

## THE ANTIDUMPING REGIME IN JAMAICA

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### INTRODUCTION

Dumping is broadly defined<sup>1</sup> as the sale of products for export at a price less than that prevailing in the exporter's domestic market or at a price insufficient to cover the exporter's production costs. The original policy behind antidumping legislation was to prevent what is called predatory conduct by an exporter whereby the exporter drives domestic producers of the importing country out of the market (by selling at dumped prices) so that it can ultimately raise its prices to monopolistic levels<sup>2</sup>.

Other justifications for antidumping legislation include preventing unfairness to domestic producers whose like products are barred from or face restrictions in the exporter's domestic market while the exporter sells in the domestic producer's open market at dumped prices, and preventing domestic producers incurring substantial adjustment costs

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<sup>1</sup> See General Agreement of Tariffs and Trade, Article VI. October 30, 1947, 61 Stat. (5), (6), TIAS No.1700, 55 UNTS 194 (1948) as amended and Vol. IV BISD.

<sup>2</sup> See Jacob Viner, *Dumping: A Problem in International Trade* (New York: Kelly, reprinted 1966); William A Wares, *The Theory of Dumping and American Commercial Policy* ( Lexington, Mass. :Lexington Books 1977).

when their capacity becomes idle as they lose market share and the re-adjustment costs in re-activating plants when the dumper leaves the market.<sup>3</sup>

Jamaica's first anti-dumping legislation was enacted in 1959 in the Customs Duties (Dumping and Subsidies) Act informed by the provisions of the General Agreement on Tariffs and Trade (GATT)<sup>4</sup> concluded at Geneva, Switzerland in 1947. Little use seems to have been made of this legislation for decades in terms of anti-dumping investigations being initiated mainly because local producers were able to use other more effective mechanisms to obtain the same results, such as import controls and applications for *ad hoc* increases in duties. These protectionist mechanisms are now largely irrelevant in the context of an increasingly liberalized framework for international trade.

On April 15 1994, seven years of negotiations were concluded with the signature of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations including the Agreement Establishing the World Trade Organization (WTO).<sup>5</sup> This organization provides the institutional framework for the conduct of trade relations among its members on issues regarding *inter alia* the Multilateral Trade Agreements (MTA) that are integral to the WTO. The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the WTO Antidumping

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<sup>3</sup> This typically occurs where the exporter is dumping because of a recession in its home market and its home market thereafter improves.

<sup>4</sup> The G.A.T.T, a multilateral agreement, was signed in 1947 by numerous countries for the purpose of establishing international rules for trade in goods. T.I.A.S. No. 1700; U.N.T.S. 187. Article VI deals with antidumping measures.

<sup>5</sup> A general discussion of the negotiating history of the WTO Agreements can be found in Horlick and Shea, "The World Trade Organization Antidumping Agreement", 29(1) *Journal of World Trade*, 1995,5,p.6-23.

Agreement), being one of these MTA, is no longer subject to a specific agreement ancillary to the GATT but is an integral part of the WTO Agreement.<sup>6</sup>

Pursuant to Article 18.4 of the Antidumping Agreement, Member States are obligated to take the required steps in ensuring that their laws, regulations and administrative procedures conform to the provisions of the Antidumping Agreement no later than the date of entry into force of the WTO Agreement being 1 January 1995. Four years later, in 1999, the Customs Duties (Dumping and Subsidies Act) was passed in Jamaica to give effect to the provisions of the WTO Antidumping Agreement. This Act repealed the former Customs Duties (Dumping and Subsidies) Act and established the Antidumping and Subsidies Commission to which aggrieved domestic producers can submit their complaints directly for antidumping investigations, as opposed to the procedure under the former Act whereby complaints had to be lodged with the Minister responsible for industry who would then refer the complaint to the Antidumping Advisory Board for investigation.<sup>7</sup>

## **1. ADMINISTRATION OF THE NEW RULES**

Under the Customs Duties (Dumping and Subsidies) Act 1999 the new body set up is charged with the administration of the antidumping and countervailing duty rules. This body, the Antidumping and Subsidies Commission, comprises 5 members unlike the

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<sup>6</sup> *The Result of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, 168-96(GATT Secretariat 1994).

<sup>7</sup> This difference in procedure for the submission of complaints between the old and the new Act is of little practical significance since the relevant Minister of Industry was, under the old Act, a conduit and had no discretion in the submission of the complaint to the Antidumping Advisory Board.

previous Antidumping Advisory Board that comprised 14 members. In relation to antidumping matters, in particular, the Act gives the Commission authority to accept complaints and initiate proceedings,<sup>8</sup> commence investigations,<sup>9</sup> and determine provisional antidumping duties<sup>10</sup> and antidumping duties<sup>11</sup> subsequent to its final determination in an antidumping proceeding.

## 2. PRACTICE AND PROCEDURE

Where a Jamaican producer has evidence of dumping by a foreign exporter causing material injury to his production in Jamaica of like goods as those being dumped, he may file an antidumping application seeking relief in the form of antidumping duties. The application for antidumping duties is to be filed before the Commission by local producers of identical or like products. However, the Commission has the authority to start an antidumping investigation on its own initiative.<sup>12</sup> The application is to be supported by evidence demonstrating dumping, material injury or threat of material injury and the causal link between the dumping and the injury. To achieve this purpose

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<sup>8</sup> Customs Duties(Dumping and Subsidies)Act 1999, sec.4(1).

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., sec. 15.

<sup>11</sup> Ibid., sec. 13.

<sup>12</sup> Ibid., sec. 4. Although self-initiation is possible under the Act this procedure has, at the time of writing, not been utilized. Additionally, the Act does not specify the circumstances when the Commission may initiate an investigation or how the Commission should go about doing this. On the other hand, the WTO Antidumping Agreement on which the Act is based does not have a provision permitting self-initiation by an investigating authority in a member country. Article 5.1 of the WTO Antidumping Agreement, which deals with topic of initiation of investigations, states that “Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping *shall be initiated upon a written application by or on behalf of the domestic industry.*” The provision for self-initiation in the Act may have been included in error because its application would have the curious result of the Commission determining a case on the basis of a complaint filed by itself before itself. In any event, the exercise of the Commission’s authority in this respect, and indeed the right of a domestic producer to file an antidumping complaint, is subject to the relevant Minister’s authority, in accordance with section 18 of the Act, to make regulations exempting goods from the application of the Act.

the Commission issues a detailed questionnaire with the necessary information sought.

The information required includes:

- name and address of applicant, and of its legal representative;
- main activity of applicant;
- volume and value of the domestic production of the identical or like goods;
- participation of the applicant in the total domestic production, in volume and value;
- description of the imported goods, their uses, physical characteristics and quality compared with domestic production; value and volume of the goods imported (or to be imported) and the import tariff classification of same;
- name or corporate name, and address of the importers;
- country of origin and name or corporate name and address of the exporters;
- normal value of the imported goods when destined for consumption in the domestic market of the countries of origin or export<sup>13</sup> (or, if relevant, either the prices at which the goods were sold from the countries of origin for export to third countries<sup>14</sup>, or the prices based on a constructed value);<sup>15</sup>

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<sup>13</sup> The Customs Duties (Dumping and Subsidies)(Determination of Fair Market Price, Material Injury and Margin of Dumping) Regulations, 2000, sec. 3. Under this section of the Regulation the calculation of the normal value or fair market price is determined by reference to the price of the goods in the domestic market of the exporting country. No reference is made to the country of origin as distinct from the exporting country, albeit reference in the Act at sec. 2(2) regarding the circumstances in which goods are to be regarded as having been dumped indicates that the price of the good in the country of origin is to be used where the country from which the goods are exported is the same as the country of origin of those goods.

<sup>14</sup> The Customs Duties(Dumping and Subsidies) Act, 1999, sec. 2(2).

<sup>15</sup> The Customs Duties (Dumping and Subsidies)(Determination of Fair Market Price, Material Injury and Margin of Dumping) Regulations, 2000, sec. 3. Constructed value refers to the method of calculating normal value of goods in the exporter's domestic market when the market situation in the domestic market does not allow for determining normal value on the basis of the price of the like goods sold in the exporter's domestic market. The constructed value method involves the use of the exporter's cost of production for sales of the like goods in his domestic market plus an amount for selling, administrative expenses, and amount for profits. The amount arrived at on this calculation is then compared to the export

- the export price of the allegedly dumped goods (or, where relevant, the prices at which the goods were first re-sold under arms length transaction<sup>16</sup> in Jamaica);
- any relevant sales information to allow the Commission to determine adjustments to be made to arrive at the ex-factory price<sup>17</sup> of the imported goods, such as brokerage/handling charges, inland freight charges, sales commissions, charges incidental to distribution, information on trade rebates and discounts and customer relationships;
- the effects that the imports of the allegedly dumped goods have had, or will have, on prices of like goods produced in Jamaica;
- the resulting impact of the imports of the allegedly dumped goods on the domestic industry;
- relevant factors affecting the industry that may have a bearing on the prices of like goods of the domestic industry and the overall impact on the domestic industry.

Once the Commission accepts the complaint as being properly documented and decides to initiate an investigation it notifies the Minister, the complainant and other interested

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price of the goods to the importing country to determine the dumping margin. See part 11 below (normal value determinations) for further discussion of this concept.

<sup>16</sup> Under Article 2.3 of the WTO Antidumping Agreement there are a number of factors that might render a sale not made at arms length. These include where the sale is made by the exporter to a related party and the price in that sale is found to have been influenced by that relationship, where there is any consideration payable for the goods other than their price (e.g. some benefit is given by the buyer to the seller as part of the consideration for the goods), or where there is some reimbursement or benefit received by the buyer or an associate of the buyer in respect of the price. The existence of a reimbursement may be deemed to occur where the goods are sold in Jamaica by the importer at a loss.

<sup>17</sup> That is the price when the goods leave the factory in which they are made.

parties.<sup>18</sup> A copy of the notice is published in the *Jamaica Gazette* and a daily newspaper in Jamaica advising:

- (a) the goods being investigated;
- (b) the country or countries in which the goods originated or from which they are exported;
- (c) a summary of the information received on which the complaint is based;
- (d) that interested parties will be invited to submit their views in writing or make arrangements to be heard orally with respect to the investigation.<sup>19</sup>

The Commission specifies the time period in which interested parties are to file responses to the complaint,<sup>20</sup> and may request additional information not covered in their questionnaires. Interested parties are also given notice of the information required by the Commission to assist them in the Commission's investigation and a reasonable opportunity to examine the non-confidential information of the parties provided to the Commission to enable them to prepare and present their cases.<sup>21</sup>

### **3. Confidentiality**

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<sup>18</sup> Section 25 of the Act. Under section 2 of the Act an interested party means a person (a) engaged in the production, purchase, sale, export or import of any goods that are the subject of an investigation; (b) engaged in the production, purchase or sale of any goods produced in Jamaica that are like goods that are the subject of an investigation; (c) acting on behalf of any person referred to in paragraph (a) or (b); (d) who is a user of any goods that are like goods in relation to any goods that are the subject of an investigation.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, sec. 8

Information provided to the Commission for the investigation is accessible to all parties unless the information is specifically designated as confidential. Where the information is designated by a party as confidential, the Commission determines whether this designation is justified and, if the designation is justified, such confidential information is not to be disclosed unless the party submitting it agrees to its disclosure.<sup>22</sup> The Commission is authorized to treat information as confidential where disclosure of the information would give a competitor a significant advantage or would otherwise have a significant adverse effect upon the supplier of the information or the party from whom the information was acquired.<sup>23</sup> Information which usually falls into this category include:

- the manufacturing process of the product;
- the cost of production and the nature of the components or raw materials;
- distribution costs;
- sales terms and conditions other than those offered to the public;
- description of the types or classes of clients, distributors, and suppliers;
- sales prices per sale and per product.

#### **4. Preliminary Determination**

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<sup>22</sup> Ibid., sec. 8(2). There is no provision for the disclosure of confidential information to counsel of any party under a protective order as is the case in some jurisdictions such as the United States and Mexico. However, in order to reduce the element of surprise to opposing parties, it is required, in accordance with section 9(2) of the Act, that evidence submitted by a party as confidential be accompanied by a non-confidential summary of said evidence ‘ in sufficient detail to convey a reasonable understanding of the evidence.’

<sup>23</sup> Ibid., sec. 8(2).



Ninety days after the commencement of an investigation the Commission is to make a preliminary determination,<sup>24</sup> although this period may be extended by the Commission by a further 45 days.<sup>25</sup> The Commission is required to examine whether there is sufficient evidence of dumping and evidence pointing to a ‘reasonable indication’ that the dumping has caused or is likely to cause material injury. The preliminary determination involves a preliminary finding of dumping and material injury or the threat thereof,<sup>26</sup> and hence the dumping investigation and the injury investigation are conducted simultaneously<sup>27</sup>.

The antidumping proceedings are to be terminated where the preliminary determination discloses a *de minimis* dumping margin<sup>28</sup>, negligible volume of dumped imports<sup>29</sup>, or negligible injury to the domestic industry.<sup>30</sup> Where the preliminary determination is affirmative<sup>31</sup> the Commission proceeds to the final determination phase of the investigation where it determines whether and to what extent the preliminary findings should stand.

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<sup>24</sup> Ibid., sec.27.

<sup>25</sup> Ibid., sec.29. Some of the circumstances in which may prompt an extension of time in which to render a preliminary determination include the complexity of the case, the variety of goods or number of persons involved in the investigation, and the difficulty of obtaining satisfactory evidence in the investigation.

<sup>26</sup> The ‘finding’ here may be based on an estimate or on the basis of the best information available to the Commission at the time of the making of the preliminary determination. This means that the decision at the preliminary determination may be different from the final determination because the Commission receives further information subsequent to the preliminary determination that was not available or verifiable before the preliminary determination.

<sup>27</sup> This situation is unlike that in the United States where the dumping and injury analyses are conducted separately by different bodies, the Department of Commerce (DOC) conducting the dumping analysis and the International Trade Commission (ITC) conducting the injury analysis.

<sup>28</sup> That is, less than 2% expressed as a percentage of the export price.

<sup>29</sup> The volume of dumped imports is negligible if the volume of dumped imports from a particular country accounts for less than 3% of imports of the like products in Jamaica, unless countries which individually account for less than 3% of imports of the like products collectively account for more than 7% of imports of the like product.

<sup>30</sup> Section 26 of the Act.

<sup>31</sup> That is, where the Commission finds evidence of dumping that has caused or is causing material injury or dumping that is likely to cause material injury to the domestic industry.

## 5. Provisional Measures

Provisional antidumping duties may be imposed<sup>32</sup> or a corresponding cash deposit, bond or other appropriate security ordered, on the basis of the provisionally determined dumping margin,<sup>33</sup> where the Commission finds that the margin of dumping is not *de minimis* and the volume of dumped imports, actual or potential, or the injury to the domestic industry is more than negligible. This provisional measure is applicable to goods of the same description as those to which the preliminary determination relate that are released after the date of the preliminary determination, and shall not be imposed earlier than 60 days since the commencement of the investigations.<sup>34</sup> The duration of the provisional measure is for a period of four months although such period may be extended for up to six months.<sup>35</sup>

If the investigation is terminated because of insufficient evidence of injurious dumping or the Commission makes a finding only to the effect that the goods dumped are likely to cause material injury,<sup>36</sup> then the provisional duties collected are returned to the importer with interest payable between the time the duty is paid and the time it is returned.<sup>37</sup>

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<sup>32</sup> Section 15 of the Act.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.* This means that provisional measures can be applied retroactively to take effect 30 days before the preliminary determination (where the preliminary determination is made 90 days after the investigation commences) or 75 days before the preliminary determination (where the date for the preliminary determination is extended by a further 45 days).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, sec. 15(5)(b) This section as currently drafted seems to indicate that the Commission's finding that the dumped goods are 'likely to cause material injury', as a pre-condition for the return of the provisional duty collected, is to be made after the finding contained in the preliminary determination, presumably the final determination. This is so because the provisional duties to be returned cannot be collected until after the affirmative preliminary determination (which involves a finding of material injury), although the provisional duties may apply to a period before the date of the preliminary determination. As it stands there is the anomalous position where provisional duties can be collected on a finding of threat of material injury

## 6. Final Determination

Within 90 days after making the preliminary determination the Commission is to make a final determination on whether there is dumping, material injury, or threat thereof to the domestic industry.<sup>38</sup> The final determination will also include, if applicable, the antidumping duties to be imposed. Notice of the final determination is given to the Minister and interested parties and is published in the *Jamaica Gazette* and a daily newspaper<sup>39</sup>.

## 7. Undertakings

Upon an affirmative preliminary determination the Commission may accept an undertaking from the party that has allegedly dumped the goods if such an undertaking will remove the dumping margin or the material injury or threat of material to the domestic industry.<sup>40</sup> The undertaking is intended to revise upwards the export price of the

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at the preliminary determination stage which provisional duties are to be returned on a conclusive finding of a mere threat of material injury at the final determination. If this is so, the provision may not comport with the article 7.1 of the WTO Antidumping Agreement that arguably requires a finding of material injury as opposed to a threat of material injury for provisional measures to be imposed.

<sup>37</sup> Ibid., sec. 15(5). Although this section clearly indicates that provisional duties collected after an affirmative preliminary determination is made are returnable *if an investigation is terminated* pursuant to section 26(2) of the Act, it is not entirely clear how this can be done since there is no provision in the Act for an investigation to be terminated *after* an affirmative preliminary determination is made. Under the Act, as currently drafted, termination of the investigation is to occur before a preliminary determination is made. As a practical matter, therefore, the provisional duty collected would have to be returned after a final determination is made indicating that the complainant has not made out a case for injurious dumping.

<sup>38</sup> Ibid. sec.30.

<sup>39</sup> Notification is also given to the WTO.

<sup>40</sup> Section 32 of the Act. Such settlement agreements usually include commitments from the exporter not to circumvent the settlement agreement by a change in the appearance of the goods, trade names of the

imported goods to remove the dumping margin and consequent injury.<sup>41</sup> On the other hand, an undertaking will not be accepted by the Commission if its administration will be difficult or not practicable.

## **8. Imposition of antidumping duties**

If the result of the final investigation by the Commission is affirmative with respect to dumping and injury, an antidumping duty is to be imposed.<sup>42</sup> Under the Act the Commission exercises its discretion as to whether the antidumping duty is to be on the basis of the entire dumping margin or a lesser duty based on the injury to the domestic industry.<sup>43</sup> The antidumping duty usually applies to imports made subsequent to the imposition of the duty. In some circumstances, however, antidumping duties may be imposed retroactively.

Retroactive imposition requires a finding either of a history of dumping on the part of the exporter or that the importer knew or should have known that the exporter practices dumping,<sup>44</sup> and that the dumping would cause material injury, and injury<sup>45</sup> resulting from

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merchandise or through sales of merchandise of inferior quality, and that the settlement not be violated through sales through a third person or third country.

<sup>41</sup> Although there is no provision in the Act authorizing the Commission to terminate an investigation on its acceptance of an undertaking, the Commission's acceptance of the undertaking would, in effect, amount to that. There is also the issue of whether provisional duties already collected are returnable upon the acceptance of an undertaking. This issue, although not specifically addressed, may be taken to have been addressed in a round-a-bout way under section 15 of the Act if acceptance of an undertaking is regarded as a termination of the investigation.

<sup>42</sup> Section 13 of the Act.

<sup>43</sup> Ibid. The application of a lesser duty is justifiably in circumstances where the duty to be imposed to remove the injury to the domestic industry is less than suggested by the dumping margin.

<sup>44</sup> Ibid. See also, article 10.6 of the WTO Antidumping Agreement. Either of these represent the first prong of the two prong test for imposition of retroactive antidumping duties, the other being that material injury is caused by a significant importation of the dumped goods *or* that the dumped imports form part of ' a series

a significant importation of the goods in Jamaica released during the period of ninety days before the date of the preliminary determination.<sup>46</sup>

There is no provision in the Act requiring the return of the balance of provisional duties paid if the amount of the antidumping duty to be retroactively paid is less than the provisional duty already paid, or for the balance to be exempted in the event that the amount of the provisional duty paid is less than the antidumping duty retroactively to be paid.

## **SUBSTANTIVE RULES**

### **9. Local Industry**

An investigation will not be initiated by the Commission unless it is brought by or on behalf of the domestic industry in Jamaica. The domestic industry in Jamaica is taken to mean those Jamaican producers whose production represents more than 50% of the total production of the like goods by those Jamaican producers who either express support for

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of importations into Jamaica, which are significant in the aggregate and have occurred within a relatively short period of time...’ However, section 13 of the Act as currently drafted does not accurately reflect the history of dumping requirement of the first prong. In fact as drafted one need only demonstrate, with respect to the first prong of the two prong test, either that ‘ there has occurred a significant importation of like goods that were dumped, which dumping has caused material injury or would have caused material injury except for the application of antidumping measures *or* the importer of the goods was or should have been aware that the exporter was practicing dumping and that the dumping would cause material injury.’ This implies that under the Act as currently drafted antidumping duties can be imposed retroactively on the basis of a significant importation of the dumped goods *alone* since the significant importation of dumped goods requirement of the first prong is essentially the same test of the significant importation of the dumped goods requirement of the second prong. This is of course inconsistent with Article 10.6 of the WTO Antidumping Agreement.

<sup>45</sup> Here, the term ‘injury’ refers to material injury. The retroactive imposition of antidumping duties does not apply to a situation of a finding of threat of injury.

<sup>46</sup> Section 13 of the Act.

or opposition to the complaint, and the production of the Jamaican producers who support the complaint represents more than 25% of the total production of like goods by the Jamaican industry.<sup>47</sup> There is no provision in the Act to exclude a Jamaican producer from being designated as a part of the Jamaican industry where the Jamaican producer is related to an exporter or importer of the allegedly dumped goods.<sup>48</sup>

## 10. Like goods

This is defined in relation to any goods<sup>49</sup>, as:

- (a) goods which are identical in all respects with those other goods; or
- (b) in the absence of such identical goods referred to in paragraph (a), goods of which the uses and other characteristics closely resemble those of the other goods

## 11. Normal Value Determinations

The normal value or fair market price of the allegedly dumped goods in the case of arms length transactions is determined by the price at which the like goods are sold in the ordinary course of business for domestic consumption in the exporting country.<sup>50</sup> Normal

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<sup>47</sup> Section 22 of the Act.

<sup>48</sup> Article 4.1 of the WTO Antidumping Agreement provides that domestic producers who are related to exporters of dumped goods or who import dumped goods may be excluded from the definition of domestic industry. This is to prevent these companies from blocking the application of antidumping law by affecting the finding of injury or by frustrating other domestic producers from filing a complaint by withholding support for it. Unlike Jamaica, both Canada and the United States have adopted Article 4.1. ( See, for example, section 31(3) of Canada's Special Import Measures Act (SIMA) RS 1985 as amended, and section 771(4) B the United States' Tariff Act 1930.

<sup>49</sup> Section 2 of the Act.

<sup>50</sup> The Customs Duties (Dumping and Subsidies) (Determination of Fair Market Price, Material Injury and Margin of Dumping) Regulations, 2000, sec. 3(2).

value may also be determined by the cost of production value of those goods in the exporting country.<sup>51</sup> This method is used where, for example, the sale of the like product in the domestic market of the exporting country is not of sufficient quantity for it to be considered as representing a viable market to permit a comparison with the export price of the like goods.<sup>52</sup> Sales of the like product in the exporting country are considered sufficient quantity when the aggregate quantity or value of those sales is at least 5% of the aggregate quantity or value of the sales of the like goods to Jamaica from the exporting country.<sup>53</sup>

Where the Commission finds that the normal value of the goods is to be determined on the basis of cost of production value<sup>54</sup> it does so by calculating the cost of production of the goods in the country of export, together with certain adjustments for administrative and selling costs, delivery charges and a reasonable amount for profit.

Where the allegedly dumped goods are exported from non-market economies<sup>55</sup> the normal value for such goods is determined by the prices of the like goods sold by a producer in a country other than Jamaica designated by the Commission (so-called surrogate country price) for this purpose. The prices of the goods sold in this country are

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<sup>51</sup> Ibid. sec. 3(4).

<sup>52</sup> The Customs Duties (Dumping and Subsidies) (Determination of Fair Market Price, Material Injury and Margin of Dumping) Regulations, 2000, sec. 3.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid., sec. 3(4). The Commission uses the cost of production method for finding the normal value if sales of the like goods in the domestic market of the exporting country are not viable, are below the cost of production and are made within an extended period of time in substantial quantities that do not allow for recovery of costs within a reasonable time period, are outside of the ordinary course of trade, are not representative, or no contemporaneous sales of comparable merchandise exist.

<sup>55</sup> These are countries in which prices for goods are not determined by market forces but by the state or an agency of the state.

then adjusted to reflect the price of the goods sold in Jamaica and any differences in terms and conditions of sale, taxes and other factors affecting price comparability.<sup>56</sup>

## 12. Export Price

Under the Act the export price of the allegedly dumped goods in an arms length transaction is determined by the exporter's sale price of the goods or the price at which the importer buys the goods or agrees to buy the goods, adjusted by deductions to arrive at an ex-factory price.<sup>57</sup>

If sufficient information does not exist or is not provided to calculate the export price, the export price is to be prescribed by the Minister.<sup>58</sup> The Commission *may* (my emphasis) also have a discretion to construct the export price, where sufficient information is not available or is not provided, on the basis of the price at which the imported goods are first resold to an independent buyer, or if not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the Commission may determine.<sup>59</sup>

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<sup>56</sup> Ibid. sec.4.

<sup>57</sup> Section 19 of the Act. These deductions include costs, charges and expenses incurred on sales of like goods for use in the domestic market of the country of export, any duty or tax imposed on the goods in accordance with Jamaican law if the duty is paid by the exporter, and such costs associated with the ex[porting of the good, such as shipment, stevedoring and handling charges.

<sup>58</sup> Section 20 of the Act. There is no indication as to the method to be employed by the Minister in calculating the export price in this situation. Indeed, the WTO Antidumping Agreement provides no solution to this question.

<sup>59</sup> The Customs Duties (Dumping and Subsidies)(Determination of Fair Market Price, Material Injury and Margin of Dumping) Regulations, 2000, sec. 11. The use of the word *may* in characterizing the nature of the Commission's discretion is due to the fact that there is some inconsistency between the Act and its Regulations on the question of *who* (the Minister or the Commission) should determine how the export price is to be constructed where the information to calculate the export price is either insufficient or has not been provided. Under the Act, the Commission's discretion in this regard is limited to a situation where there is no known buyer in Jamaica of the goods shipped or to be shipped. The Minister's discretion seems to cover any other situation. However, under the Regulations to the Act, The Commission's discretion is



### 13. Due allowances and Adjustments

The Commission gives consideration to due adjustments to arrive at a fair comparison between normal value and export price at the ex-factory level to calculate the dumping margin. These adjustments would become unnecessary if products produced overseas and in Jamaican markets were identical in physical and sale characteristics. In reality, however, goods, even if identical physically, are packed and transported differently and sold through different commercial procedures. This, therefore, requires adjustments to be made to provide a fair price comparison.

Adjustments are made for differences in the quantity and quality of the goods sold in the exporter's domestic market and Jamaica, and differences in the circumstances of sale between the exporter's domestic market and Jamaica.<sup>60</sup>

Regarding adjustments for differences in the quality or physical characteristics of the goods, the Commission ensures that the goods sold in the exporter's domestic market and Jamaica's market are comparable. Where the price of like goods<sup>61</sup> is greater than the price of identical goods, the amount of the difference is to be deducted from the price of

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enlarged to include construction of the export price, absent sufficient information or where information has not been provided, where there is an association between the exporter and the importer, and where the goods are not re-sold in the condition as exported.

<sup>60</sup> The Customs Duties (Dumping and Subsidies)(Determination of Fair Market Price, Material Injury and Margin of Dumping Regulations, 2000, sec. 5-11.

<sup>61</sup> The term 'like goods' as used here in the Regulation can only mean like goods in terms of part (b) to the definition of like goods in section 2 of the Act, that is, goods 'of which the uses and other characteristics closely resemble those of other goods,' since like goods by definition includes identical goods.'

like goods, and where the price of like goods is less than the price of identical goods, the amount of the difference is to be added to the price of the like goods.<sup>62</sup>

With respect to quantity adjustments, the Commission ensures that sales used to establish normal value are comparable in volume to those used to establish the export price.<sup>63</sup>

Therefore, prices are adjusted to reflect quantity discounts generally granted in exporter's domestic market regarding the same quantity of goods as are sold to Jamaica.<sup>64</sup>

There is also level of trade adjustments<sup>65</sup>, that is, the difference between the actual functions performed by sellers in the exporter's domestic market and in the Jamaican market, to ensure that retail sales in the exporter's domestic market are not compared with wholesale sales in Jamaica, or vice versa.

Other adjustments to the normal value involve the circumstances of sale adjustments because of differences in the prices of the goods in exporter's domestic market and the market in Jamaica resulting from differences in sales commissions, warranties, technical services, interest on accounts receivable, guarantees, credit terms, advertising, warehousing, general discounts and rebates, free samples of goods and other direct expenses, that is expenses resulting from or bearing a direct relationship to sale.<sup>66</sup> These

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<sup>62</sup> Ibid. sec.5.

<sup>63</sup> Ibid., sec.3.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid., sec. 6(3). This section of the regulation does not make specific reference to circumstances of sale adjustments but is drafted in terms to include these adjustments.

expenses are deductible from the normal value as a circumstance of sale if they would not have been incurred but for the particular sales in issue.

The same adjustments are made to the export price of the goods as well. For example, the cost of containers and packing costs for shipment of the goods to Jamaica, if not already included in the export price, would be added to the export price, in addition to the amount of any import duties imposed by the exporting country that are rebated or uncollected because the goods are exported to Jamaica, and the amount of any taxes imposed by the exporting country that are rebated or uncollected because the goods are exported to Jamaica. These expenses are added because the exporter includes such costs in the pricing of similar goods in its domestic market.

Deductions from the export price, if not already excluded, include, shipping costs incurred from the place of shipment in the exporting country to Jamaica<sup>67</sup>, and the amount of any export taxes imposed by the exporting country on the goods. These are excluded because the exporter does not include these items in pricing similar goods sold to consumers in its domestic market.

#### **14. Dumping Analysis**

Dumping is defined as occurring when the export price of goods sold is less than either the price of like goods sold in the ordinary course of trade in the domestic market of the

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<sup>67</sup> This would also include freight charges, insurance premiums, handling, port, and custom brokerage fees.

exporting country or the cost of production of like goods in the exporting country.<sup>68</sup> Goods are considered not sold in the ordinary course of trade where the sale is made to a related party and that relationship influences the price at which the sale is transacted. This is also the case where there is consideration payable for the goods other than the price or there is some benefit received by the buyer regarding the price of the goods, there are government controls on the pricing of the goods, or a monopoly situation affecting the price of the goods.

If domestic sales in the exporting country are unsuitable for comparison because they are not in the ordinary course of trade or not conducted in an arms length fashion, the Commission may construct the normal value on the basis of the cost of production of the goods in the exporter's domestic market together with allowances for administrative and selling costs and an amount for profits.<sup>69</sup>

## **15. Material Injury Determination**

In determining whether any material injury to the Jamaican industry has been, is being or is threatened, the Commission looks at factors such as :

- the volume of the dumped imports in either absolute terms or relative to the production or consumption of like goods in Jamaica

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<sup>68</sup> Section 2 of the Act.

<sup>69</sup> The Customs Duties (Dumping and Subsidies)(Determination of Fair Market Price, Material Injury and Margin of Dumping) Regulations, 2000., sec.3.

- the impact of the dumped imports on the Jamaican producers of like goods taking into account indices such as, decline in output, sales, market share, profits, productivity, return on investments or the utilization of industrial capacity; or negative effects on cash flow, inventories, employment, wages, growth, or the ability to raise capital, the magnitude of the margin of dumping
- the price effect of the dumped imports, that is , whether there has been significant price undercutting or depression in the price of the like goods sold in Jamaica; or whether there has been to, a significant degree, a prevention of price increase which would have otherwise occurred.<sup>70</sup>

The Commission also looks at factors other than those enumerated above that have affected or are affecting the Jamaican industry to determine whether the source of the material injury to the domestic industry is the dumped goods. These include the volume and price of imports that are not dumped, contraction in demand or changes in the pattern of consumption, restrictive trade practices of and competition between overseas and Jamaican producers, the export performance and productivity of the Jamaican industry, and developments in technology.<sup>71</sup>

In terms of a threat of material injury, the Commission looks at factors such as:

- a significant rate of increase of dumped imports in the Jamaican market indicating the likelihood of substantially dumped imports

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<sup>70</sup> Ibid., sec. 12.

<sup>71</sup> Ibid.

- actual or potential capacity in the exporting country or country of origin indicating the likelihood that the resulting imports will be directed to Jamaica
- the potential for product shifting where production facilities that can be used to produce the dumped goods are currently being used to produce other goods
- inventories of the product
- whether imports are entering at prices that will have a significant depressing effect on domestic prices, and would likely increase demand for further imports
- actual and potential negative effects on existing development and production efforts, including efforts to produce a derivative or more advanced version of the like goods
- the magnitude of the dumping margin<sup>72</sup>

## 16. Causation

In order for the complainant representing the Jamaican industry to obtain relief, it must be demonstrated not only that there is dumping or material injury or threat thereof which is more than *de minimis*, but that the injury is caused or is threatened by the dumped imports.<sup>73</sup> There is no specific reference in the Act as to whether the dumping must be the only or the predominant factor causing the injury to the Jamaican industry for there to be an affirmative finding of causation.

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<sup>72</sup> Ibid., sec. 13.

<sup>73</sup> See, for example, section 12 of the Act.

## 17. Cumulation

Where there is simultaneous dumping by two or more exporting countries, the cumulative effect of the dumping from the countries concerned is deemed to be an effect of imports from each country concerned where, the dumped imports of any exporter taken into account are dumped by a margin which is at least 2%, the volume of the imports from any country taken into consideration is not negligible, and a cumulative assessment of the effect of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported product and the like Jamaican good.<sup>74</sup>

## 18. Circumvention

There is no provision in the Act dealing with the issue of circumvention of antidumping duties. Circumvention may occur in instance such as downstream dumping and fictitious foreign market price, and third country dumping.

In the case of downstream dumping, a foreign producer sells goods at less than normal value to customers who further process the goods and exports the 'downstream' goods to Jamaica. In this case the final exported good is different from the originally exported good, and since antidumping duties are imposed on final products causing material injury the original dumping would not be addressed.

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<sup>74</sup> The Customs Duties(Dumping and Subsidies)(Determination of Fair Market Price, Material Injury and Margin of Dumping) Regulations, 2000., sec. 12(4).

The fictitious market price scenario arises where a foreign company, in order to avoid or reduce the amount of antidumping duties, sells goods at an inflated price to a related company, which then exports the goods at a non-dumped price. Typically, this arrangement is accompanied by a rebate to the producer intended to conceal the dumping. Alternatively, goods may be sold at artificially low prices in the exporters domestic market to avoid antidumping duties on the like goods in another country.

Third country dumping or country hopping occurs where a particular exporter gets around or circumvents an antidumping notice by starting to export the goods from a different country. It also covers a situation where goods subject to an antidumping notice are exported by any company or country not subject to the antidumping order, or where the goods are altered in the form or condition in which they are imported so as not to fit the description of the goods specified in the antidumping notice.

## **19. Reviews**

Both the Commission's preliminary determination<sup>75</sup> and final determination<sup>76</sup> are subject to judicial review under traditional administrative law grounds.<sup>77</sup> This also applies to a decision to not initiate an investigation or to terminate an investigation.<sup>78</sup> If a judicial review is successful, the decision made will normally be set aside or revoked, and the

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<sup>75</sup> See section 33(c) of the Act.

<sup>76</sup> *Ibid.*, sec. 33(a).

<sup>77</sup> *Ibid.*, sec. 34 of the Act.

<sup>78</sup> *Ibid.*, sec.33(c). Any order, finding, ruling or determination of the Commission is reviewable.



Commission will have the matter remitted to it for re-consideration to either confirm, rescind or vary the determination.<sup>79</sup>

## **ISSUES CONCERNING PRACTICE AND PROCEDURE**

### **20. Confidentiality**

As indicated above confidential information submitted by the parties to the Commission is not available under court protective order to attorneys for the opposing parties as is the case in some jurisdictions. Given that confidential information submitted to the Commission involves sensitive commercial information on customers, prices, costs, and production processes, it may be reasonable to require the non-disclosure of such information to opposing parties. Yet, this requirement must be balanced against the need to ensure transparency and fairness to the parties in the presentation of their cases before the Commission. Denial of access to confidential information may not only preclude counsel from monitoring the decisions of the Commission more effectively, but may prevent counsel from arguing their clients' cases more effectively as well. On the other hand, access to confidential information could increase legal costs for the parties concerned as each party plays tit-for-tat in requesting each other's confidential information for its own analysis. Administrative costs are likely to increase with this approach as well as the Commission would have to spend much time that could be

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<sup>79</sup> The requirement for the matter to be remitted to the Commission on a successful challenge of its decision on review expressly applies to the final determination. Although the preliminary determination is subject to review there is no clear indication as to whether the Commission may revisit the preliminary determination in the same way as it is expressly authorized to do with respect to the final determination.

devoted elsewhere in re-analyzing parties' own calculations of normal value, export price and dumping margins done on the basis of the confidential information provided to them. Perhaps some balance could be struck between these two competing objectives by permitting some form of disclosure of confidential information under a protective order together with a guaranty from counsel to whom access to the confidential information is granted to guarantee payment of the sanction in the event of infringement of the confidentiality obligation.

## **21. Final Determination**

Because the final determination has to be made within a specific time period from the preliminary determination, and there is no provision for extension of this period, an anomalous situation may arise where a preliminary determination is to be reviewed.<sup>80</sup> On the one hand, the court has an obligation to review the Commission's decision if the decision can be impugned on any of the traditional administrative law grounds.<sup>81</sup> However, judicial review of a preliminary determination exposes the Commission to running afoul of the Act in terms of it not being able to complete the final determination within the statutory time limit. This anomaly could be addressed by excluding preliminary determinations from the provision for judicial review or by extending the time within which a final determination is to be made once a preliminary determination is

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<sup>80</sup> This was the situation in *Statement of Reasons: Inorganic Fertilisers, Originating in or Exported from the Dominican Republic*, Ref. No. AD-01-2001 (February 3, 2002) where aspects of the Commission's finding at the preliminary determination stage were challenged.

<sup>81</sup> See section 34 of the Act. These grounds include (a) failing to observe a principle of natural justice or otherwise acting beyond or refusing to exercise its jurisdiction (b) erring in law in making a determination, order or finding, whether or not the error appears on the face of the record (c) making its determination in a perverse or capricious manner or without regard to the material before it.

subject to judicial review. Neither solution would perforce be inconsistent with the WTO Antidumping Agreement. Excluding preliminary determinations from judicial review is consistent with Article 13 of the WTO Antidumping Agreement which provides that “*Each Member whose national legislation contains provisions on antidumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to **final determinations***<sup>82</sup> and reviews of determinations within the meaning of article 11.” Whether or not the court will abide any such amendment is another matter since courts have tended to look askance at statutory provisions intending to oust their jurisdiction<sup>83</sup>.

Extending the time for conclusion of a final determination in circumstances where a preliminary determination is reviewed may not be violative of the WTO Antidumping Agreement since the time for the conclusion of investigations can be extended under special circumstances.<sup>84</sup> The WTO Antidumping Agreement seems to give member countries the discretion in determining what these exceptional circumstances should be, provided the exercise of this discretion does not result in an investigation being concluded more than 18 months after its initiation. On the other hand, the answer to this question is not conclusive because the WTO Antidumping Agreement does not say

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<sup>82</sup> My emphasis.

<sup>83</sup> See for example, *A.-G. v. Ryan* [1980] AC 718. In this case the Privy Council invalidated the decision of a minister refusing an application for citizenship notwithstanding a provision in the relevant statute stating that the minister’s decision ‘shall not be subject to appeal or review in any court’; *Anisimic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147.

<sup>84</sup> Article 5.10 of the WTO Antidumping Agreement provides that “ investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months after initiation.” However, because the WTO Antidumping Agreement does not say what these special circumstances are, it is unclear whether extension of the time for the completion of an investigation after initiation beyond the 18month limit, on the basis of a judicial review of a preliminary determination or final determination, would constitute special circumstances under the WTO Antidumping Agreement.

whether delay in the conclusion of an investigation because of judicial review would be one of the special circumstances to be factored in determining whether there is a breach of a country's obligation to complete an antidumping investigation in a timely manner.

## **22. Imposition of antidumping duties**

Although, the Act clearly contemplates the imposition of antidumping duties on a finding of dumping and material injury or threat thereof, it fails to specify *who* should impose this duty.<sup>85</sup> Under the 1959 Customs Duties (Dumping and Subsidies) Act, the relevant Minister had the power to impose an antidumping duty.<sup>86</sup> The designation of the Minister as the person to impose the duty with the usual safeguards against an infringement of the separation of powers principle<sup>87</sup> served to avoid possible constitutional challenges consequent on the imposition of the duty. The new Act takes Parliament or the Minister of Industry and Commerce out of the picture in so far as the setting of the antidumping duty is concerned, unlike the old Act which expressly reposed power in the Minister to order the duty to be imposed and the rate thereof, the duty then being regarded as a species of customs duty to be collected and enforced as if a duty imposed under the Customs Act.<sup>88</sup> Additionally, the new Act does not say who should collect the

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<sup>85</sup> See, for example, section 16 of the Customs Duties (Dumping and Subsidies) Act 1999. Section 16(1)(a) of the Act specifies that the antidumping duty is payable by an importer upon being notified in writing by the Commission, without clearly stating whether it is the Commission which imposes the duty. This situation is likely to create constitutional issues since the power to impose a tax or duty is reposed in Parliament under the Jamaican Constitution. On the other hand, it is arguable that the fact that the Act specifies that the antidumping duty becomes payable by the importer upon the importer being notified in writing by the Commission of the duty payable suggests an implied delegation to the Commission of the power to impose a duty.

<sup>86</sup> See section 4 of the Customs Duties (Dumping and Subsidies) Act, 1959.

<sup>87</sup> The Minister's power to impose the duty was limited by section 7 of the Customs Act, which limited the duration of the order imposing the duty to 21 days unless confirmed by the House of Representatives.

<sup>88</sup> Section 4 of the Customs Duties ( Dumping and Subsidies) Act, 1959.

antidumping duty or, if the duty were to be collected by Customs, on whose directive or authority would the Customs be collecting the duty.

There is also no provision in the Act effectively dealing with injury sustained by a Jamaican industry prior to initiation of an antidumping investigation or prior to the submission of a properly documented complaint, even though this period would usually be included in the period of investigation (POI). Jamaican producers inexperienced in utilizing available trade remedies may take many months before they are able to put together a properly documented complaint, a period in which they may be suffering from injury. Under the Act, the antidumping duties imposed on a prospective basis would not address this injury, nor would the antidumping duties imposed on a retrospective basis because this would only cover injury sustained from the initiation of the antidumping investigation.<sup>89</sup> This situation could be further compounded where the lesser duty provision is applied to permit the imposition of antidumping duties at a rate below the applicable dumping margin.

The criteria for imposition of antidumping duties retroactively may present many problems for the unsuspecting importer. Under the Act, one of the essential criteria to be met is either a history of dumping on the part of the exporter or producer or knowledge on the part of the importer that the exporter practices dumping that would cause material injury.<sup>90</sup> In as much as antidumping duties are imposed on the importer, it is incumbent on the importer to determine prior to importation of the goods whether the exporter or producer of the goods has a history of dumping, and whether the particular goods to be

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<sup>89</sup> See section 13 of the Customs Duties(Dumping and Subsidies) Act, 1999.

<sup>90</sup> Ibid., sec. 10.

imported are being sold at dumped prices. An importer may face tremendous difficulties in getting information about an exporter's history of dumping absent any central organization from whom such information is readily available regarding companies against whom findings of dumping have been made. Investigating authorities may not have such information to inform prospective importers in their country, and even the WTO website may not be sufficiently user-friendly to the unsophisticated importer in providing this information.

Questions may also arise as to whether an importer having knowledge of a finding of dumping by an investigating authority which is subject to review, either by the local courts in the jurisdiction of the investigating authority, or by the WTO Panel or Appellate body, is nevertheless to be treated as having knowledge of dumping on the part of the exporter for the purpose of imposing retroactive antidumping duties.<sup>91</sup> If the finding of dumping by one investigating authority (which becomes the basis for a finding of importer knowledge of dumping by an investigating authority in another jurisdiction) is set aside at the review stage, should the retroactive duties imposed by the second investigating authority be returned? There is no provision in the Act for return of duties collected in this situation, although the WTO Antidumping Agreement seems to address this situation in a general way.<sup>92</sup>

The importer may also face difficulties in obtaining information on the normal value of goods from an exporter to determine whether the goods to be imported are being

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<sup>91</sup> There is no provision in the WTO Antidumping Agreement providing guidance on this issue.

<sup>92</sup> See Article 9.3.1 of the WTO Antidumping Agreement.

imported at dumped prices. And, even where the importer knows the prices at which the like goods are sold in the exporter's domestic market, this knowledge does not necessarily translate into knowledge that the exporter is dumping and that the dumping would cause material injury because of the calculations and adjustments to be taken into account in arriving at a dumping margin.<sup>93</sup>

The Commission has so far taken the position that a sufficiently sophisticated importer associated<sup>94</sup> with the exporter and the producer of dumped goods in circumstances where the dumping margin is 22% should know that the exporter practices dumping.<sup>95</sup> There is no clear guidance on this issue either from the WTO Antidumping Agreement or from the jurisprudence of the WTO, and the practice of investigating authorities varies on this point. In the United States, for example, the Department of Commerce<sup>96</sup> imputes knowledge of dumping to the importer if the dumping margin is 25% or more.<sup>97</sup> In Canada, on the other hand, the Canadian International Trade Tribunal (CITT) does not

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<sup>93</sup> This lack of knowledge on the part of the importer, however sophisticated, is compounded where goods are imported from non-market economies and normal value and export price of the goods have to be constructed.

<sup>94</sup> Under section 2 of The Customs Duties ( Dumping and Subsidies) (Determination of Fair Market Price, Material Injury and Margin of Dumping) Regulations, 2000 an importer is associated with an exporter when: (a) they are individuals related by blood, marriage or adoption;(b)one is an officer or director of another;(c)each of them is an officer or director of the same two corporations, associations, partnerships or other organizations;(d)they are partners;(e) one is the employer of the other;(f) they directly or indirectly control or are controlled by the same person;(g) one directly or indirectly controls or is controlled by the other.

<sup>95</sup> See *Statement of Reasons: Inorganic Fertilisers, Originating in or Exported from the Dominican Republic*, Ref. No. AD-01-2001 ( February 3, 2002) at 15. Its not clear from this case whether the amount of the dumping margin is necessarily implicated in the determination of whether an importer knew or ought to have known that an exporter practices dumping that would cause material injury, or, if the amount of the dumping margin is involved in this determination, the minimum dumping margin required to impute knowledge of dumping to the importer.

<sup>96</sup> This is the body charged with determining the dumping margin in the United States' bifurcated system of antidumping investigations. The International Trade Commission (ITC) makes determinations on whether there is injury to the domestic industry.

<sup>97</sup> See, for example, *Silicomanganese from India*, 66 Fed. Reg. 53, 207 ( October 19, 2001); *Notice of Preliminary Determinations of Sale at Less Than Fair Value: Steel Concrete Reinforcing Bars From Poland, Indonesia, and Ukraine*, 66 Fed. Reg. 8343,8351( January 30, 2001).

impute knowledge of dumping to an importer on the basis of a dumping margin, nor does it impute knowledge of dumping on the basis of the sophistication of the importer.<sup>98</sup> In as much as the WTO Antidumping Agreement does not specify the circumstances when an importer should be presumed to know when goods are being dumped, it is certainly open to investigating authorities to develop their jurisprudence in this area, as has been the case. The practice in Jamaica so far, however, does not establish a clear view of how this issue is to be addressed.<sup>99</sup>

## **SUBSTANTIVE RULES**

### **23. Local industry**

The Act does not provide for a clear requirement that Jamaican production should be determined by rules of origin. What percentage value added in Jamaica should accompany imported goods before the final goods can be regarded as having been produced in Jamaica? This question may have increasing significance in a context where

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<sup>98</sup> See, for example, *Certain Refrigerators, Dishwashers and Dryers Originating in or Exported from the United States of America and Produced by, or on behalf of, White Consolidated Industries, Inc. and Whirlpool Corporation, Their Respective Affiliates, Successors and Assigns*, Finding 9 1 August 2000), *Statement of Reasons* (16 August 2000) (CITT) at 32-33. In this case the Tribunal rejected the argument of the domestic industry that on the basis of the sophistication of the importers knowledge of dumping causing injury should be imputed to them even though some of the importers were actually subsidiaries of the exporter; See also *Certain Flat Hot-Rolled Carbon and Alloy Steel Sheet Products Originating in or Exported from France, Romania, the Russian Federation and the Slovak Republic*, Finding (2 July 1999), *Statement of Reasons* ( 19 July 1999) (CITT) at 31. In this case the domestic industry argued that the experience and sophistication of the importer Thyssen meant that it knew or should have known that the exporters were dumping and causing injury. The Tribunal rejected this argument despite the fact that Thyssen alone accounted for the majority of the increase in imports during 1998, the final year of the period of investigation(POI).

<sup>99</sup> In the case of *Agri-Chemicals Limited v. the Antidumping and Subsidies Commission* (Suit No.M18/02 unreported) the issue of was raised at the judicial review. Although the application for review was refused, there is no indication as to how that issue was decided, there being no written judgment of the decision at the time of writing.



Jamaican producers have links with or are related to producers under investigation for injurious dumping. This is because Jamaican producers accounting for substantial production of the like goods may prevent a Jamaican producer from meeting the standing threshold for filing an antidumping complaint. True enough, non-reliance on rules of origin for determining domestic production may assist the ‘Jamaican producer’ who imports intermediate goods with little value added to claim the designation as Jamaican producer.

#### **24. Like goods**

Although the definition of like goods in the Act is set out in clear terms, the application of the concept may present certain problems.<sup>100</sup> Because the term is central to an antidumping investigation at various stages, there will be the incentive by parties to an investigation to manipulate the category of ‘like products’ to determine whether an investigation is to be initiated, the scope of the investigation and the goods on which duties are eventually imposed.

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<sup>100</sup> See, for example, Hudec, Robert, “*Like Product*”: *The Differences in Meaning in GATT Articles I and III*, in *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* 101-124 (Cottier, Thomas and Mavroidis, Petros eds., The University of Michigan Press, 2000); Mavroidis, Petros, “*Like Products*”: *Some Thoughts at the Positive and Normative Level*, in *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* 125-136 (Cottier, Thomas and Mavroidis, Petros eds., The University of Michigan Press, 2000). These articles explore some of the ambiguities inherent in the definition of like product and the difficulties of applying the definition to give effect to GATT’S MFN principle and Article III of the GATT that prohibits tax discrimination between imported and domestic products. In terms of antidumping practice, EC practice is illustrative of the irreconcilable positions taken on the issue of ‘like products.’ For example, early EC antidumping law placed emphasis on physical and technical characteristics ( See, Vermulst and Waer, *EC Anti-Dumping Law and Practice*, Sweet and Maxwell, 1996, at 282) while recent cases have tended to emphasize end use and consumers’ perceptions, albeit these factors are not dispositive. See also, Commission Regulation 550/93 of 5 March 1993 imposing a provisional antidumping duty on imports of bicycles originating in the People’s Republic of China (OJ 1993 L 58, 12 ) ; and *Bicycles from Indonesia, Malaysia and Thailand*, Council Regulation 648/96 of 28 March 1996, OJ 1996 L 91, emphasizing the shift to a more market based analysis focusing on factors such as end use and consumers’ perceptions.

Firstly, from the beginning of an antidumping case it is critical to decide which goods are at issue since the investigation will not be initiated unless it is supported by the domestic industry,<sup>101</sup> which is defined in terms of the 'like product' because it refers to those companies producing the like product in the importing country.<sup>102</sup>

Complainants may be faced with opposing considerations in this regard: there is the desire to define the category of 'like products' widely to include a larger group of products within the scope of the investigation for the imposition of antidumping duties. But, by including too wide a category of like products, complainants may make it more difficult to meet the standing criteria and to prove injury. A Jamaican producer producing product P, for example, might be producing a sufficient quantity of the product to be representative of domestic producers of product P, yet may not have enough support to file the complaint because of other domestic producers opposing the filing of a complaint producing a range of 'like goods.' And, the larger the category of 'like products' the more difficult it is to prove injury to a major proportion of domestic producers of the 'like goods' where, for example, domestic producers of the range of 'like products' are thriving, while only the domestic producer of product P, for example, is suffering injury.

Secondly, the determination of the 'like goods' is important for the calculation of dumping in comparing sales abroad to sales of a like product in the importing country, and important also for determining the scope of the application of antidumping duties. In terms of the calculation of the dumping margin, complainants may end up having a

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<sup>101</sup> See Article 5.4 of the WTO Antidumping Agreement and The Customs Duties( Dumping and Subsidies) Act, 1999, sec., 22.

<sup>102</sup> See Article 5.4 of the WTO Antidumping Agreement.

reduced dumping margin by including too many products within the like product definition if only one or very few of the range of goods included in the like products definition are found to have a high dumping margin, while most of the other goods within the category of ‘like goods’ have a lower dumping margin.<sup>103</sup>

The application of the concept of ‘like goods’ may be problematic when a dumper simultaneously dumps, for example, one category of goods that is identical to those produced by a domestic industry, and another category of goods that closely resemble goods produced by the domestic industry. It is not clear, for example, whether if one has an ‘identical’ product, one should nevertheless look at products which have characteristics ‘closely resembling’ that product.<sup>104</sup> In the Act,<sup>105</sup> like goods are defined as goods identical in all respects to other goods *or*<sup>106</sup> in the absence of identical goods, goods of which the uses and other characteristics closely resemble the other goods. Interpreting the *or* as being in the disjunctive would mean that goods which closely resemble each other should not be considered in the like goods category where identical goods exist. However, this literal reading of the definition may prevent a finding of injury to a domestic industry where the imported identical goods to those being produced in the domestic market are negligible in volume and price effects and other indicia of material

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<sup>103</sup> The definition of like product is also important for the de minimis threshold which provides that ‘dumped goods shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3% of imports of the like product in the importing Member...’ (See, Article 5.8 of the WTO Antidumping Agreement).

<sup>104</sup> This issue arose in the case of *Agri-Chemicals Limited v. the Antidumping and Subsidies Commission* (Suit No. M18 of 2002, unreported), an application for review of the Commission’s preliminary determination contained in *Statement of Reasons: Inorganic Fertilisers, Originating in or Exported from the Dominican Republic*, Ref. No. AD-01-2001 ( February 3, 2002). Counsel for interested party Fersan (the foreign producer of the goods under consideration) argued that the Commission should only include goods ‘closely resembling’ in their scope of investigation ‘in the absence of identical goods’ because the *or* in the definition separating the two categories of goods is in the disjunctive.

<sup>105</sup> See section 2.

<sup>106</sup> My emphasis.

injury while imports of goods closely resembling the domestically produced goods cause injury to the domestic industry. The purposive approach would, therefore, seem to be more appropriate. On the other hand, as seen above, utilizing the purposive approach in broadening the category of goods to be considered 'like goods' may mean that a complainant may not be able to meet the standing criteria, let alone prove injury with respect to his product, if other domestic producers accounting for most of the domestic production of the like goods are thriving and do not support the complainant.

## **25. Material Injury**

As seen above, actionable dumping requires material injury to the domestic industry caused by the dumping. Both the Regulations<sup>107</sup> to the Act and the WTO Antidumping Agreement<sup>108</sup> list a number of factors to be taken into account in determining whether there is material injury to a domestic industry, but there is no guidance in either the Agreement or the Regulations as to the weight to be given to any of the factors. Because none of the factors<sup>109</sup> to be considered in the injury determination is dispositive, the Commission has considerable discretion in making injury findings, provided there is a finding that the volume of the dumped imports is significant and the price effects are evident, whether price depression or price suppression.

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<sup>107</sup> The Customs Duties (Dumping and Subsidies) (Determination of Fair Market Price, Material Injury and Margin of Dumping) Regulations 2000, sec 12(1).

<sup>108</sup> Article 3. Article 3.1 of the WTO Antidumping Agreement identifies three factors to be considered in making a material injury determination: the volume of the subject goods in the importing country, effect of such goods on prices for a domestic like product, and consequent impact of such goods on domestic producers of the like product.

<sup>109</sup> The factors here refer to those to be considered in examining the impact of the dumped imports on the domestic industry

The Commission's discretion is even wider in terms of finding a threat of injury. Although the WTO Agreement stipulates that a finding of a threat of material injury "shall be based on facts and not merely on allegation, conjecture or remote possibility,"<sup>110</sup> some amount of conjecture is of necessity involved in this exercise because the Commission has to make a counterfactual analysis, that is, it must ask whether continued imports of the dumped goods will cause injury and, if the answer to this question is in the affirmative, whether injury would occur in spite of the non-existence of such imports.

Similarly, the requirement that the 'particular situation' that is 'likely to develop into material injury' should be 'clearly foreseen and imminent' and the factors to be taken into account in determining 'clearly foreseen and imminent' invite some degree of speculation, notwithstanding the stipulation in the WTO Antidumping Agreement to the contrary. For example, a significant rate of increase of dumped imports or excess capacity in the exporting country for the dumped goods need not result in dumped imports directed to the importing country. And, even if there is evidence that excess capacity in the exporters country is directed to the importing country the goods exported need not be exported at dumped prices. Further, an investigating authority might be hard-pressed to find threat of injury if an importer intends to switch its supply source of the dumped goods or engages in a pattern of source switching, since the finding of injury is country specific. On the other hand, a finding of threat of injury might be justifiable if the pattern of the importer suggests that at some point (perhaps six months to a year or so

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<sup>110</sup> Article 3.7.

following the close of an antidumping investigation) it will revisit a source of supply against which a finding of threat of injury was made, although the longer the period the importer takes to return to such a source the less likely it may be for the 'clearly foreseen and imminent' criteria to be met.

### **Concluding remarks**

Jamaica has in the main satisfied its obligation under the WTO by giving domestic effect to the WTO Antidumping Agreement. However, several issues remain unresolved, some due to ambiguities in the WTO Antidumping Agreement, others due to the fact that the Act does not adequately reflect the provisions of the Agreement. As the Act is in the process of being amended, it is expected that the latter concerns will be addressed. The ambiguities in the WTO Antidumping Agreement, however, present a different problem, because many of the issues raised above for further clarification under the Antidumping Agreement, such as like goods determination, the weighting of factors in the material injury analysis, the oft-speculative nature of the analysis implicated in threat of injury, and the criteria to be met for imposition of retroactive antidumping duties will, at the very least, have to await the next round of trade negotiations to be addressed.

In the meantime, countries will continue to exercise their discretion in the application of ambiguous provisions of the WTO Antidumping Agreement with the likelihood of increased judicial review at the national level and before the WTO Dispute Settlement Body (DSB).