping rules and how the anti-dumping investigation should be conducted pursuant to the ADA. Chapter three then highlights the legal gaps in the WTO ADA, especially in relation to articles dealing with injury and causality determinations and those dealing with the reviews of anti-dumping duties. It also provides evidence of how the judicial review mechanism

in the WTO Dispute Settlement Body (hereinafter "DSB") fails to effectively fill these legal gaps. Panelists found their hands tied when it came to clarifying the deficiencies of some anti-dumping provisions, due to the absence of clear textual provisions. Thus, the panelists left the WTO members with wide discretionary powers that allowed them to manipulate anti-dumping rules so as to impose disguised trade barriers on a selective and discriminatory basis in the pursuit and preservation of their favorable market interests. In addition, this chapter endeavors to highlight the efforts made by various WTO members to clarify or amend this Agreement during the current WTO negotiations by producing a newly proposed legal text of the ADA. It also analyzes the new proposed text to see if the problems mentioned above will be solved by the application of the amended ADA. Finally, Chapter four provides findings and recommendations in order to ensure that the anti-dumping rules are applied in a manner that best fulfills their purposes.

II. Overview of the WTO Anti-Dumping Rules

In order to understand the legal gaps in the ADA and their effect on the international market, it is necessary to first understand the current provisions of the ADA rules. This chapter examines and sheds light on the main pillars of any anti-dumping investigation process, which include the government of the WTO member or the investigating authority (hereinafter "IA"), the domestic industry (hereinafter "DI"), competing domestic and foreign products vis-à-vis "like product and product concerned", and the determination of dumping, which caused or threatens to cause injury to the domestic industry. Clarification of the definition of each pillar will facilitate an understanding of the explanation of how the investigation actually runs.

A. Basic theme of anti-dumping investigations

1. Investigating Authority (IA)

The WTO Agreements have been formulated and signed by WTO members. Thus, the language of the WTO Agreements targets in its provisions and obligations the governments of its members. Anti-dumping provisions incorporated under Article VI: 1 of the GATT 1994 refers to these governments by using the term "the *contracting parties* recognize that dumping…etc" (emphases added). In addition, Article VI: 2 of the GATT 1994 states that "in order to offset or prevent dumping, a *contracting party* may levy on any dumped product…etc" (emphases added). However, in the ADA, these governments have been referred to as "authorities". Article 5.4 of the ADA specifies that "an investigation shall not be initiated pursuant to paragraph 1 unless the *authorities* have determined…etc" (emphases added). In sum, the element of a governmental body is quite essential and serves as the bedrock for carrying out the obligatory investigation process, since no anti-dumping measures may be applied

unless an investigation has been carried out. Article 1 of the ADA states that "an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." Accordingly, any WTO member shall establish a competent governmental authority to conduct anti-dumping investigations. The authority is obliged to conduct these investigations in an unbiased manner and pursuant to the provisions in Article VI of the GATT and the ADA. In addition, any conclusion made by these authorities may be reviewed by domestic courts in an internal judicial review pursuant to the ADA Article 13 and by DSB pursuant to the ADA Article 17.

2. Domestic Industry (DI)

The ADA defines DI in its Article 4.1 as follows: "for the purposes of this Agreement, the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products... etc." No anti-dumping investigation can be conducted unless the WTO member demonstrates that its domestic market contains producer/s that produce a like product. Article 5.4 of the ADA obliges the IA, in order to conduct an anti-dumping investigation, to determine that the complaint has been submitted by the domestic producers of the like product. However, the ADA considers that it is enough to initiate an anti-dumping investigation if it is supported by "those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no

investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 percent of total production of the like product produced by the domestic industry."[3] Pursuant to this article, the IA may initiate an anti-dumping investigation with the support of the domestic producers of the like product, which account for 25 per cent or more of the total production. And these producers shall account 50 percent or more of the total production of those who expressly oppose initiating the investigation. Yet, under special circumstances and pursuant to Article 5.6 of the ADA, the IA can initiate an anti-dumping investigation without necessarily having received an application from or on behalf of the domestic industry and if it has sufficient evidence of dumping, injury, and a causal link. In this case the IA is also required to conduct the injury analysis on the domestic industry within the definition of Article 4.1 of the ADA.

3. Product concerned and like products

In principle, the underlying reason for the anti-dumping investigation is to examine whether the imported dumped product has caused or threatens to cause injury to the domestic industry. In this regard, three types of products are subject to the investigation: first, the "domestic like product," which is the product produced and sold in the domestic market of the importing member, second, the "foreign like product," which is the product produced and sold in the domestic market of the exporting member, and third, the "product concerned," which is the product imported by the importing member from the exporting member. In order to initiate an anti-dumping investigation, the IA should determine the definition of the product under investigation to set the scope of the investigation. Based on this definition, the

[3] ADA Article 5.4.

examination of the dumping and injury determination should show the likeness of the "domestic like product," the "product concerned," and the "foreign like product." However, in the case where there is an absence of the "foreign like product" or if its sales quantities are insufficient, the IA can rely on other alternatives, which will be discussed later. Article 2.6 of the ADA defines the "like product" as follows: "throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." The ADA required that these products should be identical or at least bear a close resemblance to the other like product. One of the most important features relied upon to determine the close resemblance is the physical characteristic of the product in question.[4] In addition, end use, channel of sale, consumer perception, competition, the process of manufacturing, and the content of the products are also features which may be used in the likeness test.

4. Dumping, injury and causal link

The presence of the previous pillars allows a WTO member to initiate an anti-dumping investigation if the member is provided with adequate and accurate minimum information about the allegation of dumping, injury, and causal link.[5] However, the anti-dumping investigation should determine the existence of these three main elements: dumping, injury or threat of injury, and causal link between dumped imports and the injury or threat of injury to the DI by obtaining, investigating, and verifying information from DI and the exporting companies. The

[4] IVO VAN BAEL & JEAN-FRANÇOIS BELLIS, ANTI-DUMPING AND OTHER TRADE PROTECTION LAWS OF THE EC 157 (4th ed. 2004).
[5] ADA Article 5.2.

absence of any of these elements should lead the IA to conclude no measures shall be taken against the imported products. These three elements will be discussed in detail in sections B and C of this chapter.

B. Dumping determinations

1. The concept of dumping

Since the GATT/WTO system aims to create free international trade by eliminating or reducing tariff and non-tariff restrictions and since all WTO members are required to reduce their tariff duties, the need for anti-dumping rules became necessary. No WTO member would agree to let its DI be harmed by allowing foreign imports to flood its domestic market through artificially low prices without having legal actions to stop this injury under the GATT/WTO system. The success in creating free markets should be joined with reasonable rules to guarantee fair trade.[6] In order to create balance between free and fair trade and to still relieve DIs' worries about the consequences of tariff reductions, the GATT/WTO rules prohibit price discrimination between the selling prices in the foreign and domestic markets if this discrimination causes or threatens material injury to the DI of the importing members. The concept of dumping is provided in the Article VI: 1 of the GATT as follows:

> 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. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

[6] CLIVE STANBROOK & PHILIP BENTLEY, DUMPING AND SUBSIDIES: THE LAW AND PROCEDURES GOVERNING THE IMPOSITION OF ANTI-DUMPING AND COUNTERVAILING DUTIES IN THE EUROPEAN COMMUNITY 1 (1996).

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

The same provisions are in Article 2.1 and 2.2 of the ADA. In sum, these articles condemn a particular dumping practice if it has negative effects on the status of the DI of its importing WTO members. In the case where negative effects are indeed prevalent, only the WTO member can raise its tariff duties against the dumped imports to the extent necessary to counteract dumping, which is causing injurious effects on the DI.

2. Normal value determinations

In principle, and pursuant to GATT 1994 and ADA, normal value refers to the price of the foreign like product when it is destined for consumption in the exporting/producing country and during the ordinary course of trade.[7] However, the normal value is not as simple as it seems because there are many considerations that should be taken by the IA in its determination of the normal value.

a. Situations of alternative normal values

The IA should disregard the actual normal value of the foreign like product pursuant to Article 2.2 of the ADA, especially if one of the following three situations exists:

[7] ADA Article 2.1.

i. No sales in the ordinary course of trade

If the IA finds no sales of the product concerned in the domestic market of the exporting/producing country or if there are sales, but not in the ordinary course of trade, the IA should use alternative normal values. Unfortunately, the ADA did not define the meaning of the "ordinary course of trade." However, ADA Article 2.2.1 provides an example of sales, which could be considered *not* in the ordinary course of trade. This example refers to the sales made by the exporting/producing country "at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs." These sales could be disregarded in determining the 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 reasonable period of time, etc…" In addition, the Appellate Body decision in *US-Hot Rolled* [8] discusses another type of sales out of the ordinary course of trade, when the US considered the sales made by Japan in their home market between two affiliated traders (parties linked by association or a compensatory arrangement).

ii. Particular market situation

The ADA permits the IA to disregard the domestic sales of the exporting/producing country because of the particular market situation. However, the ADA does not provide a definition for this term nor does it provide any examples of this situation. Furthermore, there is no case law in the WTO/Dispute Settlement defining this term. Some legislation such as the EC AD Regulation,[9] defines the particular market

[8] United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (2001).
[9] COUNCIL REGULATION (EC) No 384/96.

situation when "such sales do not permit a proper comparison."[10] One example of this approach as applied by the EC is that the "domestic sales which were made through sales channels different from those used on the Community market were also considered as not permitting a proper comparison."[11] In any event, the definition and the application of the particular market situation has not yet been examined by the WTO/Dispute Settlement. Hence, WTO members will take different approaches in dealing with this situation.

iii. Low volume of sales in the domestic market of the exporting/producing country

The ADA permits the IA to disregard the domestic sales of the exporting/producing country in the calculation of the normal value if these domestic sales have been made in quantities below five percent of the quantities of the export sales to the imported country. Accordingly, if the domestic sales of the like foreign product in the exporting/producing country are 100 units and its exports of the product concerned to the importing country are 1500 units, the IA will disregard the domestic sales of the exporting/producing country and will use alternative normal values.

b. Types of alternative normal values

If one of the above mentioned situations exists, the IA should rely on a different methodology to determine the normal value to be used in the determination of the dumping margin because the existence of these situations does not permit proper comparison between the normal value and the export price. Article 2.2 of the ADA provides two methodologies for determining alternative normal values: either to rely on "a comparable price of the like product when exported to an appropriate third

[10] *Id.* at Article 2.3.
[11] BAEL & BELLIS, *supra* note 4, at 64.

country, provided that this price is representative, or on the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and profits."

i. Export sales to third countries

Instead of using the actual domestic prices of the exporting/producing country to determine the normal value of the product concerned, the IA will use prices of the exported like products to the third country. In order to do this, the IA should rely on export sales to an appropriate third country. The criterion for defining "an appropriate third country" has not been clearly provided in the existing legal text. In addition, this method is rarely used by authorities; hence, it has not been discussed clearly in any panel or appellate body reports. However, in applying this method, "all considerations as to comparability and sales in the ordinary course of trade apply in the same way as they apply to domestic sales of the exporting/producing country. The sales taken into account must be representative."[12]

ii. Constructed normal value

This is the common method that is used by IAs because it guarantees accurate and trustworthy normal values that represent the prices of goods actually exported to the domestic market. On the contrary, prices of goods sold to third countries are rarely used because of the suspicion that they could also be dumped prices. Constructing the normal value is a very complicated process that needs much detailed data from the producers to present their cost of production plus their amount for administrative, selling, and general costs, as well as profits. The concept of this process is to build the

[12] STANBROOK & BENTLEY, *supra* note 6, at 39.

price of the product concerned when it destines for consumption in the exporting/producing country.

c. Normal value of exports from non-market economy countries

The GATT Ad Article VI:2 provides the following: "it is recognized that, 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, 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." This article exempts the WTO members from following the provisions for determining the normal value of the product concerned if the export sales are from a non-market economy country. Hence, the methodology used to determine the normal value provided under ADA Article 2.2 is not strictly applied. The reason behind this is that the prices and the costs of the product concerned are not reliable information for determining the normal value because these prices and costs are not set pursuant to the condition of the market economy and do not represent the actual prices and cost in a free market. Accordingly in this case the IA may rely, in its determination of the normal value, upon the information of the like product in the third country and its applicability of the market economy's operative conditions.

3. Export price determinations

Export price is the price actually paid or payable for the product concerned when sold for export from the producing/exporting country. Normally, this price determination relies upon the invoice prices of the product concerned and its terms of delivery. These prices can include different costs such as cost, insurance, and freight (hereinafter "CIF"), cost and freight (hereinafter "C&F"), or only cost without insurance or freight (hereinafter "FOB"). In all cases, the IA normally sets the export price on the CIF value because this value is needed for determining the margin of dumping. However, in some cases the export price obtained from the invoices can be unreliable because of the affiliation between the exporter/producer and the importer or third party. In this case, ADA Article 2.3 allows the IA to construct the export price based on the prices for which the imported products are first resold to an independent buyer. If the IA finds no resale to an independent buyer or the products have been resold under a different condition than when imported, it may determine the export price upon any other methods that it deems reasonable.

4. Fair comparison and dumping margin

In order to determine the dumping margin, a fair comparison must be conducted between the normal value and export price. The IA must set export price and normal value at the same level of trade. Normally, most of the IAs set the two prices at the ex-factory level of trade which means the price of the good at the factory door. The IA is entitled to reach this level by adjusting any differences that might affect price comparability between the two prices in order to set them at the same level of trade. For example, differences can be found in physical characteristics, import charges and taxation, and terms of sale. In addition, the IA must compare the two prices with

respect to sales made at, as closely as possible, the same time.[13] After setting the export price and normal value at the same level of trade, adjusting any differences that might hinder price comparability, and after deducting the normal value from the export price, the result is the dumping margin amount in absolute terms. However, in order to determine the dumping margin's percentage, the dumping amount must be divided by the CIF value of the export price then multiplied by a hundred. This formula will generate the dumping margin percentage that will be multiplied by the CIF value of the product concerned if it is imported after the imposition of an affirmative dumping margin and as a result of the anti-dumping investigation.

C. Injury determinations

1. The concept of injury

ADA footnote 9 defines injury as follows:

> Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

However and as specified in the ADA, injury determination methods differ from one type to another. For example, in its determination of material injury, the IA must consider specific factors that are different from those considered in determining the threat of material injury or material retardations. In any event, the main point of this analysis is to provide the impact of the dumped imports on the status of the DI. Injury determination is the foundation for the determination of the illegality of a dumping practice under the provisions of the ADA. Mere dumping without causing injury to the DI is a legitimate practice in itself and does not trigger nor allow a WTO

[13] ADA Article 2.4.

member to apply anti-dumping measures on the dumped imports. Determining that the DI suffers injury is not enough in itself as the importing member must determine the causal link between the dumped imports and the injury. In order to reach injury determination, a WTO member must analyze many aspects and factors provided under ADA Article 3, which will be discussed below. In order to impose any anti-dumping measures, the WTO member must conclude that its DI suffers or is threatened with injury as a result of the dumped imports.

2. Cumulation

According to ADA standards, anti-dumping measures may be applied on imports of the like products produced or exported from a given country if after demonstrating, through an investigation process, that the imports of this country are dumped imports that have caused or threatened to cause material injury to the DI of the importing WTO member. In some cases the dumped imports do not come from one country but from more than one country. In these cases the importing country would be required to determine a specific injury caused by each of the imports received from each country. This separate determination is very difficult or nearly impossible as the exporting country should demonstrate that there is injury caused by each country at a time during which imports from different sources are simultaneously entering the domestic market. However, ADA Article 3.3 permits the exporting member to cumulatively assess the effect of all imports from different sources under certain conditions, as provided below:

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than de minimis as defined in paragraph 8 of Article 5 and the volume of

> imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

Unless the IA fulfilled its investigation obligations and meets the two conditions through which it can assess the injury cumulatively, it should determine the injury separately for each importing country.

3. The analysis of the volume of the dumped imports

The volume of dumped imports should be examined throughout the investigation period (IP) to demonstrate caused injury. The assumption is that the dumped imports increased during this period of time, thus, the DI suffers material injury. The IA must compare the trend of dumped imports during the IP, which normally constitutes 3 or 4 years before the initiation of the investigation. This comparison is normally considered on a quarterly basis for each year of the IP and on a yearly basis for all years of the IP. Pursuant to ADA Article 3.2 "the IA shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing member." Accordingly, the IA can consider the increase in imports not only in absolute terms but also relative to the total production or consumption of the domestic market of the importing country. Thus, if the dumped imports are not increasing but decreasing, they can be considered injurious within the meaning of this article, especially if they still constitute more than the total production and consumption within each comparing periods. However, a mere finding that dumped imports have increased does not necessarily justify injury determination. The ADA does not consider specific indication as a proof of injury but the IA should go through all related factors and examinations provided in ADA

Article 3 in order to reach the answer on whether the DI suffers or is threatened to suffer material injury.

4. The effect of dumped imports on domestic prices

Another indication of injury is the effect of the dumped imports on the DI's prices. The rationale behind this indication is on the assumption that the dumped imports, which normally enter with low prices to gain market share have an adverse effect on the prices of the domestic like product. ADA Article 3.2 outlines the following:

> [T]he investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.

Price undercutting, price depression, and price suppression are three tests that must be considered by the IA to demonstrate the impact of the like product on the DI's prices. However, the results of one or all of these tests are not by themselves exclusively indicative of injury. These tests with other examinations can lead the IA to conclude that the DI has suffered or is threatened to suffer injury. Through these tests the IA must provide a comparison between the price trends during the IP. The comparison in price undercutting must show whether the price of the product concerned is less than that of the domestic like product during the IA. However, if the price of the product concerned is more than the domestic like product, the IA can examine whether the dumped imports had, or threatened to, decrease or restrain the domestic like product's price increase.

5. The economic impact of the dumped imports on the domestic industry

In addition to examining the effect of the dumped imports on the DI's prices, the IA has to examine the DI's economic status by evaluating all of the relevant economic factors before and after the entry of the dumped imports. Normally, the IA requests all relevant data from the DI within the previous four or five years in order to conduct this examination. ADA Article 3.4 refers to fifteen specific economic factors that must be examined by the IA as a minimum. These factors have been identified as follows:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, 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 investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

Pursuant to this article and as interpreted by WTO case law, the IA is required to examine all of the aforementioned factors; disregarding any of these factors would be a violation of ADA Article 3.4. In fact, the IA is not required to show that all of the DI's economic factors are affected by the dumped imports. It is only required to examine the condition of these factors after the introduction of the dumped imports and then evaluate the effect of the dumped imports on the DI's economic status as a whole.

6. Causation and other known factors

If the IA concludes that the DI's economic status has been negatively affected, it must demonstrate that this negative impact has been indeed triggered by the dumped imports. Accordingly, it is not enough for the IA to reach this conclusion by simply

showing that the negative impact started after the introduction of the dumped imports for it should demonstrate that there are direct links between the introduction of the dumped imports and the negative impact on the DI's economic status. In order to guarantee the neutrality of the attribution of the DI's negative impact, ADA Article 3.5 obliges the IA to examine any other factors that could be reasons for the DI's negative economic impact. ADA Article 3.5 provides examples of those additional factors, other than the dumped imports, that could have an effect on the DI's economic status as follows:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

This provision does not assume that the existence of other factors affecting the DI necessarily dismisses the possibility of dumped imports being injurious. It only obliges the IA to examine all factors in its investigation process that negatively affect the DI. Accordingly, if the IA finds other factors of injury besides dumped imports, it can conclude that the dumped imports are not the only cause but just one of the factors of injury.

7. Threat of material injury

Pursuant to the injury concept described above, injury can be material injury or a threat of material injury to a DI. The IA may, in some cases, conclude that there is no material injury but there is a prevailing threat of material injury that can be caused by the dumped imports. The demonstration of the threat of material injury must be based on sufficient evidence and not mere allegations. The conclusion of threat of material injury is enough to justify the imposition of dumping measures pursuant to ADA. Hence, ADA Article 3.7 provides the IA with specific examination guidelines to conclude the threat of material injury. These guidelines are as follows:

> A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:
>
> (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
>
> (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
>
> (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
>
> (iv) inventories of the product being investigated.
>
> No one of these factors by itself can necessarily give decisive guidance, but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

This provision requires the IA to demonstrate that there is a significant rate of increase in dumped imports, which will further increase and hinder the economic well-being of the DI if no measures are applied.

D. Reviews

1. Interim or changed circumstances reviews

Interim reviews are the mechanism granted under the ADA for review of any new circumstances occurring with regards to the anti-dumping measures during their imposition. As a result of the anti-dumping investigation, if the IA concludes that there is dumping, injury, and a causal link, it can impose anti-dumping duties or undertakings. In principle, the amount of anti-dumping duties must not exceed the margin of dumping established during the investigation. Indeed, if any interested party believes that the duties collected exceed the margin of dumping, a refund review can be requested in order to refund all the exceeded amount of money to the concerned party.[14] In addition, another type of review can be requested by any new exporter/producer that starts shipping the like product after the end or nearly the end of the anti-dumping investigation. This exporter/producer can request a new shipper review from the IA, which will determine for the individual margin of dumping on a case-by-case basis.[15] Moreover, a third type of interim review is the review of the need to continue imposing the duty to offset dumping, or injury or both, and whether the injury or dumping or both would be likely to continue or recur if the duty is removed.[16]

This type of review can be requested by any interested party after a reasonable period of time has elapsed from the duty imposition or the IA can conduct this review at any time after the imposition of the duties. In fact, these three types of reviews are the most widely used by WTO members as they apply anti-dumping duties. However,

[14] ADA Article 9.3.
[15] ADA Article 9.5.
[16] ADA Article 11.2.

there can be other types of reviews, such as determining the scope of the like product, depending on different cases. In general, any new circumstances affecting the finding of facts or law of the original investigation should be handled through a review by the IA on its initiative, or by a request of any interested party, in order to give all interested parties an adequate opportunity to participate in any new decision which may be taken.

2. Five years ("Sunset" or "Expiry") reviews

Anti-dumping measures must not remain in force more than five years to the day of their imposition. The WTO member can impose anti-dumping measures to the extent necessary to counteract dumping that causes injury without exceeding five years. However, ADA Article 11.3 permits WTO members to renew the time period for an additional five years if the member conducts, upon its initiative or by request from the DI, a sunset review to determine whether the revocation of the anti-dumping measures would be likely to lead to the continuation or recurrence of dumping and injury.[17] If the IA does not receive a request from the DI, or self initiates this review before the end of the five years of the anti-dumping measures, it must revoke the measures after the five years elapse. The IA in this review shall consider the likelihood of continuation or recurrence of both dumping and injury. Thus, considering only the likelihood of dumping does not permit the IA to renew the five year period of anti-dumping duties even if it concludes that the dumping would continue or recur.

[17] ADA Article 11.3.

III. Deficiencies in the WTO Anti-Dumping Agreement

An overview of the WTO anti-dumping rules is essential as a first step to introduce the discussion of how the ambiguity of the legal text of the ADA negatively affects international trade. Although WTO Agreements are established to liberalize international trade by eliminating tariff and non-tariff restrictions, the ambiguity of the ADA encourages WTO members to use its rules as a means to restrict importations of foreign goods. Consequently, and after the WTO Agreements have come into force, 3210 anti-dumping investigations have been initiated and 2049 definitive anti-dumping measures have been applied by the WTO members from 1995 to 2007. These initiations and definitive measures included goods linked to 19 different sectors in the harmonized tariff system. These numbers indicate how many restrictions and distortions were caused by the arbitrary application of this Agreement.[18]

This chapter primarily focuses on the deficiencies of injury and Sunset Review provisions under the ADA. Injury analysis is the core point of the dumping accusation since dumping without causing injury is not considered an issue within the ADA. And the current terms of the Sunset Review provide a continuing guarantee for the renewal of the anti-dumping measures to protect certain industries for an unlimited time. Thus, this chapter shows how easily a WTO member may to conduct an anti-dumping investigation to find an injury or conduct a Sunset Review to find likelihood of recurrence or continuation of dumping and injury. As Tharakan indicates, "a number of studies have indicated that the injury determination process is the component of

[18] http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (last visited Dec. 2, 2008).

contingent protection that is the most amenable to misuse."[19] Therefore, this chapter will examine the wide discretionary powers that the WTO leaves to its members to allow them to manipulate the anti-dumping rules by protecting their DI and imposing disguised trade barriers.

A. Injury determinations

1. Legal critique of the current cumulation provisions

The discussion of cumulation in Chapter II illustrates how the ADA provisions permit WTO members to cumulatively assess the effect of all imports from different sources, under certain conditions, as provided under ADA Article 3.3. Current cumulation provisions may attribute injury to small quantities of dumped imports that do not have injurious effect on the DI because these imports have been cumulatively assessed with other high or increasing volumes of dumped imports from other countries.

a. Legal arguments against current provisions of cumulation and interpretations of the WTO case law

In order to demonstrate material injury considerations must include of, first, "whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member"[20] and the effect of dumped imports on domestic prices, and second, the impact of these imports on domestic producers.[21] In brief, the IA should examine the volume of the imports and their effect on prices and the consequent effects on the domestic producers. However, the current cumulation provision in the ADA permits the WTO members, in case of

[19] P. K. M. Tharakan, *Political Economy and Contingent Protection*, 105 Econ.J. 1550, 1562 (1995).
[20] ADA Article 3.2.
[21] ADA Article 3.1.

more than one country exporting the like product at the same time, to cumulatively examine the effect of these imports on the DI. Using cumulation may allow a WTO member to sanction one country by anti-dumping measures even if the import's volume of the exporting country did not increase in absolute or relative terms and its prices have no effect on the domestic prices. Indeed, the current language of cumulation creates an unfair position for the described exporting country because its imports are assessed with other harmful imports that are causing injury.

An illustration of this is found in *EC-Pipe Fittings* when Brazil argued the following:

> [T]he volume and price analyses prescribed by Article 3.2 must first be performed on a country-by-country basis as a pre-condition to cumulative assessment under Article 3.3. According to Brazil, only if such a country-specific analysis has identified the imports of the particular country as a likely source of negative effects on the domestic industry, is it permissible under Article 3.3 for an investigating authority to cumulatively assess the negative effects of all imports likely to have caused injury.[22]

However, the Appellate Body rejected the Brazilian interpretation and went through textual analysis of the relevant articles and asserted that:

> The text of Article 3.3 expressly identifies three conditions that must be satisfied before an investigating authority is permitted under the Anti-Dumping Agreement to assess cumulatively the effects of imports from several countries. These conditions are:
> (a) the dumping margin from each individual country must be more than de minimis;
> (b) the volume of imports from each individual country must not be negligible; and
> (c) cumulation must be appropriate in the light of the conditions of competition
> (i) between the imported products; and
> (ii) between the imported products and the like domestic product.
> By the terms of Article 3.3, it is 'only if' the above conditions are established that an investigating authority 'may' make a cumulative assessment of the effects of dumped imports from several countries.

[22] European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, para. 105, WT/DS219/AB/R (2003).

> We find no basis in the text of Article 3.3 for Brazil's assertion that a country-specific analysis of the potential negative effects of volumes and prices of dumped imports is a pre-condition for a cumulative assessment of the effects of all dumped imports. Article 3.3 sets out expressly the conditions that must be fulfilled before the investigating authorities may cumulatively assess the effects of dumped imports from more than one country. There is no reference to the country-by-country volume and price analyses that Brazil contends are pre-conditions to cumulation. In fact, Article 3.3 expressly requires an investigating authority to examine country-specific volumes, not in the manner suggested by Brazil, but for purposes of determining whether the 'volume of imports from each country is not negligible.'[23]

Accordingly, the Appellate Body did not find any supporting evidence in the legal text of ADA to hold that the importing country must first individually assess the effect of the dumped imports from each exporting countries. In addition, the Appellate Body justified its interpretation as being consistent with the rationale behind the practice of cumulation. In its point of view, the cumulation provision would be undermined if it ruled according to Brazilian interpretation since it is practically difficult to differentiate between the injurious effects of different dumped imports from several sources. Assessing the volume and price effect on a country-by-country basis may indeed attribute injury to large volumes of dumped imports, but also may not attribute injury to low volumes of imports from different sources if they are individually assessed. Although the Appellate Body's interpretation of cumulation was restricted with the language of the current legal text, this interpretation may lead to the application of anti-dumping measures on countries which may not in fact be causing injury if their imports were assessed individually. It is clear that the Appellate Body's interpretation is cautious in its approach to the injured importing country regardless of the interest of the exporting countries whose imports may individually not be causing injury.

[23] *Id*. at paras. 109-110.

In fact, the Appellate Body's position would be justified if the individual assessment of dumped imports shows that all or most importing countries have low import volumes while in fact these low volumes cumulatively are increased in absolute or relative terms. However, this position would not be justified if one importing country has a significantly increased volume of dumped imports while another country with low or decreasing import volumes is sanctioned only because its imports were evaluated cumulatively with those of the first country.

The WTO members recognized this situation when they provided in the current text of ADA Article 3.3 that the imports of each importing country should not be negligible. However, the negligibility is not defined under Article 3.3 of the ADA. Some practitioners believe that negligibility is defined under ADA Article 5.8 as constituting less than 3 per cent of imports of the like product in the importing country: other practitioners oppose this point of view and believe that ADA Article 3.3 is drafted in an ambiguous way which may suggest different interpretations especially due to absence of cross reference to Article 5.8 directly after the negligibility condition. The opposing practitioners demonstrate their objection on the ground that ADA Article 3.3 is drafted in a relevant part as follows:

> [T]he investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis as defined in paragraph 8 of Article 5* and the volume of imports from each country *is not negligible*. (emphasis added)

The drafters mention the cross reference of "paragraph 8 of Article 5" to define the term "de minimis" and do not mention it again after the term "negligible." This discrepancy has not been settled yet because the issue has not been referred to the

WTO through any cases. In any event, and if it is true that the drafters mean that the import volume of each country should be 3 per cent or more to be assessed cumulatively, this threshold still very low and should be increased because a member who imports 3 per cent of the total imports should not be treated on the same level as another whose imports may constitute 20 or 40 per cent of the total imports. Indeed, the member whose dumped import's volume is higher is causing relatively more injury. Thus, the current cumulation provision should be amended or clarified to avoid this unjust assessment. This can be fulfilled by raising the negligible threshold and setting a mechanism to differentiate between the anti-dumping measures, which may be imposed, pursuant to the level of the dumped imports for each exporting country.

b. Evaluation of the proposed new legal text of the ADA by the WTO members

Within the framework of the WTO discussions, which trigger efforts concerning the enhancement and clarification of WTO Agreements and draw lines for additional Multilateral Agreements concerning new international topics, "WTO members agreed at the Doha Ministerial Conference to launch negotiations in the area of 'WTO Rules.' These negotiations relate to the following: the Agreement on Implementation of Article VI of GATT 1994 (better known as the ADA), the Agreement on Subsidies and Countervailing Measures and, in this context, WTO disciplines on fisheries subsidies; and WTO provisions applying to regional trade agreements."[24] As a result of this ongoing negotiation the Chairman of the Negotiating Group on Rules circulated, on 30 November 2007, to the WTO members his Draft Consolidated Texts on the ADA.[25] The Chairman encouraged the WTO members to reach a mutual

[24] http://www.wto.org/english/tratop_e/rulesneg_e/rulesneg_e.htm (last visited Dec. 2, 2008).
[25] http://www.wto.org/english/news_e/news07_e/rules_draft_text_nov07_e.htm (last visited Dec. 2, 2008). *See* also Negotiating Group on Rules, WTO, TN/RL/W/232 (2008).

agreement on the proposed amendments after he believed that the ongoing negotiations took more time than expected. After considering most of the members' concerns he proposed the consolidated version to be discussed by the various delegations. This section presents the proposed amendments and the extent to which they will clarify or eliminate legal deficiencies in relation to the ADA.

Concerning cumulation methodology, as provided under the ADA Article 3.3, the Draft Consolidated Texts show proposed amendments by WTO members to clarify the de minimis and negligible definitions. The proposed clarification adds a clear cross-reference to ADA Article 5.8 by requiring the exclusion of any dumped imports from the cumulation assessment if they are less than 3 per cent of the total imports of the product concerned. ADA Article 5.8 states in relevant part as follows:

> There shall be immediate termination in cases where the authorities determine that the margin of dumping is de minimis, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be de minimis if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

Adding Article 5.8 as a cross-reference in Article 3.3 would mean that the IA should exclude from its cumulation assessments all imports from countries that constitute less than 3 per cent of the total imports of the product concerned. However, it also means that countries which constitute less than 3 per cent can be cumulated if the imports of these countries collectively account for more than 7 per cent of the total imports of the product concerned. In fact, this proposal would put countries with low

volumes in a worse position than has been discussed above since countries that import volumes less than 3 per cent may also be included in the cumulative assessment.

Other amendments have been suggested which would increase the threshold requirements in Article 5.8 by increasing the negligibility amount to reach 10 per cent and to delete the possibility of including the countries that account for 3 per cent if they account collectively for 7 per cent of the total imports of the product concerned. If these two proposals are simultaneously applied, the risk of including the countries with low volume imports in the cumulative assessment will be reduced.

2. Legal critique of the current provisions of the effect of dumped imports on domestic prices

The effect of the dumped imports on the DI is an essential element in determining the occurred injury to the DI. After determining the absolute or relative increase of the dumped imports, the IA shall examine the effect of these imports on the DI's prices by considering whether there has been a significant price undercutting, price depression, or price suppression.[26] In fact, Article 3.2 of the ADA does not require any specific outcomes. It only requires the IA to examine the effect of the dumped imports on the DI's prices. In addition, this article does not include a specific threshold of that effect, which might justify or support the conclusion of a negative outcome occurring through these examinations.

[26] ADA Article 3.2.

a. Legal arguments against current provisions of the effect of dumped imports on domestic prices and interpretations of WTO case law

An examination of the effect of dumped imports on the DI must include an examination of prices of the like product and whether DI suffers from the prices of dumped imports. In this examination process, the IA is obliged to examine the effect of the dumped imports' prices on the DI's prices pursuant to ADA Article 3.2, which relevantly states:

> With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

Hence, the legal text of this article obliges the IA to "consider" three types of price effects: price undercutting, price depression, and price suppression. However, the term "consider" does not introduce specific action to be taken by the IA so as to "determine" or to "find" one of these price effects. Furthermore, although the text identifies that the considered price effects must be significant, the closing statement of the article indicates that "no one or several of these factors can necessarily give decisive guidance."[27] In brief, the IA is only obliged to "consider" and not to "find" any one of these factors in order to fulfill the requirement of the mentioned part of article 3.2.

[27] ADA Article 3.2.

Three panel reports discussed the price effects as mentioned in ADA Article 3.2: *EC –Salmon*[28], *Korea- Paper*[29], and *Egypt- Rebar*[30]. In *EC–Salmon*, the Panel discussed the issue of the difference between "consider" and "find" as follows:

> It is clear that the text of Article 3.2 provides no methodological guidance as to how an investigating authority is to 'consider' whether there has been significant price undercutting. It is also clear that while the question of significant price undercutting must be considered, a finding of significant price undercutting is not necessary to a finding that dumped imports have had an effect on prices. In our view, price undercutting may be demonstrated by comparing the prices of the like product of the domestic industry with the prices of the dumped imports, as the EC did in this case. Where the prices of imports are lower than the domestic prices, it seems clear to us that there is, as a factual matter, price undercutting. The significance of any such undercutting would, in our view, be a question of the magnitude of such price difference, in light of other relevant information concerning competition in the domestic market between the imports and the domestic product, the nature of the product, and other factors. It is in this context that the question of a price premium may be relevant.[31]

According to the Panel's interpretation, the IA is not obliged to demonstrate that the dumped imports have had an effect on domestic prices to fulfill the requirement of ADA Article 3.2. It is enough for IA to conduct the mentioned examinations of price effect without necessarily concluding the existence of a price effect.

In *Korea-Paper* the Panel analyzed the term "significant" as it appears in ADA Article 3.2 as follows:

> We do not read Article 3.2 as requiring that the word 'significant' appear in the text of the IA's determination. Furthermore, as we stated above (para. 7.242),Article 3.2 does not generally require the IA to make a determination about the 'significance' of price effects or indeed as to whether there were price effects as such. All it requires is that the

[28] European Communities - Anti-Dumping Measure on Farmed Salmon from Norway, WT/DS337/R (2008).
[29] Korea - Anti-Dumping Duties on Imports of Certain Paper from Indonesia, WT/DS312/R (2005).
[30] Egypt - Definitive Anti-Dumping Measures on Steel Rebar from Turkey, WT/DS211/R (2002).
[31] EC–Salmon, *supra* note 28, at para. 7.638.

> IA consider whether there has been significant price undercutting, price depression or price suppression. In our view, therefore, the requirements of that article will be satisfied if the determination demonstrates that the IA properly considered whether or not prices of dumped imports had one of the three price effects set out under Article 3.2.[32]

The Panel clarified that ADA Article 3.2 requires the IA to only consider whether the dumped imports had one of the mentioned three price effects. As in *EC –Salmon,* this Panel concluded that the IA is not obliged to make any determinations concerning price effects analysis or its significance, it is only required to consider the existence of one of these effects.

Requiring the IA to only consider price effects would weaken the objectivity of the injury determination. Since one of the main effects responsible for the causation of injury to the DI is the effect of the dumped imports on domestic prices, the absence of requirements for producing specific findings in the examination of price effects provides WTO members with an arbitrary authority for determining injury or threat of injury. Finding one of these price effects in a case does not necessarily prove the existence of injury or threat of injury since injury determination is based on a cumulative assessment of all injury factors. However, the drafters of this article should require a minimum threshold which would indicate that the DI's prices are negatively effected. For example, in the case of price undercutting that occurs if the price of the product concerned is lower than the price of the like product, the ADA did not specify to what extent the differences between the two prices would be sufficient in considering or proving serious price undercutting. Is it enough if the price of the product concerned is lower than the like product's prices by 1%, 3%, or

[32] Korea-Paper, *supra* note 29, at para. 7.253.

5%? The current draft of Article 3.2 may lead the IA to conclude injury regardless of the seriousness of the negative effect of the dumped imports on the DI's prices.

b. Evaluation of the proposed new legal text of the ADA by the WTO members

No proposals or suggestions have been provided by the WTO members within the framework of the WTO negotiations to amend ADA Article 3.2. However, some proposals address the issue of calculating the injury margin, also known as "lesser duty rule."[33] This rule suggests that the IA shall, in addition to calculating the dumping margin, calculate the injury margin and to apply the lesser margin when determining the dumping measures. The injury margin calculation is based mainly on the existing price undercutting. Thus, in case of determining the anti-dumping measures based on injury margins, these measures would vary depending on the differences between the prices of the product concerned and the like product. This way of determination may produce fairer results if the injury margin is used to calculate the definitive measures since the dumped imports with high export prices would be subject to measures lesser than dumped imports with low export prices.

Another proposal[34] suggests that in the case of no price undercutting, the IA should conclude the absence of the causal link between the dumped imports and injury. According to this proposal, the absence of price undercutting means that there is no negative effect from the dumped imports on the DI's prices; thus, there is no causal link between the dumped imports and the injury. However, if any injury is found, it shall be attributed to factors other than the dumped imports.

[33] Negotiating Group on Rules, WTO, TN/RL/GEN/43 (2005).
[34] *Id*. at TN/RL/GEN/42 (2005).

Although these proposals do not tackle ADA Article 3.2 directly, they indirectly highlight the need for the use of price effect data in a more serious manner. It is not only sufficient to "consider" price effects without assessing the consequence of such serious assessment. The outcome of this assessment makes a vital difference in the final conclusion of the injury determination depending on the different results found. This outcome can be quite effective, as provided in the mentioned proposals, in reducing the applied duty in the case of using the lesser duty rule or in eliminating the causal link between injury and dumped imports.

3. Legal critique of the current provisions of the causal link

The ADA Article 3.5 requires the IA to demonstrate a causal link between dumped imports and the injury or threat of injury occurring to the DI. It is not enough to merely demonstrate the existence of negative impacts on the DI after the flows of dumped imports; the IA should examine all relevant evidence and any other factors aside from dumped imports, which are injurious to the DI.[35] Although Article 3.5 provides a basic standard of evaluating the existence of factors of injury other than the dumped imports, it fails to identify the method of the attribution. It becomes easy to attribute injury to dumped imports since the IA is only required to examine other possible factors of injury without clearly isolating the injury incurred due to dumped imports and injury incurred due to other factors. This article did not provide guidance on how to differentiate between injuries caused by the dumped imports and injuries caused by other factors so as not to attribute the injuries caused by the latter to the dumped imports. Without requiring the measurement of how much injury is caused by

[35] ADA Article 3.5.

each type of factors, the attribution requirement provided under Article 3.5 lacks any tangible effect.

a. Legal arguments against current provisions of the causal link and interpretations of the WTO case law

The main problem undermining the effectiveness of the causality test is the ambiguity of ADA Article 3.5, which states in a relevant part the following:

> The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.

Although this article requires that injuries caused by other factors must not be attributed to dumped imports, it does not clarify how this requirement can be fulfilled. In practice, it becomes enough for the IA to only examine other factors of injury without evaluating the actual effect of the other factors on the final injury determination. If this article has been drafted to prove an accurate attribution, it must identify the methodology for differentiating between injuries caused by dumped imports and injuries caused by other factors. The current legal text does not require specific methodology to differentiate between the two categories of injury, leading to inconsistent results.

It is inadequate to find the same conclusion of causality for the following two cases: in case A, the IA found that the determined injury of the DI is only because of the impact of the dumped imports on the DI during the investigation period. In case B, the IA found that the determined injury of the DI is because of the impact of the dumped imports and the changes in the patterns of consumption in the domestic market. On

the one hand, case A includes high certainty that the injury is attributed directly to the dumped imports because of the absence of any other factors of injury. On the other hand, case B lacks this assurance because the dumped imports may not have any impact on the DI and may not cause any injury since other factors were also found. Changes in the pattern of consumption may be the only cause of injury and that the dumped imports may have no impact. Thus, in order to fulfill the attribution requirement, it is not proper to attribute the injury in case B without measuring the impact of the dumped imports and the impact of the changes of pattern of consumption to be able to accurately conclude that injury was caused because of dumped imports.

Despite the ambiguity of the language of ADA Article 3.5, the WTO case law provides some clarifications, which although helpful, are still not sufficient to avoid arbitrary injury attribution. The Appellate Body in the *U.S.–Hot-Rolled Steel*[36] provides some clarification to the non-attribution rule under ADA Article 3.5. In this case, Japan considered that the non-attribution rule required the U.S., in its assessment of the other factors of injury, to identify and isolate the effect of these other factors from the injuries caused by dumped imports in order to fulfill the requirement of the non-attribution rule under Article 3.5. In addition, Japan believed that the U.S. must ensure that the injury attributed to dumped imports reach the level of "material" injury. In fact, the U.S. only considered some other known factors of injury and concluded that the effect of these other factors were minimal and did not break the causal link between injury and dumped imports. The Appellate Body supported the U.S. point of view when it upheld the panel report interpretation as follows:

[36] United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (2001).

> If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the Anti-Dumping Agreement, justifies the imposition of anti-dumping duties.[37]

According to this interpretation, the Appellate Body requires the IA to distinguish and separate the injurious effect of dumped imports from other factors so as to attribute the injury to the dumped imports. The Appellate Body asserted that the ADA does not provide the methodology for this attribution:

> We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the Anti-Dumping Agreement. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.[38]

Hence, the Appellate Body requires that the IA must only separate and distinguish among injuries caused by the dumped imports and other factors. The Appellate Body did not require that, in order to fulfill the non-attribution test, the IA must isolate the effect of the other factors from the material injury. In fact, the Appellate Body rejected the word "isolation" that was mentioned in a previous case regarding the attribution test. The Appellate Body cited part of the *U.S.–Atlantic Salamon Anti-Dumping Duties*, which interpreted the non-attribution in Article 3.5 as follows:

> [T]his did not mean that, in addition to examining the effects of the imports under Articles 3:1, 3:2 and 3:3, the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway.[39]

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[37] *Id.* at para. 223.
[38] *Id.* at para. 224.
[39] Panel Report, *United States–Atlantic Salmon Anti-Dumping Duties*, para. 555, BISD 41S/Vol. I/229 (1994).

The Appellate Body asserts, in commenting on *U.S. – Atlantic Salamon Anti-Dumping Duties,* that:

> By following the panel in *United States – Atlantic Salmon Anti-Dumping Duties*, the Panel, in effect, took the view that the USITC was not required to separate and distinguish the injurious effects of the other factors from the injurious effects of dumped imports, and that the nature and extent of the injurious effects of the other known factors need not be identified at all. However, in our view, this is precisely what the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement* requires, in order to ensure that determinations regarding dumped imports are not based on mere assumptions about the effects of those imports, as distinguished from the effects of the other factors.[40]

The Appellate Body in *U.S.–Hot-Rolled Steel* requires separating and distinguishing between the injuries caused by dumped imports and from other factors. In addition, it rejects the panel report interpretation of *U.S.–Atlantic Salamon Anti-Dumping Duties* because the panel did not even require the IA to separate or distinguish the injuries caused. If it is true that the Appellate Body rejected the panel interpretation because the aim of Article 3.5 is to guarantee the non-attribution of injury caused by other factors to the dumped imports, then it should conclude that the IA must isolate the latter injury from the final injury assessment. However, the Appellate Body could not conclude this because the wording of Article 3.5 does not support this approach.

Consequently, the Appellate Body's interpretation leads to the further logical question if the IA finds that there are many other factors of injury, should it assess the impact of these factors individually or collectively. This is discussed in the case of *EC–Pipe Fittings* where the EC found more than one other factor having an effect on its DI. The EC assessed the impact of these factors and concluded that each one of them had minimal impact on the DI and did not break the causal link between material injury

[40] *U.S–Hot-Rolled Steel, supra* note 36, at para. 227.

and dumped imports. However, Brazil requested the Appellate Body to consider the EC methodology inconsistent with ADA Article 3.5 because it did not evaluate the collective effect of these other factors on the DI to justify the conclusion that the remaining effects of the dumped imports were very limited. The Appellate Body rejected this argument by Brazil on the basis that ADA Article 3.5 does not require the EC to isolate the effect of the other factors in order to fulfill the non-attribution test and that Article 3.5 does not require collective assessment of the effect of these factors.[41]

Despite the fact that the Panel and Appellate Body made a tremendous effort to clarify the provision of non-attribution laid down in ADA Article 3.5, this effort was restricted by the ambiguity of the actual text of Article 3.5. It is meaningless to oblige the IA to separate injuries caused by dumped imports and other factors without requiring the isolation of these injuries and their causes. If the IA separates the injuries caused by other factors, without isolating them from the overall material injury assessment, it may attribute these injuries to the dumped imports. In the final injury assessment, the IA will include all types of injuries, whether caused by dumped imports or other factors, in determining the final material injury. Thus, the IA must isolate the injuries caused by other factors from the final assessment of the material injury in order to attribute only the injury caused by the dumped imports to the dumped imports.

[41] EC–Pipe Fittings, *supra* note 22, at paras. 187-195.

b. Evaluation of the proposed new legal text of the ADA by the WTO members

Realizing the potential hazard of the ambiguity in the ADA Article 3.5 including the non-attribution rule, a group of the WTO members proposed extensive amendments to clarify the non-attribution rule and to avoid the arbitrary attribution of material injury to the dumped imports. The Chairman of the Rules Committee provided these proposed amendments in the Draft Consolidated Texts.[42]

The proposed amendments of the ADA Article 3.5 outlined two main types of considerations. The first type of consideration is in relation to those members who seek to incorporate into the new text amendments that reflect the interpretations reached by the Panels and Appellate Bodies in the previous WTO cases. These types of amendments mainly reflect interpretations discussed above in the *EC–Pipe Fittings,* the *U.S.–Atlantic Salmon Anti-Dumping Duties*, and the *U.S.–Hot-Rolled Steel*. The aim of these proposals is to oblige the IA to fulfill the non-attribution rule by distinguishing and separating the injuries caused by the dumped imports and those caused by other factors.[43]

The second type of consideration seeks to incorporate additional provisions in Article 3.5 that will attribute to the dumped imports only the material injury actually caused by the dumped imports apart from any other injuries caused by other factors. This type of amendment also includes scenarios where the IA must conclude that there is no causal link between injury and dumped imports. The goal here is to reduce or restrict the possibility of finding a causal link by showcasing additional factors which would indicate lack of causality. For example, the IA must find no causal link

[42] Negotiating Group on Rules, WTO, TN/RL/W/232 (2008).
[43] *Id*. at A-19.

between injury and dumped imports in the following situations: (1) if the volume of non-dumped imports increased and significantly exceeded the volume of dumped imports, (2) if there is no strong correlation between a significant price undercutting by the dumped imports and the injury to the DI, or (3) if there is no strong correlation between a significant increase in dumped imports and the injury to the DI.[44]

These two types of considerations indicate the deficiencies in the current causality test and confirm that the causality provisions are drafted in a way that leads to arbitrary causal link determination. Since the current draft does not oblige the IA to isolate injury caused by other factors from the final injury assessment, it may in the final causal link determination attribute injuries caused by other factors to dumped imports. Some WTO members realize the threat of maintaining weak causality provisions since this weakness may justify the decision of imposing anti-dumping measures. These WTO members seek to clarify and limit the causality test in order to reduce the unjust and unjustified anti-dumping measures that may be imposed pursuant to the ADA.

B. Reviews

1. Legal critique of the current provisions of the Sunset Review

The purpose of the Sunset Review is to allow WTO members to extend the imposition of the anti-dumping measures for more than the maximum limit of five years. The IA may extend the anti-dumping measures for an additional five years if it finds that there is likelihood of continuation or recurrence of dumping and injury. Indeed, there are differences between the original anti-dumping investigation and the Sunset

[44] *Id.*

Review. In the original investigation the IA must determine dumping, injury or threat of injury, and causal link in order to impose anti-dumping measures for a maximum of five years. In the Sunset Review the IA is not required to find dumping and injury but rather to find the likelihood of their continuation or recurrence. The Sunset Review does not require dumping and injury determinations because the current anti-dumping measures effect the DI. The effect of the current anti-dumping measures may stop the flow of dumped imports and, completely or partially, cure the damages of the DI. Thus, it may be impossible to determine dumping or injury after the five year dumping measure imposition period.

Instead of requiring dumping and injury determinations, ADA Article 11.3 conditions the examination on whether the revocation of these measures "would be likely to lead to continuation or recurrence of dumping and injury." However, Article 11.3 does not provide any guidelines or methodological requirements for the fulfillment of the likelihood examination. The lack of obligatory methodological requirements or at least guidelines allows some WTO members to extend the imposition of the anti-dumping measures many times. In some cases, these extensions have exceeded 20 years. Protecting an industry for this length of time is completely illogical and counterproductive. The weakness of Article 11.3 provides an easy and legal method for overprotecting the DI, causing international market distortion by the imposition of dumping measures against foreign products for long and continuous periods of time.

a. Legal arguments against the current provisions of the Sunset Reviews and interpretations of the WTO case law

The duration and review of the imposition of anti-dumping measures are provided under the ADA Article 11. The ADA Article 11.1 sets the principle that "an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." This article obliges the IA not to enforce anti-dumping measures, either in terms of their amount or time limit, without justifying this enforcement by the existence of dumping that causes injury; however, Article 11.3 provides a five year maximum period for that imposition. By terms of exception, Article 11.3 provides that the IA may depart from the five year rule if it fulfills the requirement provided in the following part of Article 11.3:

> [U]nless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, *that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.* The duty may remain in force pending the outcome of such a review. (emphasis added and footnote omitted)

Nevertheless, the article does not provide any guidelines or methodological framework for a WTO member to conduct Sunset Reviews. It also does not clarify the meaning of the "likelihood of continuation or recurrence" and the circumstances which may lead to that conclusion.

ADA Article 11.4 indicates some procedural obligations of the IA in conducting reviews, including Sunset Review as follows:

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

However, the provisions of Article 6 do not clarify the methodological guidelines for conducting a Sunset Review. Article 6 may only provide the IA conducting Sunset Reviews with some principles, including transparency, equal opportunity, and the right of parties to defend their interests. This vagueness may lead to arbitrary conclusions by WTO members who wish to protect their domestic markets. Some WTO members may impose anti-dumping measures for an extensively prolonged period of time, relying on the absence of clear provisions in Article 11.3 describing the legitimate method of extending the five year anti-dumping imposition period.

The ambiguity of Article 11.3 causes immense confusion for the WTO member conducting the Sunset Reviews. Two main ways of understanding arise in the application of this article. The first type of application, which is followed by the U.S.[45], may limit the Sunset Review to examining the development of the volume of the imports during the imposition period of the anti-dumping measures to check if the imports have ceased or continued. If the imports have ceased, the IA would be likely to consider that the dumped imports may reoccur after the revocation of the anti-dumping measures. And if the imports have decreased but the country that is subject to the measures increases its production capacity, or if its export to other countries has become subject to anti-dumping measures, the continuation of dumping is likely to occur. In this application, the injury analysis has minimal importance in the likelihood examination because the positive economic situation of the DI would prove that the current anti-dumping measures have succeeded in overcoming the injurious effect of the dumped imports. This type of application mainly depends on a hypothetical injury analysis that may include some prospective scenarios if the anti-dumping measures

[45] *See* Tariff Act of 1930, 19 U.S.C. 1675b (1995).

are revoked. In brief, the main feature of this type is that it distinguishes the provisions of Sunset Review from the provisions of Articles 2 and 3, which deal with the determination of dumping and injury.

The second type of application does not limit its Sunset Reviews to what has been discussed in the first type; however, it obliges the IA to follow the provisions of ADA Article 2 (of dumping determination) and 3 (of injury and causal link determination) with some modifications. WTO members who follow this application realize that Article 11.3 requires the IA to determine the current level of dumping and current status of injury as indicated in Articles 2 and 3. Although, these members understand the differences between the Original Investigation and the Sunset Review, they believe that the methodology described under Articles 2 and 3 must provide a mandatory guideline to conduct Sunset Reviews.

These two types of application were in opposition in several WTO disputes.[46] Each party in these disputes attempted to argue its interpretation to the Appellate Body depending on advantage. In short, in these cases the Appellate Body could not provide clear guidelines on how to conduct Sunset Reviews due to the poor drafting and ambiguity of Article 11.3. The Appellate Body found that because of the absence of a cross reference within Article 11 to Articles 2 and 3, the IA is not obliged to follow the provisions of Articles 2 and 3 in conducting Sunset Reviews so as to find the likelihood of continuation or recurrence of dumping and injury.

[46] *See* U.S.–Sunset Reviews of Anti-dumping Measures on OCTG from Argentina, WT/DS268/AB/R (2005). and U.S–Sunset Reviews of Anti-dumping Measures on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (2004).

Due to the lack of textual support, the Appellate Body found its hands tied in interpreting the current terms of Article 11.3 to shape clearer guidelines for conducting Sunset Reviews. Hence, the method of conducting the Sunset Review remains unclear. The WTO members may determine their own methodology, based on hypothetical analyses predicting what might happen in the future. In fact, the likelihood of continuation or recurrence of dumping and injury test needs restrictive provisions to be added in Article 11.3 to set clear bases for conducting objective Sunset Reviews. Adding these provisions will guarantee the revocation of anti-dumping measures after specific time limits, and will avoid unjustified extensions of the imposition of anti-dumping measures for prolonged or unlimited periods of time.

b. Evaluation of the proposed new legal text of the ADA by the WTO members

This section highlights the proposals submitted by the WTO members to set a methodological requirement in determining the likelihood of continuation or recurrence of dumping and injury.

A group of WTO members proposed extensive amendments to Article 11.3 in order to clarify the ambiguity of its provisions, which encourage some WTO members to extend their anti-dumping measures many times on the basis of hypothetical fears of the continuation or recurrence of dumping and injury.

These proposals focus primarily on clarifying the methodological requirement in the Sunset Review process and present two main types of considerations. The first type is to enhance the current text in order to explicitly identify mandatory methods for the implementation of the likelihood test. This would oblige WTO members to make

determinations based on positive evidence involving an objective examination of all relevant factors, and avoid arbitrary decisions that may be based on mere presumptions.[47] Two sets of examinations would determine whether the expiry of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping. In the first set of examinations, the IA must identify "whether there has been dumping while the duty was in place"[48], "the past and likely future performance of the exporters"[49] or foreign producers, "change in market conditions in the economy of the member and internationally"[50], "evidence of the imposition of anti-dumping or countervailing duties by other members in respect of like or similar products"[51], and evidence that the revocation of the duties would cause a diversion of imports into the member country.

In the second set of examinations, the IA must identify "the likely volume of dumped imports if the duty is allowed to expire"[52], "the likely prices of the dumped imports if the measure is allowed to expire and their effect on the prices of like product"[53], "the likely performance of the domestic industry and of the foreign industry"[54], and "the likely impact of the dumped imports on the domestic industry if the measure is allowed to expire, having regard to all relevant economic factors and indices"[55] of the DI that are mainly listed in ADA Article 3.4.[56]

[47] Negotiating Group on Rules, WTO, TN/RL/W/232, at A-112 (2008).
[48] *Id*. at A-113.
[49] *Id.*
[50] *Id*. at A-114.
[51] *Id*.
[52] *Id*.
[53] *Id*. at A-115.
[54] *Id*.
[55] *Id*.
[56] *Id*. at A-113-116.

The second type of consideration would avoid the possibility of maintaining or extending anti-dumping measures for unlimited periods of time by conducting Sunset Reviews each time before the expiration of the anti-dumping duties. Thus, this type limits the extension of the anti-dumping measures to one time only. In addition, the IA must not impose anti-dumping measures, under any circumstances, for more than ten years including the imposition period of the Original Investigation and Sunset Review. However under special circumstances, and during two years after the termination of the anti-dumping duties, a WTO member may initiate an expeditious action instigating immediate imposition of provisional measures if this member receives an application containing sufficient evidence of dumping, injury, and a causal link.[57]

In brief, WTO members are seeking to restrict the rules that may be used to maintain unjustified anti-dumping measures for prolonged periods of time. They realize the risk of keeping Article 11.3 in its current form without articulating a legitimate method of concluding the likelihood of the continuation or recurrence of dumping and injury. In addition, limiting Sunset Reviews to be conducted for one time only and limiting the duration of anti-dumping imposition for a maximum of ten years, may guarantee the avoidance of unlimited extension of anti-dumping measures for same cases.

[57] *Id*. at A-120-121.

IV. Findings and Recommendations

A. Findings

This paper provides a detailed analysis of the weaknesses of the ADA through the provisions of ADA Articles 3.2, 3.3, 3.5 and 11.3. These articles are crucial in justifying the imposition of anti-dumping measures and the extension of their duration. Other anti-dumping provisions of the ADA relating to dumping determination, such as ADA Article 2, may also be affected by the ambiguity and uncertainty of the overall language of the text. However, this paper emphasizes the provisions of injury determination and Sunset Reviews because they are rules used to justify or legitimize the imposition of anti-dumping measures.

The ADA affirms that the main purpose of the WTO Agreement "is to help producers of goods and services, exporters, and importers conduct their business."[58] To achieve this purpose, the WTO generally strives to free the movement of goods in the international market by reducing tariffs and eliminating non-tariff restrictions. Since WTO members recognize the dangerous effect of dumped imports on the DI, they drafted the ADA to allow themselves to impose anti-dumping measures under certain conditions. It is clear that anti-dumping measures are used as a tool for evading the main purpose of the WTO Agreement, since these measures allow members to restrict international trade to protect their domestic markets. After thirteen years of the ADA application, it is quite evident that the ADA is not being implemented in the way that best serves its original purpose and the overarching goal of enhancing international trade. Instead of using the ADA as exceptional rule to free international trade, some WTO members use its ambiguity to abuse anti-dumping measures and impose

[58] http:/wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Dec. 2, 2008).

arbitrary restrictions through legitimized inappropriate treatment. A WTO member who commonly experiences political and economic pressures from the DI to restrict the importation of foreign goods has no choice other than to fulfill these requirements and impose anti-dumping measures.

The lack of clear provisions for determining injury and the lack of clear attribution related guidelines for determining the causal link between dumping and injury, force some WTO members to respond to the pressures of their DIs and impose arbitrary anti-dumping measures. In addition, the lack of clear cumulating rules in the injury assessment process allows a WTO member to impose anti-dumping measures against imports of other members who are not actually causing injury. Another crucial weaknesses of the ADA is that it not only encourages members to impose anti-dumping measures, but also to extend these measures for a prolonged and often indefinite period of time; this is essentially due to the lack of restricting and clear provisions and guidelines for Sunset Review processes.

It is well known to all WTO members that the ADA suffers from deficiencies. They direct their delegations to work on modifying and clarifying the current text of the ADA. It is also well known to all WTO members that the current text of the ADA is used to distort the international market and the free movement of goods between WTO members. This paper examines, in a practical manner, the reasons why the ADA does not adequately achieve its objectives.

B. Recommendations

Although all WTO members realize the weaknesses of the ADA, they differ, based on their varying interests, when it comes to addressing these discrepancies or modifying the ADA. On the one hand, the WTO members with importing interest have requested modification of the ADA in order to guarantee unrestricted rules or rules that allow them to apply measures without complications. They want to avoid the confusion of Panel or Appellate Body decisions that may interpret the ambiguous rules differently from what they understand them to be. On the other hand, WTO members with exporting interest are struggling to limit the agreement and to complicate its provisions to make it very difficult for a member to impose anti-dumping measures in future investigations.

Apart from all these differences, all WTO members agree on the ADA's linguistic ambiguity and the dire need for modifications and clarifications. This paper endeavors to examine and clarify the danger of this ambiguity which leads to the overuse of anti-dumping measures and ultimately hinders the progress and development of the international market. However, this paper does not provide specific modifications of the anti-dumping provisions subject to the above critique. It attempts to provide general principles that must be followed by WTO members in their current negotiations to amend the current legal text of the ADA if they desire to maintain an effective and efficient application of the ADA.

The first principle is to ensure the mutual agreement on the ultimate purpose of the ADA. Since this agreement sets out to provide an exception to the free movement of goods in the international market, it should not undermine the main purpose of the

WTO Agreement for the enhancement of free international trade. The second principle is to emphasize the fact that mere dumping must not trigger the imposition of anti-dumping measures. Finding dumped imports does not justify the anti-dumping measures unless the WTO member ensures that these specific imports are in fact causing or threatening to cause injury to the DI. WTO members must first find material injury and then provide sufficient evidence attributing the determined material injury to the specific dumped imports in question.

The third principle is that dumped imports which are imported simultaneously from different countries must be evaluated separately. Each country must not be penalized on the same level if it is evident that their imports do not have the same effect on the DI. The forth principle is that anti-dumping measures provide the DI with temporary protection in order to recover from the existing material injury and these measures must not be applied indefinitely. However, the WTO member may initiate new investigations against the same dumped imports, based not only on assumptions or likely examinations, but on the basis of actually testing and observing the effect of the revocation of original anti-dumping measures. The designated period for testing this effect can be set for a limited period of time after the revocation. Finally, there must be a common understanding between the WTO members that using anti-dumping measures as a method protecting against imported foreign goods does not always benefit the domestic market, but may damage the function of fair competition and may negatively affect the interest of the domestic consumers. Anti-dumping measures may also negatively affect the domestic producers who are producing goods that depend on intermediate imported goods. Since the cost of importing these goods will

be increased after the imposition of anti-dumping measures; consequently, this will increase the cost of their finished goods.

If the WTO members acknowledge these general principles they understand that overuse of anti-dumping measures will harm their DI and consumers as well as the progress of the free international market. Renegotiating the ADA is crucial in order to return the anti-dumping provisions to their main purpose, that of opposing dumped imports causing or threatening to cause material injury. Indeed, all WTO members have experienced the negative effect of the overuse of anti-dumping measures that distort the international market by restricting the free movement of 19 different sectors in the harmonized tariff system. Thus, corrections must include balanced and clear new language fulfilling the purposes of the WTO ADA and be respected by all WTO members.