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ZEROING PRACTICES UNDER THE ANTI DUMPING RULES

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CONTENTS

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ABBREVIATIONS:

ADA	The Agreement on Implementation of Article VI of GATT 94
AD	Anti Dumping
DSB	Dispute Settlement Body
EC	European Community
EU	European Union
FANs	Friends of Anti-Dumping Negotiations
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
MTN	Multinational Trade Negotiations
PCN	Product Code Number
PTY	Polyester Textured Yarn
RTA	Regional Trade Agreement
TNC	Trade Negotiation Committee
TPRR	Trade Policy Review Report
U.S.	The United States of America
WTO	World Trade Organization

PREFACE:

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CHAPTER 1: INTRODUCTION

Since the 1970's nearly two thirds of the world population have started to contribute to the international trade as a consequence of globalization.[1] Regarding to a healthy economic integration, tariff cuts play an important role. World Trade Organization (WTO), having 160 Member States, is the single multilateral platform so as to negotiate trade issues including tariff cuts. However, the WTO does not only focus on free trade, it also takes action to secure fair trade and one of the tools to ensure this objective is anti dumping measures, a type of trade remedy instrument which is regulated under the WTO Anti Dumping Agreement (ADA). Dumping is the sale of a product exported into a foreign market at a price below that at which the same product is usually sold in its home market, so it refers to a situation of international price discrimination.[2] The WTO legislation, condemns dumping if it causes injury instead of prohibiting and Member States have right to take measures if they conduct an investigation in compliance with ADA. Since the establishment of the WTO in 1995, anti dumping measures have been the most frequently used trade remedy instrument compared to safeguards and countervailing measures.

[1] Milner, H. V. & Kubota, K. (2005) Why the Move to Free Trade? Democracy and Trade Policy in the Developing Countries *Journal of International Organization* Vol:59(1), pp:107-143.
[2] United Nations Conference on Trade and Development Report (2003) *Dispute Settlement: Anti Dumping Measures* p:16. (UNCTAD Report)

Originally devised as a remedy to the unfair practice dumping, it is nowadays widely recognized as a successful form of protectionism".[3] As it is mentioned by Blonigen and Prusa, *"... anti dumping is simply another form of protectionism."*[4] The main motive behind the anti dumping measures is to secure the balance between the domestic products and low priced imports of like products. Therefore, the measure should intervene the market up to the level of reel dumping amount. However, the ADA does not include explicit provisions on the calculation methods of anti dumping measures. And because of this reason, Members practice their own calculation methods of the dumping margin.

Dumping margin is calculated by taking into consideration of all transactions of the like product exported by a firm within a certain period of time. And within this period, it is possible that some transactions are not priced lower than the home market of the exporter. It is difficult to explain zeroing in a few words, but, for instance, company X produces microwave ovens and sells them in Mexico for 100 US Dollars. This firm exported ovens in two parties to the U.S. within the investigation period and the prices are 90 and 110 U.S. Dollars. To decide whether there is a dumping or not first, the differences between the normal value (the domestic price in Mexico) and the company's export price in the U.S. should be calculated which are +10 and -10 U.S. Dollars respectively. Therefore, if the dumping is calculated by taking into account both of these transactions, then there is no dumping, but, if the negative dumping margins will be zeroed, meaning that the 110 U.S. Dollars priced transaction is ignored, there will be dumping margin of 10 U.S. Dollars. Basically, this calculation method is called *zeroing* and the WTO Appellate Body condemns its usage. This calculation method is in the center of the anti dumping debate as it increases

[3] Zanardi, M. (2004) Anti Dumping: What are the Numbers to Discuss at Doha? *The World Economy* Vol:27(3), pp:403-433. (Zanardi, M.)
[4] Blonigen, B. A. & Prusa, T. J. (2003) Antidumping Harrigan, J. (ed.) *Handbook on International Trade Policy* Blackwell Publishers, pp:336-383.

the protectionist effect of the measure. Since the U.S. refers zeroing as the main calculation method during anti dumping investigations, it is the most single most litigated subject under the WTO Dispute Settlement Mechanism with 18 cases so far. Zeroing is also on the agenda of the ongoing, but hopeless Doha Development Agenda launched in 2001.

Within this context of international trade law, zeroing is a hot topic for a long time and this study is dedicated to this matter in order to draw a general framework. In order to achieve this, the study shall first focus on the theory of trade remedies and price discrimination in the Chapter 2. Then, the history and the components of the dumping will be presented in the following two chapters to construct a basis before the core arguments. Chapter 5 is devoted to different calculation methods of dumping to demonstrate how the same instrument can affect the level of protection for the domestic producers. The disputes about zeroing held by the WTO Dispute Settlement Mechanism shall be analyzed in Chapter 6 in order to familiarize the attitude of the complainants, respondents and most importantly the panel and the Appellate Body. Chapter 7, on the other hand, shall focus on the current negotiations on the matter as it is on the agenda of the Doha Development Round. These perspectives shall be harmonized in the conclusion to highlight that zeroing should be explicitly prohibited as it overprotects the domestic producers which is inconsistent with free trade pursued by the WTO.

As the study shall analyze the current legal framework of zeroing practice, the doctrinal research methodology will be used throughout the study. In other words, the question of "*what is the law*" shall be the starting point.[5] The law of dumping and specifically zeroing shall be prescribed through the chapters. These descriptions or findings shall lead us to the

[5] Chynoweth, P. (2008), "Legal research", in Knight, A. and Ruddock, L. (Eds), *Advanced Research Methods in the Built Environment*, Wiley-Blackwell, Oxford, pp. 28–38.

main argument of the study that zeroing causes inefficiency by overprotecting the domestic producers. The ADA and other related GATT provisions will be used as a basic resource. Also, the WTO negotiation documents, draft texts, TPR, Panel and Appellate Body Reports shall be referred frequently in order to make an accurate analysis on the matter.

CHAPTER 2: THEORETICAL CONTEXT

Trade remedies, as a significant part of the WTO law, involve three main types of measures, namely anti dumping, safeguard and countervailing duties. Thus, in order to analyze the theory of anti dumping, the one also needs to understand the structure of trade remedies. This chapter will firstly deal with the trade remedies as a whole by touching upon to safeguard and countervailing measures and then will continue with the economic rationales of dumping which is needed to be clarified by examining the definition. According to a widely accepted definition, dumping practices are conceived as selling abroad at a price below domestic price and it refers to a type of *international price discrimination*[6], so the theory of price discrimination will be also addressed briefly while examining the economic reasons of dumping practices. The chapter concludes with the critics against dumping measures.

2.1 Trade Remedies:

[6] Irwin, D. A. (2005) The Rise of Antidumping Activity in Historical Perspective IMF Working Paper:WP/05/31 p:4. Available at: http://www.imf.org/external/pubs/ft/wp/2005/wp0531.pdf [accessed on 03/06/2014].

The notion of *free trade* is accepted as an ultimate goal of the countries which have almost the whole part of the world Gross Domestic Product (GDP).[7] As these countries follow the mainstream economic policies which envisage the idea of liberalization at the core of development and growth, they mainly focus on reducing the tariffs and eliminating non-tariff barriers to provide a free trade environment. However, the system, which is mainly conducted by the WTO, also provides *a safety valve* for situations in which liberalization process causes an injury.[8] Otherwise, as it is stated by the WTO Dispute Settlement Body (DSB), *"the Member could be deterred from entering into additional tariff concessions and from engaging in further trade liberalization."*[9] These *safety valve* regulations of the WTO are mainly regulated within the context of trade remedies which generally refers to import restrictions, including anti dumping measures, authorized under national and international trade laws.[10]

Trade remedy instruments were first introduced to the WTO law after a tremendous success of Member states, GATT 1947.[11] With reference to the first GATT negotiating round in 1947, Member states, accounting for 80 percent of world trade, agreed to implement tariff reductions by accepting to enforce those cuts on the Most Favored Nation basis.[12] However, the drafters of the GATT anticipated that tariff concessions might become unexpectedly burdensome, so trade remedies mechanism was also introduced in order to remove the

[7] Krugman, P. R. & Obstfeld M. (2009) *International Economics: Theory & Policy*, Eight Edition, United States of America, Pearson International Edition, p:27. (Krugman.P.R. & Obstfeld M., 2009)
[8] Caribbean Export Development Agency (2010) An Introduction to Trade Remedies in the Multilateral Trade System *Tradewins* Vol:1 (1), p:1-14. (Caribbean Export Development Agency Report)
[9] Report of the Panel United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat From New Zealand and Australia, WT/DS177/R adopted:21/12/2000. Available at: http://www.worldtradelaw.net/reports/wtopanels/us-lamb(panel).pdf [accessed on: 03/06/2014].
[10] Sykes, A. O. (2005) Trade Remedy Laws *Chicago: John M. Olin Law &Economics Working Paper*, No:240, p:3. Available at: http://www.law.uchicago.edu/files/files/240.aos_.trade-remedy.pdf [accessed on: 03/06/2014].(Sykes, A. O.,2005)
[11] Irwin, D. A. (1995) The GATT in Historical Perspective *The American Economic Review* Vol:85(2), pp:323-328. (Irwin, D. A., 1995)
[12] Irwin, D. A. (1995), p:325.

concerns of Member States.[13] Although the term trade remedy law refers to three types of national laws, namely *safeguard, countervailing and anti dumping measures*, in the 1947 version of the GATT, there was no set of rules[14] on *anti dumping duties* and the trade remedy tools were only covering *safeguard and countervailing measures*.[15]

In this context, Paragraph 1(a) of GATT 47 Article XIX regulates the *safeguard measures* and according to that; if an unanticipated import surge, which causes of serious injury or threat of domestic industries of the importing country, exists, the importing nation may deviate from its tariff concession obligation temporarily and to the degree necessary to address the injury due to the import surge.[16] Today, The Agreement on Safeguards, which is part of Annex 1A to the WTO Agreement, confirms and clarifies the provisions of Article XIX of the GATT 47 (also GATT 94), but also provides for new rules such as procedural requirements.[17]

GATT 47 also permitted the usage of *countervailing measure* providing that; *"the duty shall be levied on any product…in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product."*[18] The WTO Agreement on Subsidies and Countervailing Measures now substitutes the GATT 47 in terms of the legal basis of measures against the subsidies since the Uruguay Round. As a result, while *safeguard measures* are temporary trade restrictions, typically tariffs or quotas, which are imposed in response to import surges that

[13] Sykes, A.(2005), p:3.
[14] During the 1940's U.S. proposed to include a provision to regulate anti dumping and a modified version of the U.S. proposal was incorporated into GATT 47, however the discipline over anti dumping measures was introduced in the 1960's with the conclusion of the first GATT Anti Dumping Code.
[15] Sykes, A.(2005) p:21.
[16] The General Agreements on Tariffs and Trade 1947, Article XIX Available at: http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm [accessed on:28/06/2014].
[17] Bossche, P.V. & Zdouc W. (2013) The Law and Policy of the World Trade Organization *Rules on Unfair Trade* Third Edition Cambridge University Press p:635 (Bossche, P.V. & Zdouc W. 2013)
[18] The General Agreements on Tariffs and Trade 1947, Article VI Available at: http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm [accessed on:28/06/2014].

injure or threaten serious injury to a competing industry in an importing nation, *countervailing measures* are tariffs in addition to ordinary customs duties that are imposed to counteract certain subsidies bestowed on exporters by their governments.[19]

Although the legal regulations were enforced under GATT during 1940's, the widely usage of trade remedies has become a major theme in world trade since 1980's, as the major economies of the world preferred free trade policies.[20] Before 1980's, import substitution policies were widely used, especially in the 1950s, 1960s and 1970s, but that policies appeared to be much less successful than the more export-oriented policies used in the high-growth economies so policy makers in both developed and developing countries had begun to turn towards policies that involved more open trade regimes.[21] By the end of the 1980s, virtually all of the centrally planned regimes that previously eschewed the use of market-based trade had either collapsed or made dramatic reforms that brought foreign trade and investment into a prominent place in their development programs.[22] In that free trade environment, the usage of trade remedies increased dramatically and one particular trade remedy tool, *anti dumping*, has become the most preferred instrument.

In parallel with *countervailing measures*, the *anti dumping measures* are also additional tariffs imposed on imports that are sold at less than fair value and sufficiently injure a domestic industry of the importing country.[23] However, according to the WTO data, between 1995 and 2013 approximately 4500 anti dumping investigations were initiated and nearly

[19] Caribbean Export Development Agency Report, pp:1-14.
[20] Martin, W. (2001) Trade Policies, Developing Countries and Globalization *World Bank: Development Research Group*, p:2.
[21] *Ibid.*
[22] Krugman P. R. & Obstfeld M. (2009) p:32.
[23] Zheng, W. (2013) Reforming Trade Remedies *Michigan Journal of International Law* Vol:34 (151), pp:152-206. (Zheng, W.)

3000 measures were *anti dumping measures* were enforced by the WTO member states.[24] Within the same time period, the number of total *safeguard and countervailing measures* were 136[25] and 190[26] respectively.

On the other hand, it should also be noted while examining the effects of the *anti dumping measures* that these data preparation process of the WTO is based on the notifications of the Member States.[27] Thus, it is a clear fact that a country which is not a member of the WTO, does not have a notification obligation. For instance, countries such as China and Russia were not member states until 2001 and 2012[28], so the measures of those countries are excluded while calculating the total effect of anti dumping measures. Thus, it is an indisputable fact that *anti dumping measures* are the most commonly used types of trade defence instrument for the governments of importing countries and the effect of these measures are far beyond the estimations. However, in order to understand why importing states are taking so much *anti dumping measures*, the one also should analyze the motivation behind the anti dumping practices and ask that question: why firms in the exporting country prefer to dump?

2.2 Price Discrimination:

The WTO definition of dumping states that; *"Dumping occurs when goods are exported at a price less than their normal value, generally meaning they are exported for less than they are sold in the domestic market or third-country markets, or at less than production cost."*[29] In

[24] World Trade Organization (2014) *Anti-dumping* Available at: http://www.wto.org/english/tratop_e/adp_e/adp_e.htm [accessed on:30/06/2014]
[25] World Trade Organization (2014) *Safeguard* Available at: http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm [accessed on:30/06/2014]
[26] World Trade Organization (2014) *Subsidies and Countervailing Measures* Available at: http://www.wto.org/english/tratop_e/scm_e/scm_e.htm [accessed on:30/06/2014]
[27] According to Anti Dumping Agreement Article 16.5, ".. Each member shall notify the initiation of an investigation and measures to the Anti Dumping Committee of WTO..."
[28] World Trade Organization (2014) *Members and Observers* Available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [accessed on:30/06/2014]
[29] World Trade Organization (2014) *Dumping* Available at : http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm [accessed on 03/06/2014].

other words, there is extensive literature that sees dumping as an exercise by foreign firms of monopoly power in international trade, but the dominant view on this subject belongs to Viner, who defines dumping as essentially *price discrimination, in* which a firm with monopoly or market power charges different prices to customers in the home and export markets.[30]

If a firm sells an identical product in two different markets for different prices, that, by definition, is *price discrimination.*[31] Such behavior automatically implies some departure from the ideal of perfect competition, since a perfectly competitive firm would choose instead to sell all of its output in the market with the higher price.[32] When *price discrimination* as just described occurs internationally, the separated markets being those of different countries, the practice is called dumping only if the lower price is charged in the export market.[33]

Viner argues that *"the exporter firm with monopoly power has to maintain at least two conditions in order to provide price discrimination for the same product".*[34] The very first condition is being able to segment or separate its home and export markets, otherwise arbitrage will simply erase the price differential.[35] If there is not market segmentation, the goods selling in the cheaper market will be resold in the high price market. However, this segmentation most probably can occur because of trade barriers in the exporting country or high transport costs.

[30] Viner, J. (1923) *Dumping: A Problem in International Trade* University of Chicago Press, p:64. (Viner, J.)
[31] Philips, L. (1981) *The Economics of Price Discrimination* Second Edition Cambridge University Press, p:4.
[32] *Ibid.*
[33] Deardorrf, A. V. (1989) Economic Prespectives on Antidumping Law, Jackson, J. H., Vermulst, E. A. (eds.) *Anti Dumping Law and Practice: A Comparative Study*, The University of Michigan Press., pp: 23-41.
[34] Viner, J. , p:53.
[35] *Ibid.*

According to Viner, the second condition is charging a lower price to consumers in the export market will be profitable to the monopolist if consumers in the export market are more responsive than consumers at home price changes.[36] If the price of the product goes up, the consumers of export market will be more inclined to decrease their demand comparing to the domestic consumers.[37] This difference in demand elasticity between the home and export market can arise if the dumping firm faces competition in the export market but retains a monopoly in its home market.[38]

Viner also provides a classification of dumping, according to the motives of the firm. From Viner's point of view, the motives of the firm may be disposing of a surplus, creating goodwill in a new market, predatory dumping, retaliation against dumping by a foreign firm and retaining reduced unit cost through the expansion of output and sales in the export market may be reasons for a firm to sell dumped products.[39] Despite his broad classification, today dumping practices are mostly related to the predatory pricing behavior of the firms.[40] In parallel with this, some of the earliest domestic laws on anti dumping, 1916 U.S. Anti dumping Act, also defines dumping a kind of predatory pricing and aims to compete with it.[41] The predatory pricing policy has common points with a monopolist firm defined by Viner, according to that the exporter firm enters the foreign market with a sufficiently low price so that domestic producers are eventually driven out of business and the exporting firm is then able to establish a monopoly.

[36] *Ibid.*
[37] Brander, J. & Krugman, P. (1982) A Reciprocal Dumping Model of International Trade Journal of International Economics Vol:15, pp:313-321.
[38] *Ibid.*
[39] Viner, J. , p:57.
[40] Deardorff, A. (1990) Economic Perspectives on Antidumping Law *The University of Michigan Press Seminar Discussion Paper* No:240, p:4.
[41] World Trade Organization Report of the Appellate Body *United States – Anti-Dumping Act of 1916* WT/DS136/AB/R, adopted on: 28/08/2000.

Nevertheless, it may not be as possible as it is explained in theory. Assuming that the exporting firm is successful in eventually driving out its competitor, it will have to subsequently raise its price so as to recoup the initial losses and earn a positive rate of return.[42] But raising its price will invite entrants to the market, which might be new domestic producers or other foreign exporters, thus defeating the purpose of predatory dumping.[43] If it does not raise its price sufficiently, it may not be able to recoup its initial losses, so the set of conditions under which predatory dumping can be successful appears to be quite difficult to realize in practice.[44]

2.3 Critics Against Dumping:

Although the low probability of being a monopoly in a foreign market with a predatory pricing approach in practice, the importing Member states are being cautious about low priced import goods and becoming more protectionist while using safety valves of the system. At this point, *zeroing*, a type of dumping calculation method, is coming into prominence as it may change the level of the dumping measure and the level of protection directly. The definition of the WTO on zeroing is as follows: **"***An investigating authority usually calculates the dumping margin by getting the average of the differences between the export prices and the home market prices of the product in question. When it chooses to disregard or put a value of zero on instances when the export price is higher than the home market price, the practice is called "zeroing". Critics claim this practice artificially inflates dumping margins*."[45] Thus, the Member States may turn the most preferred trade defence instrument into a way of protectionism by applying zeroing while calculating dumping margin and also may tend to criticisms. In stark contrast to their popularity with governments

[42] World Trade Report (2009) *Dumping and Antidumping Measures* pp:65-84. Available at: http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report09_e.pdf [accessed on: 02/07/2014]
[43] *Ibid.*
[44] *Ibid.*
[45] World Trade Organization, *Zeroing*, Available at <http://www.wto.org/english/thewto_e/glossary_e/zeroing_e.htm> [accesed 08/03/2014].

that use them, trade remedies have been subject to criticisms; especially the primary weapon anti dumping has received disapproval from many economists and legal scholars and zeroing practices was one of the mainstays of these critics.[46]

The economic rationales of anti dumping practices as an exporting firm is taking the advantage of price discrimination. However, some of the scholars, such as Irwin argues that *international price discrimination* is neither unfair nor a problem unless it harms competition.[47] The clear consensus among legal scholars and economists who criticize anti dumping is that these measures are not about remedying unfair trade practices, as they are purposed to be, but about protecting the domestic producers of the importing country and retaliating purposes.[48] Some scholars argue that anti dumping laws are biased in favor of finding dumping and zeroing is one of the most efficient ways of it.[49] If the calculations of dumping margin are based on zeroing methodology, it is nearly certain that the investigating authority will impose a dumping measure. Furthermore, this measure is described much more protectionist, as the zeroing methodology inflates the dumping margin and results with a higher duty.[50]

In addition to zeroing practices, the dramatic rise of the anti dumping measures, to some extent, affirm the criticisms. According to the WTO notifications, it is seen that China and United States (U.S.) are in the first five countries that use this instrument regularly, when China has taken 164 anti dumping measures between 1995 and 2013, the U.S. has enforced 319 measures.[51] In parallel with that, China and the U.S. are again in the first five countries

[46] Zheng, W., p:157.
[47] Irwin, D. A. (2002) *Free Trade Under Fire* Third Edition Princeton University Press. p:162.
[48] *Ibid.*
[49] Krishna, R. (1997) Antidumping in Law and Practice *The World Bank: Policy Research Working Paper* WPS:1823, p:16.
[50] *Ibid.*
[51] World Trade Organization (2014) *Anti-dumping measures: by reporting country* Available at: http://www.wto.org/english/tratop_e/adp_e/adp_e.htm [accessed on: 04/07/2014]

which are subject to these anti dumping measures.[52] Within the same period, Member states have taken 717 and 150 anti dumping measures against China and the U.S. respectively.[53] Indeed, some countries have gone as far as including a reference to the latter possibility in their law.[54] For example, Article 56 of the new Chinese law that entered into force on January 1, 2002 states that;

"Where a country (region) discriminatorily imposes antidumping measure on the exports from the People's Republic of China, China may, on the basis of the actual situations, take corresponding measures against that country (region)."[55] Thus, as Viner stated, a retaliatory motive may be another reason of dumping practices, but it is also a worrying fact in addition to protectionism.

There is perhaps no other body of law that is so frequently used and is of such impact on policy and practice yet whose major components are so widely perceived as meritless or problematic. As Czako stated; *"anti dumping is a double edged sword"*.[56] On the one hand, anti dumping is a measure to deal with unfair imports. On the other hand, it is a trade remedy tool which can be abused and used as a protectionist weapon to stifle import competition.[57] It is clear that in practice, the debate on how to achieve the optimal balance between providing trade remedy tools to Members in order to sustain a *safety valve* during the liberalization processes and keeping it in harmony with the liberal trade order will continue.

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[52] World Trade Organization (2014) *Anti-dumping measures: by exporting country* Available at: http://www.wto.org/english/tratop_e/adp_e/adp_e.htm [accessed on: 04/07/2014]
[53] *Ibid.*
[54] Wooton, I & Zanardi, M. (2002) Trade and Competition Policy: Anti-Dumping versus Anti-Trust Choi I. & Hartigan, J. (eds.) *Handbook of International Trade: Economic and Legal Analyses of Trade Policy and Institutions*, Volume:II, pp:102-135.
[55] *Ibid.*
[56] Czako, J. & Human, J. & Miranda, J. (2003) *A Handbook on Antidumping Investigations* Cambridge University Press, p:164. (Czako, J. & Human, J. & Miranda, J. , 2003)
[57] Matsushita, M. (2010) Some International and Domestic Antidumping Issues *Asian Journal of WTO & International Health Law & Policy* Vol: 5 pp:249-268. (Matsushita, M., 2010)

CHAPTER 3: HISTORICAL CONTEXT

This chapter will focus on the history of anti dumping practices and legislations to prevent unfair trade. The WTO dumping legislation is under the influence of several Member state's national legislations which were set out in the beginning of the 20th century, so this chapter will firstly touch upon the legislations of Canada and the U.S., then, will continue with the GATT and the WTO period by examining trade rounds on the anti dumping issue.

As it is stated by Jacksons and Vermulst anti dumping has a very long history[58] and since the times of Adam Smith, the term *dumping* is commonly used to refer undersell competitors in other countries.[59] Jacob Viner, who made major contributions to international economics and the subject of dumping, noted that in the sixteenth-century foreign traders were selling paper at a loss to stunt the infant paper industry in England.[60] He also stressed a similar situation in the seventeenth century in which the Dutch was accused of selling at low prices in the Baltic regions in order to drive out French merchants and British dumped products in the American market.[61] According to Viner, the *Tariff Act of 1816* in the U.S. was the first protectionist act of the country in order to counter with English dumped products.[62] It is also recorded that

[58] Jackson, J. H. (1989) Dumping in International Trade: Its Meaning and Context, Jackson, J. H., Vermulst, E. A. (eds.) *Anti Dumping Law and Practice: A Comparative Study*, The University of Michigan Press., pp: 1-23.
[59] *Ibid.*
[60] Viner, J., p:38.
[61] *Ibid.*
[62] *Ibid.*

during and after the World War I, the U.S. Congress enacted several anti dumping statues, but first anti dumping law was enacted by Canada in 1904.[63] The legislation was proposed by Canadian Minister of Finance by stating that;

"We find today that the high tariff countries have adopted that method of trade, which has now come to be known as...dumping; that is to say, that the trust or combine, having obtained command and control of its own market and finding that it will have a surplus of goods, sets out to obtain command of a neighbouring market, and for the purpose of obtaining control of a neighbouring market will put aside all reasonable considerations with regard to the cost or fair price of the goods; the only principle recognized is that the goods must be sold and the market obtained...They send the goods here with the hope and expectation that they will crush out the native Canadian industries. And with the Canadian industries crushed out, what would happen? The end of cheapness would come, and the beginning of dearness would be at hand."[64]

According to Deardorrf and Stern; *"At a time when tariffs were not bound, what made the duty special in Canada was that it could be levied administratively, rather than being enacted.*[65] *It was rather a modest step, with the legislation specifying that the duty be set at the difference between the selling price in Canada and the fair market value, which was to be identified with the price at which the goods were sold in the country of production, subject to a cap set at 50 percent of the legislated tariff."*[66]

[63]Ciuriak, D. (2005) Anti-dumping at 100 Years and Counting: A Canadian Perspective *The World Economy* Vol:28 (5) pp:641-649. (Ciuriak, D.,2005)
[64] U.S. Government and Printing Office (1919) *U.S. Tariff Commission, Information Concerning Dumping and Unfair Competition in the UnitedStates and Canada's Antidumping Law* p:22.
[65] Deardorrf, A. V. & Stern, R. M. (2005) A Centennial of Anti-dumping Legislation and Implementation: Introduction and Overview *The World Economy* Vol:5 (5), pp:633-640. (Deardorrf, A. V. & Stern, R. M.,2005)
[66] *Ibid.*

In addition to those national legislations, the multilateral initiatives started with the GATT 1947 by including a special article on dumping and anti dumping action, which still remains at the heart of today's regime.[67] Today, anti dumping legislation is set out within the context of GATT 1994 Article VI and the WTO Anti Dumping Agreement for all Member States.[68]

But the legislation, as a form of non-tariff barrier was placed on the agenda of the Kennedy Round Trade Negotiation Committee and the conclusion of the Anti Dumping Agreement was one of the achievements of the round in 1967.[69] Unlike Article VI, the Anti Dumping Code imposed binding obligations, such as Article 14. According to that; each party was obliged to *"take all necessary steps ... to ensure ... the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement."*[70] The 1967 Anti Dumping Code was revised during the Tokyo Round and two basic factors encouraged this development.[71] First, the obvious similarities between the anti dumping and countervailing duties led the parties to amend the 1967 Anti Dumping Code to conform with the provisions of the new Subsidies Code negotiated during the Tokyo Round.[72] The second factor was the growing dissatisfaction of the European Community (EC) with the interpretation of injury requirements by the U.S. authorities and the simultaneous realization in the Community that certain requirements, notably the causation standard, might be too stringent.[73] The result was a new *Anti Dumping Agreement* in 1979 which slightly changed the language concerning material injury and the definition of regional industry.[74] Another innovation introduced into the 1979 Code was a provision, Article 13, recognizing that *"special regard must be given*

[67] Jackson, J. H. (1997) The World Trading System: Law and Policy of International Economic Relations *Unfair Trade and the Rules of Dumping* Second Edition The MIT Press, London, p:256.
[68] Bossche, P.V. & Zdouc W. 2013, p:514.
[69] Evans, J. W. (1971) The Kennedy Round in Ameracican Trade Policy Cambridge University pres, p: 238.
[70] WTO Anti Dumping Agreement, *Article 14.*
[71] Van Bael, I. & Bellis (1996) *Anti Dumping and other Trade Protection Laws of the EC* Third Edition CCH Editions Limited, p:26. (Van Bael & Bellis, 1996)
[72] *Ibid.*
[73] Van Bael & Bellis (1996) p:28.
[74] *Ibid.*

by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under this Code."[75]

The measures were also put on the agenda of the Uruguay Round Negotiating Group on Multinational Trade Negotiations Agreements and Arrangements and the result was an *Agreement on Implementation of Article VI of GATT 1994* (hereinafter Anti Dumping Agreement) which is essentially a compromise between the conflicting demands presented by two major groups of countries.[76] On the one hand the U.S. and the Community and on the other Japan, and the most new industrialized countries and finally the new Agreement introduces a number of changes to the procedural provisions of the former Code, especially as regards provisional duties and reviews.[77] These competing views of antidumping have clashed in successive round of trade negotiations and at the end, The November 2001 declaration of the Fourth Ministerial Conference in Doha, Qatar, provided the mandate for negotiations on a range of subjects including ADA.[78] Negotiation partners agreed to language that laid out the basic framework for negotiations by stating;

"In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of

[75] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade Geneva Round Code 1979, Available at: http://www.antidumpinglaws.com/content.php?id=Agreement [accessed on: 06/07/2014].
[76] Van Bael & Bellis (1996) p:29.
[77] *Ibid.*
[78] Moore, M. (2005) Antidumping Reform in the Doha Round: A Pessimistic Appraisal *Pacific Economic Review* Vol: 12 (3), pp:357-379. (Moore, M., 2005)

these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants."[79]

On the other hand, the mandate articulated by Ministers in this paragraph suggests that fundamental changes are unlikely, given the language about the preservation of existing antidumping concepts.[80] Only a broad coalition of nations pushing for change would be likely to overcome this limited agenda which is still taking place in the Rules Negotiating Group.[81] In the subsequent parts of this study, the working documents of the Rules Negotiating Group will be discussed.

It should also be noted that current anti dumping activities are very different from those observed in the last 100 years of anti dumping legislation. While antidumping actions were used primarily by major developed countries until less than a decade ago, they are now the trade policy of choices of developing and transition economies as well.[82] According to the WTO, between the years 1995 and 2013, more than 1500 anti dumping measures, which accounts nearly half of total anti dumping measures in the same period, had been taken so as to protect domestic markets of India, United States, European Union, Argentina and Brazil.[83] It is clear that antidumping is not a phenomenon limited to a few developed countries but has become a universal legal instrument to deal with import issues in a historical manner.[84]

[79] Doha WTO Ministerial 2001: Ministerial Declaration
[80] Moore, M. (2005), p: 360.
[81] *Ibid.*
[82] Ciuriak, D. (2005), p:645.
[83] World Trade Organization (2014) Anti-dumping Available at: http://www.wto.org/english/tratop_e/adp_e/adp_e.htm [accessed on: 06/07/2014].
[84] Matsushita, M. (2010) p:250.

CHAPTER 4: COMPONENTS OF DUMPING

The aim of this chapter is analyzing the substantive elements of dumping which can be listed as *normal value, export price, like product* and *fair comparison* with regard to Article 2 of the Anti Dumping Agreement. In addition to dumping, the other two conditions for taking a dumping measure, *injury* and *causal link*, will also be examined briefly. However, before analyzing the components of dumping, giving brief information about the investigation proceedings will be beneficial.

Anti Dumping Agreement rules that; *"An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement...."*[85] According to that; an investigation is initiated as a result of a complaint from domestic producers of a product which is subject to importation and these domestic producers allege that they are suffering from injury, or threat of injury because of the dumped products.[86] After having an application from domestic industry which meets the documentation requirements, the investigation authority has to notify the government of the exporting country.[87] Then, the investigation authority must examine the evidences and take a decision whether there is sufficient evidence that an investigation should be initiated or to reject the application.[88] On initiation of the investigation, the public notice must be given.[89] As anti dumping investigations are product and country specific measures, the public notice must identify the product at issue, the exporting country or the country of origin and set out deadlines for the

[85] WTO Anti Dumping Agreement, *Article 1*.
[86] Czako, J. & Human, J. & Miranda, J. (2003), p:7.
[87] WTO Anti Dumping Agreement, *Article 5.5*.
[88] Czako, J. & Human, J. & Miranda, J. (2003), p:8.
[89] *Ibid.*

investigation process.[90] During the investigation period, further detailed information is gathered mainly from exporters, importers and the domestic industry by means of questionnaires.[91] Finally, after verifying the gathered information from the parties, the investigation authority makes a final preliminary determination. At this stage, the relevant parties also have right to comment on the factual and legal basis of this determination.[92] At the end of the investigation processes, if it is established that the export price is less than normal value, dumping has occurred, the country which is importing the dumped product, may impose an anti dumping duty, provided that dumping has caused injury to domestic producers of like product.[93] In other words, the investigation authority has to determine these conditions respectively so as to take a dumping measure; *the existence of dumping, the injury of the domestic industry producing the like product and suffering from injury and the causal link between dumping and injury.*[94] There is also another significant point which needs to be clarified that dumping investigations are done by product and country, but duties are specific to individual exporting firms.[95]

The duration of measures is also a significant point while examining the impact of duties. According to the WTO ADA, the duration of a measure which is taken by an original investigation is 5 years from the date they have been imposed.[96] However, these measures may be extended for another five years with a *sunset review* if the authorities conclude that

[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*
[93] Silberston, A. (2003) Anti Dumping Rules: Time for Change *Journal of World Trade* Vol:37(6), pp:1063-1081.
[94] Bossche, P.V. & Zdouc W. (2013), p:517.
[95] Nye, W. (2008) The Implications of Zeroing on Enforcement of U.S. Antidumping Law *Government of the United States of America – Antitrust Division, Competition and Policy Section Economic Analysis Group Discussion Paper*, p:3.
[96] Palmeter, D. (1996) A Commentay on the WTO Anti Dumping Code *Journal of World Trade* Vol:30, pp: 43-70.

their absence would result in the continuation of dumping or subsidization and injury.[97] In order to assess the consequences of the expiry of the duties, the investigating authorities must analyze relevant economic facts that might indicate that dumping or subsidization would occur if the duties were removed.[98] Furthermore, *an interim and a newcomer review* can be initiated during the lifetime of definitive measures. While the aim of *interim review* is examining whether the current measures are still necessary and whether the injury would be likely to continue, the main purpose of *newcomer reviews* is calculating a firm specific dumping margin for the companies which just started exporting the product under consideration.[99]

On the other hand, as it is mentioned earlier, dumping is the practice of selling a product for export at a price below its normal value which refer to the comparable profitable domestic price, adjusted to an ex factory level. However, Article 2 of the ADA has much more complex anti dumping definition rather this simple comparison mentioned above. Article 2.1 sets out that *"for the purpose of the Antidumping Agreement, a product is to be considered as being dumped; i.e. Introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."*[100] Under these rules a dumping determination involves four basic steps;

(a) The determination of the normal value

(b) The determination of export price

[97] International Trade Centre (2008) *Business Guide to Trade Remedies in Brazil: Anti-dumping, Countervailing and Safeguard Legislation, Practices and Procedures* p:12. Available at: http://legacy.intracen.org/publications/Free-publications/Trade_Remedies_Brazil.pdf [accessed on: 19/07/2014].
[98] *Ibid.*
[99] *Ibid.*
[100] WTO Anti Dumping Agreement, *Article 2.*

(c) The comparison of normal value and export price

(d) The calculation of the dumping margin.[101]

4.1. Dumping:

As it is stated above, in order to take a dumping measure, countries should have these three conditions namely, *dumping, injury and causal link*. Since dumping refers to a price difference between the normal value and export price, this part will briefly examine the basic terms of dumping by touching upon; l*ike product, normal value, export price and fair comparison.*

4.1.1. Like Product:

The notion of *like product* is one of the most important terms of ADA since it refers to products which are compared to the dumped imports under consideration.[102] Normally, it is expected from the authorities during a dumping investigation, to compare the exporting country's domestic and export prices, so *like product* is used while calculating the domestic prices in the exporting country. In addition to that, while determining injury of the domestic industry in importer country, the notion of *like product* again has a crucial role. This time while *like product* indicates the product sold by the domestic industry (the domestic industry which suffers from dumped products in importing country), the product under consideration again refers to the allegedly dumped product, and the authorities need to compare them. In other words, the term *like product* plays a critical role in a dumping investigation since it

[101] Vermulst, E. (2005) Dumping *The WTO Anti Dumping Agreement: A Commentary* Oxford University Press p:11. (Vermulst, E., 2005)
[102] Müller, W. & Khan, N. & Neumann, H. (1996) *EC Anti-Dumping Law – A Commentary on Regulation 384/96* John Wiley & Sons Publishing, para: 1.23, p:42.

has a strong effect on complying with the two conditions of a measure, dumping and injury.

Article 2.6 of the Anti Dumping Agreement covers the notion of *like product* and according to Vermulst; *" for dumping purposes, the like product is to be compared with the allegedly dumped product, which is referred to in Article 2.6 as the product under consideration. In the context of the injury determination, on the other hand, the term refers to the product produced by the domestic industry allegedly being injured by dumped product."*[103] As a result, the *like product* has a different meaning, depending whether it is used for dumping or for the injury determination.[104] At this point, it needs to be questioned that what characteristics should be examined in order to determine like product. However, the Agreement is silent on this issue, according to general accepted principles investigating authorities worldwide looking into a number of factors, such as; tariff classification, raw materials used, manufacturing processes and consumer preference.[105]

4.1.2. Normal Value:

Article 2.1 of the Anti Dumping Agreement defines *normal value* as the comparable price in the ordinary course of trade, for the *like product* when destined for consumption in the exporting country.[106] Thus, the *normal value* indicates the price of the *like product* in the domestic market of the exporting country, when *the export price* is equal to this, dumping will not have occurred. However, in some circumstances the domestic price of the exporting country may not be determined. At this point, *ordinary course of trade* phase in Article 2.1 has a crucial role. For

[103] Vermulst, E., (2005) p:16.
[104] *Ibid.*
[105] World Trade Organization (2014) *E-Learning Report: Anti Dumping.*
[106] WTO Anti Dumping Agreement, *Article 2.*

instance, in 2001 China was accepted as a full member of the WTO and found itself in a unique situation on antidumping and safeguard issues, because of a special provision in the WTO Accession Protocol which may be used against Chinese exporters.[107] According to China's Accession Protocol to the WTO, the Chinese economy is defined as a non-market economy for 15 years.[108] This means that domestic sales (or normal value) in China could not be considered as being made in the ordinary course of trade. In such kind of situations, member states have two alternatives while calculating normal value. The first one is the price charged by the exporter in another country which is known as third country market or analogue country in literature.[109] The second one is constructed normal value which refers to a fictitious value obtained from the addition of the cost of production of the like product in the country of origin plus a reasonable amount for selling, general and administrative expenses and for profits.[110] In other words, investigating authority calculates the sale price of the product as if it is produced in a market economy.

4.1.3. Export Price:

According to Article 2.1 ADA, the *export price* is the price at which the product is exported from one country to another. Export documentation, such as the commercial invoice, the bill of lading and the letter of credit are accepted as indicators of the export price.[111] It is the price that is allegedly dumped and for which an appropriate

[107] Messerlin, P. A. (2004) China in the World Trade Organization: Antidumping and Safeguards *The World Bank Economic Review* Vol:18 (1), pp:105-130.
[108] Accession of the People's Republic of China: Decision of 10 November 2001, WT/L/432.
[109] World Trade Organization (2010) Trade Remedies and the WTO E-learning Module Available at: https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf [accessed on:10/07/2014] (WTO E-learning)
[110] *Ibid.*
[111] *Ibid.*

normal value must be found in order to determine whether dumping in fact is taking place.[112]

Similar with the normal value, in some cases, it is possible to calculate a constructed export price as the *export price* may not be reliable. For instance, where the exporter and the importer are related, the price between them may be unreliable because of transfer pricing reasons. Article 2.3 of the Agreement provides that the *export price* may be constructed on the basis of the price at which the imported products are first resold to an independent buyer. In such cases, allowances for costs, duties and taxes, incurred between importation and resale, and for profits accruing, should be made in accordance with Article 2.4 of the Agreement. However, such allowances decrease the export price, increasing the likelihood of a dumping finding.[113]

Regarding with the constructed normal value and export price issue, one should always bear in mind that two facts. According to that, dumping amount is the difference between normal value and export price.

Dumping Amount = Normal Value – Export Price[114]

On the other hand, calculating those *normal value* and *export prices* with "constructed value" approach will always inflate the dumping margin. Because while calculating these values which are both based on fictitious profits and allowances, the investigating authority tends to find a higher constructed normal value and a lower

[112] Bryan, G. & Boursereau, D. (1985) Antidumping Law in the European Communities and the United States: A Comparative Analysis *Geo. Wash. Journal of International Law & Economics* Vol:18, pp:633-700. (Bryan, G. & Boursereau, D., 1985)
[113] WTO E-learning, p:11.
[114] Anderson, S. P. & Schmitt, N. & Thisse, J. F. (1995) Who benefits from antidumping legislation? Journal of International Economics Vol:38 pp:321-338.

export price.[115] As a result, the difference between the normal value and export price increases, and this situation results in a higher dumping amount.

4.1.4. Fair Comparison:

Article 2.4 of the Anti Dumping Agreement sets out the general principles of a *fair comparison* so as to make between the *export price* and the *normal value*. Once *export price* and *normal value* have been determined on the basis of the rules described in the preceding sections, they must be compared with each other and as an intermediate step.[116] These comparisons are made on a product code number (PCN) basis.[117] PCN's are subdivided versions of like product and these PCN's are normally prepared by the administering authorities before the dumping case is initiated and then communicated to all interested parties.[118] If, for example, the *like product* is polyester textured yarn (PTY), different types PTY could be distinguished on the basis of quality, denier, filament count, flame retardants, coloring and number of twists.[119]

On the other hand, the comparison has to be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.[120] In addition to that, the domestic legislations of the Member states specify in much greater detail the elements for which allowances can be made, the criteria to be applied in considering requests for allowances and the method of calculation of the amount of the adjustments.[121]

[115] Bryan, G. & Boursereau, D. (1985) p:692.
[116] Vermulst, E., (2005) p:45.
[117] *Ibid.*
[118] Vermulst, E., (2005) p:12.
[119] *Ibid.*
[120] WTO Anti Dumping Agreement, *Article: 2.4.*
[121] Koulen, M. (1989) Some Problems of Interpretation and Implementation of the GATT Anti Dumping Code, Jackson, J. H., Vermulst, E. A. (eds.) *Anti Dumping Law and Practice: A Comparative Study*, The University of Michigan Press., pp: 366-388..

4.2. Injury:

Article 3 and indirectly Articles 2.6 and 4 of the ADA cover the determination whether material injury has been caused to the domestic industry of the importing country producing the like product as a result of the dumped imports. In addition to maternal injury, the threat of material injury and material retardation of the establishment of such an industry also accepted as injury.[122] The determination of the injury involves many criteria which fall in three categories. First the authorities consider if there is a significant increase in the volume of dumped imports has occurred. With regard to the rising volume of the imported goods, the conditions of anti dumping have similarities with safeguard measures. According to Article 2 of the Agreement on Safeguards, *"A Member may apply a safeguard measure to a product…. (which) is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."*[123] However, while taking an anti dumping measure, the rise in the volume of imports is not a compulsory condition; the investigating authority only takes into consideration if there is such kind of increase in imports. The second step of the injury research is investigating if there is an effect of dumped imports on prices in the domestic market for like products. The third and final step is examining the consequent impact of these imports on domestic producers, according to a variety of factors. According to Bryan & Boursereau; such factors may include an increase in the share of market enjoyed by dumped product, a decrease in domestic production, a

[122] WTO Anti Dumping Agreement, *Article 3.*
[123] WTO Agreement on Safeguards, *Article 2*

reduction of employment, prevention of the recovery of domestic producers, or an impossibility of profitable investment.

4.3. Causal Link:

At the end of the investigation process, a causal link between dumping and injury has to be established in order to take an anti dumping measure as it is also clarified in Article 3.5 of the ADA.[124] covers the casual link issue and requires a demonstration that the dumped imports are, through the effects of dumping causing injury. The DSB also interpreted the features of an evidence for causality and ruled these three conditions by stating that; *"the factor at issue must be; a known factor, a factor other than dumped imports and be injuring the domestic industry at the same time as the dumped imports."*[125]

All signatories to the ADA have obviously agreed to adhere to the above rules.[126] However, implementation of the anti dumping rules, in particular dumping margin calculation methodology, differs significantly across countries. The next part of the study will discuss the zeroing by examining dumping margin calculation methodologies as a whole.

[124] According to *WTO Anti Dumping Agreement, Article 3.5.;"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."*
[125] Report of the Appellate Body European Communities Anti Dumping Duties On Malleable Cast Iron Tube Or Pipe Fittings From Brazil, WT/DS219/AB/R adopted: 22/07/2003; Available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds219_e.htm [accessed on:13/07/2014]
[126] Reynolds, K. M. (2009) From Agreement to Application: An Analysis of Determinations Under The WTO Anti Dumping Agreement *Review of International Economics*, Vol:17 (5), pp:969-985.

CHAPTER 5: CALCULATION METHODS OF DUMPING

The WTO ADA envisages three comparison methods while calculating the dumping margin. Article 2.4.2 of the Agreement states that;

"… the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions, or by a comparison of normal value and export prices on a transaction-to-transaction basis…."[127]

However, over the past several years, one of the most contentious issues in the WTO has been the use of *zeroing*[128] in the context of calculating dumping margin in domestic trade remedy proceedings and there have been an increasing amount of disputes on dumping measures since the last decade, especially for the *zeroing* practices of the United States.[129]

In general terms *zeroing* refers to a dumping calculation that ignores import sales for which the export price exceeds the normal value, instead taking into account only those sales where the export price is less than the normal value.[130] In essence, the difference between the *zeroing* and *non zeroing* approaches is the following: *zeroing calculates dumping based only on the export sales that could themselves be classified, individually or as a subgroup, as*

[127] WTO Anti Dumping Agreement, *Article 2.4.2*.
[128] It is stated earlier (supra note: 41) but the definition of zeroing is "*An investigating authority usually calculates the dumping margin by getting the average of the differences between the export prices and the home market prices of the product in question. When it chooses to disregard or put a value of zero on instances when the export price is higher than the home market price, the practice is called zeroing. Critics claim this practice artificially inflates dumping margins."*- World Trade Organization (2014) *Zeroing*, Available at <http://www.wto.org/english/thewto_e/glossary_e/zeroing_e.htm> [accesed 08/03/2014].
[129] Prusa, T. & Vermulst, E. (2011) *United States – Continued Existence and Application of Zeroing Methodology: The End of Zeroing?* World Trade Review 10(1), pp:45-61. (Prusa, T. Velmust E., 2011)
[130] UNCTAD Report, p:16.

dumped, whereas non zeroing calculates dumping based on all export sales.[131] As a result, these measures are criticized of being used in a protective manner, because the *zeroing* practice creates a stricter protection to domestic producers by increasing the dumping margin and the level of measure.[132] In order to analyze the *zeroing* practices, this chapter will firstly focus on other types of calculation methods and then will use a simplified example used by Vermulst to clarify issue. Through that simplified example, the one can easily understand how to calculate a dumping margin with *zeroing* approach. Through these calculations, analyzing the difference of zeroing comparing to other methodologies will be easier.

5.1. Common Methods: "Weighted Average to Weighted" Average and "Transaction to Transaction":

Since the first two methods of calculating margin, clarified in Article 2.4.2 of the Agreement, is *"weighted average to weighted average"* and *"transaction to transaction"* methods, the first exercise will clarify these two ordinary methodologies. Suppose four transactions of equal weight are sold in the domestic and the export market as follows[133];

Table-1:Sample Data for Common Calculation Methods

Date	Domestic	Export
1 June	50	50
10 June	100	100
15 June	150	150
20 June	200	200

[131] *Ibid.*
[132] Prusa, T. Velmust E., p:46.
[133] The dumping margin calculation example exists in Vermulst, E. (2005) Dumping *The WTO Anti Dumping Agreement: A Commentary* Oxford University Press p:51.

In the example above, both the weighted average domestic price (normal value) and weighted average export price are 125. [(50 + 100 + 150 + 200) / 4]. As a result, according to weighted average to weighted average method no dumping would be found.[134] Similiarly, under the domestic and export transactions which took place on the same date will be compared with each other. In the perfectly symmetrical example above, the transactions on 1 June will be compared with each other and so on. Again, the dumping amount will be zero.

5.2. The Exceptional Method: Weighted Average to Transaction Method:

Exceptionally, weighted average normal value may be compared to prices of individual export transactions. Article 2.4.2 of the Anti Dumping Agreement covers that; "... *A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."*[135] This methodology is often described as *"targeted dumping" which is a* trade law term that refers to the justification for utilizing an alternative U.S. price-normal value comparison methodology in antidumping calculations.[136] Essentially, the U.S. Commerce Department

[134] Dumping= Normal Value – Export Price. In the example, both normal valu and export price are 125, so there is not a dumping margin.
[135] WTO Anti Dumping Agreement *Article 2.4.4.*
[136] Porter, D. L. & Bidlingmaier, R. (2013) Targeted Dumping: The Next Frontier in Trade Remedy Litigation *Tulane Journal of International Law and Comparative Law* p:4. Available at: http://www.cit.uscourts.gov/Judicial_Conferences/17th_Judicial_Conference/17th_Judicial_Conference_Papers/PorterPaper.pdf [accessed on: 04/08/2014].

prefers targeted dumping as it can depart from the statutorily used average-to-average comparison methodology.[137]

If the exceptional method is applied[138] to the example above, the result will be quite different:

Table-2:Sample Data for Exceptional Calculation Method

Date	Domestic	Export	Dumping Amount
1 June	125	50	75
10 June	125	100	25
15 June	125	150	-25
20 June	125	200	-75

According to that, domestic price refers to the weighted average normal value, as it is calculated above it is 125. [(50 + 100 + 150 + 200) / 4]. When the weighted average normal value of 125 is compared with the export prices on a transaction by transaction basis, the result becomes as follows, +75, +25 and -25, -75. Thus, as a result of this comparison, the dumping amount on the first transaction is 75 and the dumping amount on the second transaction is 25. On the other hand, the dumping amount on the third transaction is -25 as the export price of 150 is 25 higher than the weighted average normal value of 125. Lastly, the dumping amount on the fourth transaction is -75, since the export price of 200 is 75 higher than the weighted average normal value of 125. In case of the third and fourth transaction, there is therefore a negative dumping amount. Under this method, it is known

[137] *Ibid.*
[138] Vermulst, E., (2005) p:51.

that two transactions which are dumped and two transactions, which are not, or negatively dumped, so the total dumping amount is 100 and the total non-dumped amount is also 100.

5.2.1. Zeroing:

Prior to the entry into force of the ADA, some authorities would routinely use this exceptional *weighted average to transaction* method to compare export prices with normal value.[139] They would then take the position that the third and the fourth transactions are not dumped and therefore attribute a zero dumping amount to these negative amounts, which refers to practice of *zeroing.*[140] The result of this was that non dumped prices could not be used to offset dumped prices. For the example above, the dumping amount is calculated as 100, since the negative amounts are excluded. Thus the first and second obvious comparison methods namely *"weighted average to weighted average"* and "*transaction to transaction"*, will lead to finding of no dumping, while the use of third method, coupled to the practice of zeroing, will result in dumping amount.[141] It does not require much imagination to understand that use of this third method will make it easier to find dumping in most cases, particularly when compared to the first method.[142] In fact, if just one export transaction is lower priced than the weighted average normal value, a finding of dumping will result from the use of the third method, even if all other export transactions are higher priced than the weighted average normal value.

On the other hand, the one also should keep in mind that while comparing those three methods namely, *"weighted to weighted, transaction by transaction and weighted to transaction"*, in less symmetrically perfect real life situations, the result of to *"weighted to transaction"* method will not always be worse than the use of the *"transaction to*

[139] UNCTAD Report, p:16.
[140] *Ibid.*
[141] Vermulst, E., (2005) p:53.
[142] *Ibid.*

transaction" method. There is not a certain rule about *"transaction to transaction"* method because it can lead to extremely arbitrary results. However, it will virtually always be worse than the use of the *"weighted average to weighted average"* method as the use of this method automatically offsets positive and negative dumping. The comparison of methodologies was discussed in a challenge brought by Japan against the EC in 1994, EC – Audio tapes in cassettes.[143] In that case, Japan had argued that the *"weighted average to transaction by transaction"* method, in other words the *exceptional method*, would always inflate dumping margins.[144] The GATT panel decided to take the *"transaction to transaction"* method as a benchmark and correctly concluded that the claim was mathematically incorrect because either method might lead to worse results than the other method, depending on the facts of the case.[145] The decision of the panel as follows;

... the average to average benchmark proposed by Japan also failed in some instances accurately to reflect the results that would be obtained if the existence and extent of dumping were determined on a transaction to transaction basis. In fact, the Panel was aware of no averaging methodology that would not in some cases produce results that differed from those obtained through the determination of the extent dumping on a transaction to transaction basis. In light of this fact, and taking into account that Japan did not contend that the use of averaging was inconsistent with the Agreement per se, the Panel could not conclude that the EC's methodology as applied in this case was unfair on the grounds of arbitrariness."[146]

Although Japan provided evidence supporting the idea that the use of *"weighted average to weighted average"* would have let better result, the Panel again considered that the

[143] Vermulst, E. & Graafsma, F. (1993) The International Practice of the European Communities. Current survey – Commercial Defence Actions and Other International Trade Developments in the European Communities 1 July 1992 – 31 December 1992 *European Journal of International Law* Vol: 4, pp: 283-304.
[144] *Ibid.*
[145] *Ibid.*
[146] Report of the Panel EC-Audio Tapes in Cassettes from Japan, ADP/136, adopted:28/04/1995 Available at: http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm [accessed on: 16/07/2014].

application of EU is appropriate as Article 2 of the Tokyo Round Code did not require any specific method. According to Horlick and Clarke, *"Observers have pointed out that the Panel's insistence on using the transaction to transaction method as a benchmark resulted in the Panel effectively imposing an impossible burden of proof on the applicant as it will be impossible for any applicant to predict how the authorities would apply such method in a particular case."*[147]

After these debates, Uruguay Round negotiations limited the use of third method (weighted average to transaction) which involves *zeroing* practices with the enforcement of Article 2.4.2. As it is stated above, Article 2.4.2 defines the *"weighted average to transaction"* method may be resorted to only if the authority finds a pattern of export prices which differs significantly among different purchasers, regions or time periods. Thus, the *"weighted average to weighted average"* and *"transaction to transaction"* methodologies became the preferred ones. However, in order to inflate dumping margins, the Member states found another way of zeroing, namely *inter-model zeroing*.

5.2.2. Inter-model Zeroing:

On the contrary to *zeroing* practices mentioned above which is also known as *intra model zeroing*, as it is explained in the previous part, *inter model zeroing* refers to a new type zeroing. In this method, it is recalled that when comparing export price and normal value, such comparisons are typically first made on a PCN-by-PCN basis, before the results of these PCN based calculations are weighted to come up with a dumping margin for each cooperating exporter.[148] Thus, in this intermediate step, a positive or negative dumping amount will have been calculated for each PCN. By using the *inter model zeroing* concept,

[147] Horlick, G. N. & Clarke, P. A. (1997) Standards for Panels Reviewing Anti Dumping Determinations under the GATT and WTO Petersman, E.U. (ed.) *International Trade Law and the GATT/WTO Dispute Settlement System*, pp:321-322.
[148] Vermulst, E., (2005) p:59.

some authorities will then zero negatively dumped PCNs, thereby not allowing such non-dumped PCNs to offset positively dumped PCNs.[149] In other words, in this type of zeroing, the investigation authority reduces the scope of product under consideration, and usually prefers to eliminate the negative dumping amounts in the beginning. The example on this method is as follows,

Table-3:Sample Data for Inter-Model Zeroing

PCN	**Domestic**	**Export**	**Dumping Amount**	**After Zeroing - Dumping Amount**
Model (A)	125	50	75	75
Model (B)	125	100	25	25
Model (C)	125	150	-25	0
Model (D)	125	200	-75	0

In this example, the total dumping amount is 100, 75 on model A and 25 on model B, and the negative dumped models are zeroed. Even the investigation authority does not use the

[149] *Ibid.*

exceptional method (weighted average to transaction), and prefers the first two methods[150], if the product at issue is grouped on PCN base and the negative dumped groups are excluded, the dumping margin inflates again. As a result of *inter model zeroing*, dumping will be found as soon as one model is dumped even if all other models are not dumped.

In parallel with *intra model zeroing*, the second type of zeroing was also subjected to the WTO DSB. In 1999, India challenged the EC on *inter model zeroing* in EC-Bed Linen. According to that dispute, EC identified with respect to the product under investigation – cotton type bed linen – a certain number of different types and models of that product.[151] Next, the EC calculated for each of these models a weighted average normal value and export price and compared these prices for each model.[152] For some models, normal value was higher than export price, EC calculated a positive margin for them and for other models, normal value was lower than export price, and there was a negative dumping margin.[153] Having made these calculations, EC then added up the amount it had calculated as dumping margins for each model of the product in order to determine an overall dumping margin as a whole.[154] However, while doing that EC treated negative dumping margins as zero and the Panel agreed with India that *inter model zeroing* was not allowed under Article 2.4.2. Panel addressed the Article 2.1 and noted that; a dumping margin can only be established for the product at issue, and not for individual transactions concerning that product or discrete

[150] As it is stated earlier, according to Article 2.4.2 "*the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions, or by a comparison of normal value and export prices on a transaction-to-transaction basis.",* so the first two methods refer to "weighted average to weighted average" and "transaction to transaction".
[151] Report of the Appellate Body, European Communities – Anti Dumping Duties on Imports of Cotton Type Bed Linen From India, WT/DS141/AB/R adopted:01/03/2001 Available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds141_e.htm [accessed on: 18/07/2014].
[151] *Ibid.*
[152] *Ibid.*
[153] *Ibid.*
[154] *Ibid.*

models of that product.[155] The panel also clarified one of the basic requirements of Article 2.4.2 and noted that weighted average normal value shall be compared with a weighted average of prices of *all* comparable export transactions.[156] By counting as zero the results of comparisons showing a negative margin, the EC, in effect, changed the prices of the export transactions in those comparisons, so the Panel considered it impermissible to zero such negative margins in establishing the existence of dumping for the product under investigation.[157] Appellate Body (AB) also agreed with Panel's findings, and defined zeroing as follows;

"Zeroing means in effect, that at least in the case of some export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the entirety of pieces of some export transactions ... (so) zeroing thus inflated the margin of dumping as a whole."[158]

However, the one also should keep in mind that AB has only ruled on the illegality of *inter-model zeroing* under the weighted average method in original investigations.[159] The next part will discuss the controversial points on issue which is created by the WTO DSB by examining some of the most important challenges on zeroing.

[155] Report of the Panel, European Communities – Anti Dumping Duties on Imports of Cotton Type Bed Linen From India, WT/DS141/R adopted:30/10/2000 Available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds141_e.htm [accessed on: 18/07/2014].
[156] *Ibid.*
[157] *Supra note:141.*
[158] *Ibid.*
[159] Vermulst, E., (2005) p:60.

CHAPTER 6: WTO DISPUTES ON ZEROING

Since there is a huge amount of measures in force, one of the most debated subjects in the WTO DSB is related with trade remedies. The WTO data on anti dumping shows that Member states had taken approximately 3.000 measures in various kinds of products between 1995 and 2013.[160] The percentages of measures during that period according to the reporting Member state as follows; while %18 of them belong to India, the U.S. is the second country with the percentage of %11 and EU is the third trade block with a rate of %10.[161] For now,102 investigation processes and anti dumping measures have been subjected to the WTO DSB.[162] There are a number of reasons why the WTO disputes challenging anti dumping frequently but the most important explanation is the simple fact that the basic use of anti dumping import restrictions has increased over time and across the WTO membership.[163] The aim of this chapter is analyzing the most important disputes on zeroing which are accepted as

[160] World Trade Organization (2014) *Anti Dumping* Available at: http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm [accesed 24/06/2014].
[161] *Ibid.*
[162] *Ibid.*
[163] Prusa, T. J. (2001) On the Spread and Impact of Antidumping *Canadian Journal of Economics* Vol:34 (3), pp:591-611.

a landmark and examining the approach of DSB while interpreting country practices within these challenges.

Before discussing the disputes, it may be beneficial to give brief information about the dispute settlement proceedings of the WTO. According to that, four separate stages can be distinguished namely; consultations, panel proceedings, appellate review and proceedings and implementation of the rulings of the Panel or AB.[164] All disputes starts with a consultation phase, the first stage, in which the complaining Member state brings the case to the WTO and sets out its objections to the trade measures of another Member State.[165] The two sides then negotiate to find a mutually satisfactory solution for the case in 60 days. Interestingly, %46 of all disputes brought to the WTO are resolved at this very first stage and this rate is higher in trade remedy issues, %60.[166] If the Member states unable to resolve the case, they request the establishment of Panel and the other Member states have also right to participate in Panel as an interested third party.[167] During that process, Article 17.6 of the ADA which refers to the standard of review, can be accepted as a guideline for panels. Article 17.6 of the ADA obliges panels to defer to the determinations of national authorities of Member state's insofar as they are established properly and their assessment was unbiased and objective.[168] In other words, panels are not allowed to overturn the conclusions reached by the national authorities.[169] After hearing the evidence, the Panel issues a ruling and parties (except third parties) have right to appeal. Appellate review refers to the third step of the

[164] Bossche, P.V. & Zdouc W. (2013), p:255.
[165] Busch, M. L. & Reinhardt, E. (2004) The WTO Dispute Settlement Georgetown University Publishing, p:4. Available at: http://faculty.georgetown.edu/mlb66/SIDA.pdf [accessed on:22/07/2014].
[166] Bown, C. P. & Prusa, T. J. (2010) U.S. Anti Dumping: Much Ado about Zeroing *The World Bank Development Research Group Trade and Integration Team Policy Research Working Paper* – 5352, p:26. (Bown, C. P. & Prusa, T. J. ,2010)
[167] Association of the Bar of the City of New York – ABCNY (2005) Composition of the WTO Dispute Settlement Panels Available at: http://www.nycbar.org/pdf/report/Composition_of_WTO.pdf [accessed on:22/07/2014].
[168] Koratana, M. (2009) The Standard of Review in WTO Law *International Trade Law & Regulation* Vol: 15 (2), pp:72-77.
[169] *Ibid.*

proceeding.[170] In its review of Panel reports, the AB did not focus on whether it approved of the result in general terms as some appellate tribunals do, but rather it closely examined the reasoning and wording of the Panel reports, and it did not hesitate to modify reasoning or wording with which it disagreed.[171]

The dispute settlement process consists of consultations, panels and possible appeals, adoption by the DSB of the resulting panel and appellate reports, and, if the defending Member is found to have violated a WTO obligation, implementation of the WTO decision by that Member, generally within an established *reasonable period of time.*[172] If the Member has not complied by this date, the prevailing Member may seek compensation from the non-complying Member or obtain authorization from the DSB to impose retaliatory measures, such as increased tariffs on selected products exported from the non-complying Member's territory.[173]Finally, after the decision of the AB and if a country's policy has been found to in violation of its WTO obligations, it is supposed to bring its policy in compliance.[174]

6.1. Panel and Appellate Body Reports on Zeroing:

In the history of the WTO dispute settlement system, zeroing is the single most litigated subject.[175] There is another interesting fact according to the table that complainant parties for all of these disputes are same, EU and the U.S., the second and third countries which use this trade defence instrument mostly.[176] In 1989, Vermulst defines the calculation methods of EEC, Australia, Canada and US by stating that; *"There is striking similarity between the four*

[170] *Ibid.*
[171] Davey, W. J. (2005) The WTO Dispute Settlemet System: The First Ten Years *Journal of International Economic Law* Vol: 8 (1), pp:17-50. (Davey,W. J., 2005)
[172] Grimmet, J. J. (2011) World Trade Organization Decisions and Their Effect in U.S. Law *Congressional Research Service Cornell University ILR School,* p:1. (Grimmet, J. J., 2011)
[173] *Ibid.*
[174] Davey,W. J. (2005), p:22.
[175] *Ibid.*
[176] *Ibid.*

jurisdictions as far as the calculation of the dumping margin is concerned in view of the fact that the Anti Dumping Code does not give any guidance. All four typically calculate the normal value on an average basis and then compare the average with each export sale. None of the jurisdictions compensate for export sales above the average normal value (negative dumping) .... this method works in favour of finding dumping."[177]

During the WTO era, the first dispute about the zeroing was EC – Bed Linen case. However, after losing at the WTO in some disputes, such as EC - Bed Linen, the EC changed its antidumping procedures and no longer use inter model zeroing methodology.[178]

The U.S., by contrast, has not yet fully complied with the WTO decisions and many WTO cases involving zeroing practice remained unresolved.[179] There are several Panel and AB Reports in which zeroing is found as practiced in a review for a specific product and supplier is inconsistent.[180] Although the views of Panel and AB Reports, Prusa and Vermulst define the U.S. current policy as follow; *"... the AB decision applies only to that particular measure and if the U.S. Department of Commerce does a new review by using zeroing, then the onus is back on the affected Member state to file another dispute with regard to that new review."*[181] To appreciate the causes of zeroing disputes, it is important to understand how the U.S. Department of Commerce calculates dumping margins. In a typical anti dumping investigation, Department of Commerce calculates weighted average net prices sold in the U.S. and then compares each of those U.S. prices to the product's normal value, which can be calculated a number of different ways but ideally weighted average net price of the most

[177] Vermulst, E. A. (1989) The Antidumping Systems of Australia,Canada, the EEC and the USA, Jackson, J. H., Vermulst, E. A. (eds.) *Anti Dumping Law and Practice: A Comparative Study*, The University of Michigan Press., pp: 426-459.
[178] Sheng, Z. (2004) Commentary of EU Anti Dumping Policy *EU Anti Dumping Policy: A Study in the CTV Case* School of Economics and Managment Lund University Press. pp:60-79.
[179] Bown, C. P. & Prusa, T. J. (2010) p:4.
[180] Prusa, T. J. & Rubini, L. (2013) U.S. – Use of Zeroing in Antidumping Measures Involving Products from Korea: It's deja vu all over again *World Trade Review* Vol:12 (2), pp:409-425.
[181] Prusa, T. Velmust E. (2011), p:48.

similar product sold in the home market.[182] The initial U.S. investigation only sets a cash deposit rate, not the actual duties[183] and according to the U.S. legislation the calculation of actual dumping margin is made during the administrative reviews.[184] Thus, in the U.S. legislation, zeroing is introduced in a latter stage, during the review investigations.[185]

To some extent, it may be possible to argue that the inconsistency of U.S. may be related with the contradiction between Panel and AB reports while interpreting zeroing. With regard to that, the U.S.- Stainless Steel (Mexico), the U.S.- Zeroing (Japan) and the U.S.- Zeroing (EC) cases may be an example to discuss the controversial points of Panel and AB reports.[186] In these cases, the complainant parties resisted the U.S. application of *model and simple zeroing* practices. With regard to *model zeroing*, the complainant parties referred to the calculating method on basis of the *"weighted average to weighted average"* comparison method in *original investigations*.[187] Secondly, the complaining parties objected to the use of *simple zeroing* by the United States Department of Commerce, while calculating the antidumping margins on the basis of a *"weighted average to transaction"* comparison method for the assessment of a *review investigation*.[188] Within the context of the U.S. – Stainless Steel and the U.S. – Zeroing (Japan) disputes, Panel both ruled that zeroing in original investigations was inconsistent but zeroing in review proceedings (such as extension for another 5 year) was consistent.[189]

[182] Ikenson, D. (2004) Zeroing In: Antidumping's Flawed Methodology Under Fire *Center for Trade Policy Studies Free Trade Bulletin* Vol:11, p:2. (Ikenson, D., 2004)
[183] U.S. has a retrospective duty system and this system will be clarified in latter parts of this study.
[184] Ikenson, D. (2004), p:4.
[185] *Ibid.*
[186] Prusa, T. J. & Vermulst, E. (2009) A One-Two Punch on Zeroing: US-Zeroing (EC) and US-Zeroing (Japan) *World Trade Review* Vol: 8 (1), pp:187-241. (Prusa, T. J. & Vermulst, E., 2009)
[187] *Ibid.*
[188] *Ibid.*
[189] Report of the Panel United States –Final Anti-dumping Measures on Stainless Steel From Mexico, WT/DS344/R adopted: 20/11/2007, Report of the Panel United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/R adopted: 20/09/2006. Available at:

It should also be noted that until that time, the U.S. was applying both *model and simple zeroing* in all types of investigations. (in both original and review investigations.) However, the previous parts of this study involve the explanation of current zeroing practices, simple zeroing on the basis of weighted average to transaction method.

The opinion of Panel based upon a part of Article 2.4.2 of the Anti Dumping Agreement in which it was emphasized that *"the existence of margins of dumping must be determined during the investigation phase"*.[190] According to that, Panel agreed with the U.S. approach as *during the investigation phase* limits the applicability of zeroing in original investigation, but enables it in reviews. In other words, the Panel found that simple zeroing in periodic reviews is not, as such, inconsistent with the obligation to make a fair comparison between the normal value and the export price as stipulated in Article 2.4 of the Anti Dumping Agreement.[191] However, in both cases, the AB objected to the Panel and found that zeroing was inconsistent in both original and review investigations.[192]

The most important reason of AB objection for allowing zeroing in review investigations and prohibiting it in original investigations that the possibility of unequal treatment between *prospective andz retrospective duty systems*.[193] Most of the WTO Member states are implementing *prospective duty* system which requires the establishment of dumping margin on the basis of the original investigation.[194] As it is stated earlier, in parallel with AB Report,

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http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#selected_subject [accessed on: 25/07/2014]

[190] *Ibid.*

[191] *Ibid.*

[192] Report of the Appellate Body United States –Final Anti-dumping Measures on Stainless Steel From Mexico, WT/DS344/AB/R adopted: 30/04/2008, Report of the Appellate Body United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/R adopted: 09/01/2007. Available at: http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#selected_subject [accessed on: 25/07/2014]

[193]Bown, C. P. & Prusa, T. J. (2010) p:11.

[194] Hambrey Consulting (2010) *An introduction to Anti-dumping Law of EU and Us as it applies to seafood*, Available at: http://www.hambreyconsulting.co.uk/Documents/Course-handbook-eng.pdf [accessed on: 25/07/2014]

the Panel also prohibited zeroing in original investigations (prohibited model zeroing). However, there is also another duty system called *retrospective system* which is used by a limited number of Member states including the U.S. According to that system, dumping margin which is determined in initial investigation, only establishes the deposit rate and the actual dumping margin is imposed during an administrative review.[195] To sum up, while prospective duty systems require the calculation of dumping margin during the original investigation, in retrospective systems the actual margin is determined in review investigations. AB argues that if the U.S. or Panel position held, then a country with a retrospective system would be able to zero, but a country with a prospective system would not zero.[196]

After a few years of those AB Reports for the U.S. Japan and the U.S. Mexico disputes, EC had a challenge with the U.S., and applied to the dispute settlement. In parallel with previous disputes, EC considered that the relevant U.S. regulations, zeroing methodology, practice, administrative procedures and measures for determining the dumping margin in reviews are inconsistent with the WTO legislation.[197] In that dispute, similar with the Japan and Mexico disputes, Panel again stated their sympathy with the U.S. position. However this time Panel had to rule that zeroing practices were inconsistent only because of previous AB decisions in the U.S. – Zeroing case with Japan.[198]

6.2. Current Situation on U.S. Zeroing Practices:

[195] *Ibid.*
[196] Bown, C. P. & Prusa, T. J. (2010) p:4.
[197] Report of the Panel United States –Continued Existence and Application of Zeroing Methodology WT/DS350/R adopted: 01/10/2008, Available at: http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#selected_subject [accessed on: 25/07/2014]
[198] *Ibid.*

At the end of the WTO disputes, especially after the U.S. – Japan and U.S. –EC cases, AB recommended that the DSB request the United States to bring its measures, found to be inconsistent with the GATT 1994 and the ADA, into conformity with its obligations under those Agreements. Furthermore, the EU and Japan requested authorization to impose hundreds of millions of dollars of trade retaliation.[199] As a result, the U.S. changed its policy, and announced that it will terminate zeroing practices in review. According to that; the Commerce Department used *Section 123 of the Uruguay Round Agreements Act* to prospectively abandon the practice in original anti dumping investigations in early 2007 and proposed modifications in the use of zeroing in subsequent phases of the U.S. anti dumping proceedings.[200] As it is stated in the latest Trade Policy Review Report (TPRR) of the WTO for ;

"The United States abandoned the use of zeroing when calculating margins in original investigations based on weighted average to weighted average comparisons in 2006."[201]

However, the U.S. did not accept to stop zeroing in reviews such as sunset, newcomers and interim investigations. It is a clear fact that limiting zeroing practices in one type of investigation may be accepted as a positive step but not a fully compliance as the other type of investigations still involve zeroing practices. It should also be noted that for the U.S. trading partners, the U.S.'s non-responsiveness to the zeroing decisions sends a signal that compliance to the WTO decisions is voluntary.[202] Thus, continuing zeroing practices of the U.S. effectively disrupts the legitimacy of the WTO.[203]

[199] Prusa, T. J. & Vermulst, E. (2009), p:189.
[200] Grimmet, J. J. (2011), p:9.
[201] World Trade Organization *Trade Policy Review Report by Secretariat United States Revision* WT/TPR/S/275/Rev.2 adopted: 8/03/2013. Available at: http://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#bycountry [accessed on: 19/07/2014].
[202] Bown, C. P. & Prusa, T. J. (2010) , p:49.
[203] *Ibid.*

In addition to DSB, the zeroing issue still has controversial points which are subject to multilateral negotiations. While the Uruguay text of the Anti Dumping Agreement and the DSB reports of the WTO restricts zeroing, the draft of the ADA under the Doha, proposes that national antidumping authorities should be permitted to zero in essentially all circumstances.[204] Thus, the next chapter will focus on the debates on zeroing from the perspective of current negotiations under Doha Round.

CHAPTER 7: CURRENT NEGOTIATIONS ON ZEROING

Since the first GATT challenge to the practice of zeroing, brought in 1992 by Norway in United States – Fresh and chilled Atlantic salmon case, the issue has been debated in the several WTO platforms, in addition to several Panel and AB reports.[205] The Committee on Anti Dumping Practices, which is established with Article 16 of ADA, may be referred as one of authorities that able to interpret anti dumping rules. According to relevant Article;

"..... (the Committee) composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on

[204]Hindley, B. (2008) The Draft Doha Round: Anti Dumping Agreement *European Centre for Political Economy Report*, p:4. Available at: http://www.ecipe.org/media/external_publication_pdfs/the-draft-doha-round-antidumping-agreement.pdf [accessed on:26/06/2014]
[205] Vermulst, E. (2005), p:51.

any matters relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee."[206]

The Committee has issued a number of recommendations that, while not legally binding, provide useful guidance on the interpretation of certain elements for anti dumping investigations.[207] These recommendations cover issues such as the timing of the dumping notifications, the periods of data collection and annual reviews of the Anti Dumping Agreement. Although its interpretation authority, the Committee on Anti Dumping Practices is a non-negotiating body of the WTO and the negotiations on anti dumping, with the participation of Member states representatives, have been conducted in a group as a part of Doha Work Programme.[208] The Doha Round of the WTO that is now in progress, has the potential to be an important further step on the path of trade liberalisation, especially for developing countries.[209] Many agreements have now being negotiated since the agenda was set out by the Ministerial Declaration in November 2001.[210] The WTO in the Declaration expressed its determination to play a full role in promoting growth and development, and its intention to place the needs and interests of developing countries at the heart of Doha Work Programme.[211]Although probably less known to the public, anti dumping rules are one of the most important issues of the agenda, as less developed countries have the most gain from.[212] In particular, Ministers agreed to;

[206] WTO Anti Dumping Agreement, *Article 16.*
[207] Vermulst, E. (2005), p:216.
[208] Lindsey, B. & Ikenson, D. (2002) Reforming the Anti Dumping Agreement: A Road Map for WTO Negotiations *Cato Institute Center for Trade Policy Studies* Vol:21, p:3. (Lindsey, B. & Ikenson, D. ,2002)
[209] Zanardi, M., p:403.
[210] World Trade Organization (2014) *Doha Agenda* Available from: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm , [accessed on: 25/06/2014]
[211] Oliva, M. J. (2004) The Doha Work Programme: Still the Development Agenda? *Journal of Finance and Trade*, p:100-102. Available at: http://www.ciel.org/Publications/Doha_SDI12.pdf [accessed on:26/06/2014].
[212] Zanardi, M., p:403.

".... negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants."[213]

As a crucial part of ADA, zeroing also is one of subjects which have being discussed under the Doha Negotiations. The negotiations mandated by the Doha Declaration take place in the Trade Negotiations Committee Rules Negotiating Group which is under the authority of the General Council.[214]

The Negotiating Group on Rules was created on 1 February 2002 by a decision of the Trade Negotiations Committee (TNC) and in addition to anti dumping, the Rules Negotiating Group also deals with issues related to subsidies (including fishery subsidies) and regional trade agreements.[215] The negotiations have essentially been proceeding in three phases.[216] In the initial phase, Members indicated which provisions they wanted to clarify and improve and then in the second phase, Members engaged in an in-depth examination of these provisions and the respective proposals for clarification.[217] Finally, in the last phase, they set forth the precise changes they seek to the existing rules and prepare drafts.[218]

[213] Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN(01)/DEC/1 Available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm [accessed on:26/06/2014]
[214] World Trade Organization (2014) *Doha Agenda* Available from: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm , [accesed 25/06/2014]
[215] Fergusson,I. F. (2011) World Trade Organization Negotiations: The Doha Development Agenda *Congressional Research Service*, p:20. Available at: http://fas.org/sgp/crs/misc/RL32060.pdf [accessed on: 06/07/2014].
[216] United Nations Conference on Trade and Development (UNCTAD) *Training Module on the WTO Agreement on Anti Dumping, p:48.* Available at: http://unctad.org/en/Docs/ditctncd20046_en.pdf [accessed on: 29/07/2014]. (UNCTAD Training Module)
[217] *Ibid.*
[218] *Ibid.*

In addition to Rules Negotiating Group, there is also an informal group of 15 participants[219], namely Friends of Anti-Dumping Negotiations (FANs), believe that the existing Anti-Dumping Agreement should be improved to counter what they consider to be an abuse of the way anti-dumping measures can be applied and they have tabled many proposals including zeroing for anti-dumping investigations.[220]

There is also another interesting fact that, although that kind of alignments, such as FANs, neither the positions in the current negotiations nor the use of the anti-dumping instrument, allows for clear North-South dividing lines.[221] Although these opposing views, the object of negotiations is not weaken national anti dumping laws but improving them by curtailing abuses. However, even the ultimate goal of negotiations is preventing unfair trade practices, the negotiations face strong political opposition of the U.S. because of zeroing issue[222] The concerns of the U.S. are reflected in trade promotion authority legislation passed by Congress in August 2002. According to that legislation, trade negotiations are referred as;

"...preserve the ability of the United States to enforce rigorously its trade laws,including the antidumping, countervailing duty, and safeguard laws, and avoid agreements which lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies, in order to ensure that United States workers, agricultural producers, and firms can compete fully on fair terms and enjoy the benefits of reciprocal trade concessions…"[223]

7.1. Discussions Under the Rules Negotiating Group:

[219] Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Chinese Taipei; Thailand; and Turkey are participants of Friends of Antidumping Negotiations.
[220] World Trade Organization (2014) Anti-dumping, Available at: http://www.wto.org/english/tratop_e/adp_e/adp_e.htm [accessed on: 06/07/2014].
[221] UNCTAD Training Module,p:49.
[222] Lindsey, B. & Ikenson, D. (2002), p:3.
[223] U.S. Department of State Archive Public Law 107-210 Trade Act, Available at: http://2001-2009.state.gov/g/oes/rls/or/81534.htm [accessed on:30/07/2014].

In stark contrast to the views as mentioned above, in 2007, the U.S. requested to circulate a communication in which it discussed the zeroing issue and examined whether the investigating authorities should provide offsets while calculating dumping margin or not. According to the U.S. communication;

"A prohibition of zeroing, or a requirement to provide offsets for non-dumped transactions, simply cannot be found in the text of the AD Agreement. Nevertheless, the AB concluded that authorities are required to offset non-dumped comparisons against dumped comparisons ... The issue of zeroing, on which Members could not reach agreement in the Uruguay Round, should not be left to dispute settlement. We as Members should endeavour to reach an agreement on this issue through negotiation."[224]

In late 2007, pursuant to mandate of Doha Declaration, the first draft consolidated text on anti dumping, horizontal subsidies disciplines, countervailing measures, and fisheries subsidies were issued and as Chairman stated, *"These texts contained no brackets or drafting alternatives, but instead proposed specific compromise language on all of the issues addressed."*[225] As a result, reactions were extremely strong especially to anti dumping - zeroing parts of the text. For instance, in a statement on zeroing which is made by Member states such as Brazil, China, India, Korea and Japan, soon after the first draft, in December 2007, it is emphasized that the text must represent the actual discussions which took place within the Negotiating Group.[226] Member states also accused the Chair's text with permitting the practice of zeroing.[227] In parallel with that statement, the delegations of several Member states presented a working document namely *"Prohibition of Zeroing"* concerning the issue

[224]World Trade Organization Negotiating Group on Rules *Offsets for Non-Dumped Comparisons: Communication from the United States*, TN/RL/W/208 [05/06/2007], p:2.
[225] World Trade Organization Negotiating Group on Rules *Anti Dumping, Subsidies and Countervailing Measures and Fisheries Subsidies: Statement by Chairman* TN/RL/W/247 [17/05/2010], p:2.
[226] World Trade Organization Negotiating Group on Rules *Statement on Zeroing in the Antidumping Negotiations* TN/RL/W/214/Rev.3 [25/01/2008], p:1.
[227] *Ibid.*

of zeroing under the Anti Dumping Agreement. In addition to previous statements, in this working group Member States clarified their objective as prohibiting the zeroing at all stages of procedures. In this regard, the views of delegations as follow;

"The vast majority of Members were concerned about the statement referring to alleged discrepancies between the AB and panels. We do not respond to the systemic issue here – i.e. a Member's criticism of the AB. Instead we intend to solve the issue constructively in the negotiations by reflecting actual discussions in the Negotiating Group and respecting Members' reasonable expectations on continuing the dependability, transparency and predictability for the Multilateral Trading System that were achieved during the last decade. We believe continued disputes between Members on zeroing should be avoided by clearly codifying the prohibition of zeroing at all stages of procedures under the Doha Development Agenda."[228]

Furthermore, one of the most important proposals of these delegations is relating with the Article 2.4.2. According to that the statement of the delegation as follows;

"The ADA also should observe and clarify the basic principle under GATT Article VI:2 that the amount of an AD duty shall not exceed the margin of dumping, which are calculated without zeroing. We therefore propose to codify and clarify these rules in the ADA by deleting the phrase "during the investigation phase" in Article 2.4.2."[229]

As it is discussed in the previous chapter, within the context of the U.S. –Stainless Steel and U.S. – Zeroing (Japan) disputes, the phrase *"during the investigation phase"* was a contentious issue that while Panel commented the word as it limits the applicability of zeroing in original investigation but enables it in reviews, AB rejected the Panel by finding

[228] World Trade Organization Negotiating Group on Rules_ *Prohibition of Zeroing* TN/RL/W/214 [31/01/2008], p:2.
[229] *Ibid.*

zeroing inconsistent in both original and review investigations.[230] It is clear that by proposing to delete that part of Article 2.4.2 in the Prohibition of Zeroing Report, Member states aimed to end the debates on this phrase.

7.2. Second Draft Anti Dumping Agreement of the Rules Negotiating Group:

The second draft of the Agreement was presented in 2008 and Article 2.4.2 was revised by excluding *"during the investigation phase"* statement.[231] In addition to these changes, one of the most important dumping calculated methods, the weighted average to transaction which is referred as an exceptional method was terminated. According to that Article 2.4.2 was rewrite as follows;

"Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis."[232]

In this new draft, Chairman also mentioned the remarks of the other delegations in addition to the ones which disagree with zeroing facilities. The Chairman states that;

"Some of these delegations believed that while the draft text went too far, zeroing might be permitted in some contexts. In particular, a number of delegations expressed the view that zeroing should be permitted in the context of the weighted average to transaction comparison methodology (the exceptional third method), while it was also suggested that the same methodology need not necessarily be applied in original investigations as in the context of

[230] *Supra note:176, 179.*
[231] World Trade Organization Negotiating Group on Rules_ *Annex A – Anti Dumping* : *Article 2.4.2* TN/RL/W/232, p:A-11.
[232] *Ibid.*

duty collection. One delegation considered that the Chairman's text permitted zeroing in certain contexts but prohibited it in the most common comparison methodology in investigations, and insisted that a restoration of zeroing in all contexts was necessary to return to the status quo that emerged from the Uruguay Round. This delegation could not conceive of a result that did not address zeroing."[233]

In addition to these comments, while presenting the draft Chairman also adds that;

"... The situation has not changed since that time (the previous draft), it should not be expected that my new texts will offer any magic solutions in the many areas (including zeroing) where Members' positions differ dramatically and where the alternatives remain as delegations originally tabled them, i.e., very far apart..."[234]

As it is stated in the second draft; "*... delegations remain profoundly divided on zeroing issue. Positions range from insistence on a total prohibition of zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorized in all contexts."*[235]

On the other hand, after the presentation of second draft, Chairman addressed zeroing as one of the most controversial issues and clarified that although the ongoing debates, *"... the discussions on the revised text was very constructive and allowed the Group to consolidate important progress in a number of areas..."* [236]

[233] *Ibid.*
[234] World Trade Organization Negotiating Group on Rules *New Draft Consolidated Chair Text of the AD and SCM Agreements* TN/RL/W/236 [19/12/2008], p:2.
[235] *Ibid.*
[236] World Trade Organization Negotiating Group on Rules *Anti Dumping, Subsidies and Countervailing Measures and Fisheries Subsidies: Statement by the Chairman* TN/RL/W/247 [17/05/2010], p:1.

CHAPTER 8: CONCLUSION

After the mid-1970's most of the economies pursued export oriented policies by reducing their import tariffs and liberalizing trade. The establishment of the WTO in 1994, is one of the achievements of these economies as it provides the legal ground for international trade. Through the WTO agreements, governments are able to keep their policies with agreed limits.[237] These agreements have removed many impediments to trade, but they also have done little to curb the use of a barrier, the trade remedies.[238] From the perspective of mainstream economics, which suggests free trade for the maximum social welfare, trade remedies are criticized of being ineffective. On the other hand, some scholars defend trade remedies on the grounds of providing a safety valve fort he domestic manufacturers against

[237] Guzman, A. T., Pauwelyn, J. H. B. (2008) International Trade Law *The WTO: History, Structure and Future* Second Edition, Aspen Case Book Series, p:85.
[238] Klitgaard, T. & Schiele, K. (1998) Free versus Fair Trade: Dumping Issue *Federal Reserve Bank of New York Current Issues in Economics and Finance* Vol:4 (8), p:3.

injurious imports.[239] The safety valve motives defend that without trade remedies, Member States may be hesitant to sign trade agreements that lead to substantial liberalization.[240]

Within this context, in 1947, during the first GATT negotiating round, trade remedies were introduced so as to eliminate the concerns of Member States.[241] Thus, with the GATT 47, Member States accepted to reduce tariffs, but also legalized their current national trade remedy instruments which refer to three types of measures namely safeguard, countervailing and anti dumping. During the WTO era, anti dumping measures has been the most frequently used policies among Member States and between the years 1995 and 2013 nearly 3000 anti dumping measures were enforced by the WTO member states.[242] However, in the same time period, the number of total *safeguard and countervailing measures* were only 136[243] and 190[244] respectively.

The most preferred trade remedy instrument, anti dumping legislation, is set out within the context of GATT 1994 Article VI and the WTO Anti Dumping Agreement for all Member States. According to the ADA, Member States may impose such a tariff on imports from selected countries if they conduct an anti dumping investigation and determine that the imports are being sold with a lower price compared to its fair price. Furthermore, the injurious effect of the dumped imports on domestic producers should be proved. Thus, the comparison of normal value (or domestic price) and export price is the most crucial point of the investigation as it directly affects the amount of dumping measures and also the level of

[239] Bown, C. (2005) Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challanged? World Bank, p:12.
[240] *Ibid.*
[241] World Trade Organization (2014) *Anti-dumping* Available at: http://www.wto.org/english/tratop_e/adp_e/adp_e.htm [accessed on:30/07/2014]
[242] *Ibid.*
[243] World Trade Organization (2014) *Safeguard* Available at: http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm [accessed on:30/06/2014]
[244] World Trade Organization (2014) *Subsidies and Countervailing Measures* Available at: http://www.wto.org/english/tratop_e/scm_e/scm_e.htm [accessed on:30/06/2014]

protection. This study aimed to clarify one of the most controversial issues on the methodologhy of calculating the dumping magrin called *zeroing*.

ADA Article 2.4.2. covers two alternative methods for this comparison namely; *"weighted average to weighted average" and "transaction to transaction"*.[245] However, if the authorities find a pattern of export prices which differ significantly among purchasers, regions or time period, there is also an exceptional method called *"weighted average to transaction"* for calculating the dumping margin.[246] None of these methods gurantee the most protectionist result for the importing country. As it is clarified in one of the GATT panel reports, depending on the facts of the specific case, either method might lead to a higher dumping measure comparing to others. On the other hand, it is a certain rule that if investigation authorities applies zeroing practices while calculating dumping margin with any of these methods, the amount of measure will be much more protectionist.

Zeroing, the main focus of this study, refers to the practice of replacing the actual amount of dumping that yield negative dumping margins with a value of zero prior to the final calculation of a dumping margin for the product under investigation with respect to the exporters under investigation.[247] If an investigating authority prefers zeroing, it needs to drop transactions that have negative margins.[248] Hence, the overall dumping margins and applied duty are inflated by the zeroing practices.[249] As a result, this makes zeroing a major irritant to exporters, but highly desired by import competing industries.[250] However, today U.S. remained as the only Member State whose zeroing policy in its anti dumping procedures has become a political flash point threatening some legitimacy of the Dispute Settlement System,

[245] WTO Anti Dumping Agreement, *Article 2.*
[246] *Ibid.*
[247] Bown, C. P. & Prusa, T. J. (2010), p:4.
[248] *Ibid.*
[249] *Ibid.*
[250] *Ibid.*

the judicial function of the WTO.[251] In this study, the U.S. zeroing disputes with Mexico, Japan and EU were examined and discussions of Panel and AB on zeroing issue were introduced. With regard to zeroing debates in these disputes, Panel suggested the application of zeroing only in review investigations, but AB objected to the Panel and found this method inconsistent with the WTO Agreements in both original and review investigations. At the end of these disputes, the U.S. changed its policy to some extent. As it is also clarified the latest TPRR of the U.S., the application of zeroing in original investigations was abandoned, but this policy is still implementing in review investigations in parallel with the Panel's suggestion.

In addition to the U.S. persistency on this policy, scholars like Bown and Prusa defended that the nature of the WTO's jurisprudence has likely contributed to this number of zeroing disputes. According to them, *"Panels and AB has typically been to craft very narrow determinations in the attempt to reduce accusations of judicial activism."* [252]

Judicial activism was also referred in Article 3.2 of the Dispute Settlement Understanding and according to that; *"Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."*[253] Thus, important issues are often left unaddressed, which opens the door for the respondent country to continue zeroing practices.[254] It should also be noted that the continuing application of zeroing is also brought to the WTO DSU again by another or same complainant party for a different dumping investigation. Because of the uncertainty on dumping calculation methods, zeroing was adjudicated in 18 disputes and remained as the single most litigated subject in the WTO.

As a result of that, in order to prevent future disputes on zeroing issue, Member States put these controversial points on the multilateral negotiations under Doha Development Agenda.

[251] *Ibid.*
[252] Bown, C. P. & Prusa, T. J. (2010), p:7.
[253] WTO Dispute Settlement Agreement, *Article 3.*
[254] Bown, C. P. & Prusa, T. J. (2010), p:8.

The negotiations mandated by the Doha Declaration take place in the Trade Negotiations Committee Rules Negotiating Group and as a crucial part of ADA, zeroing is one of the main subjects of the Trade Negotiations Committee.

The Doha Round was launched in 2001, but suggesting the first draft of ADA took nearly 6 years for the Committee. However, this first draft text of the Agreement was criticized strongly as it did not represent the actual discussions in the Committee. Delegations such as Brazil, China, Japan and Korea circulated a communication, namely *"Prohibition of Zeroing"* and stated that the draft next should cover a clear codification for the prohibition of zeroing. The second draft of the Agreement which was presented in 2008, involves remarkable changes, so the delegations found the second draft more successful. One of the most important achievements of the second draft is the exclusion of controversial phases and rewriting Article 2.4.2 in order to bring a mutual solution for zeroing issue. However, positions of the Member States range from total prohibition on zeroing to a demand that zeroing be specifically authorized in all context, so most of the WTO Members still continue to hold their positions and zeroing still remains as the most divisive subject in the anti dumping negotiations.

In addition to these challenges, there are also other obstacles related with WTO Doha Round. As it is stated earlier, the Round has started in 2001 but since then Members had not been able to reach consensus. In parallel with that, numbers of Regional Trade Agreements are increasing dramatically. In 2001, when the Doha Round was launched, there were 195 RTA's notified in force, this figure was 575 in 2013.[255] Today, the U.S. is the leading country of the bilateral policies in world trade system and the trade agreements of U.S. generally

[255] World Trade Organization *Regional Trade Agreements and Preferential Trade Agreements* Available at: http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm [accessed on 01/08/2014].

preserve anti dumping provisions.[256] Thus, in addition to multilateral negotiations, anti dumping provisions are also subject to bilateral agreements. However, it is also a clear fact that Member States, especially the countries which are participating in a trade agreement with U.S., has a weaker negotiation position and have to give concessions while discussing on zeroing issue. As Pascal Lamy stated in one of his speeches about bilateral agreements, developing countries, entering into a bilateral agreement with a powerful big country means less leverage and a weaker negotiating position as compared that in the multilateral talks.[257] However, developing countries have a chance to band together in groups such as the FANs and gain a negotiation power, if they prefer multilateral platform rather than bilateral agreements.

Prohibition of zeroing through explicit provisions under the ADA shall prevent criticisms against dumping for being used in a protective manner and it leads a more liberalised international trade. On the other hand, anti dumping measure is a balancing tool between the exporters and domestic producers in the importing country. Therefore, if it is allowed, the dumping margins generally increase, and this shifts the imbalanced positions from the dumper exporters to domestic producers by over protecting the latter firms. The calculation of the absolute economic effects of zeroing policies in a complicated international trade environment is extremely challenging. Still, it is very crucial to have clear rules on the subject matter. Otherwise, an exporting firm with the same export and domestic prices, may face with different amounts of anti dumping measures because of the diversion on the calculation methods and this makes another unfairness. An ideal anti dumping measure should only eliminate the unfair price policy of an exporter without granting a privileged position to its own manufacturers.

[256] Kazeki,J. (2010), p:949.
[257] World Trade Organization *Speeches* Available at: *http://www.wto.org/english/news_e/sppl_e/sppl53_e.htm* [accessed on 01/08/2014].

ANNEX:

1.	European Communities - Cotton-type Bed Linen - Complainant: India	3 August 1998
2.	United States - Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip - Complainant: Korea	30 July 1999
3.	European Communities - Malleable Cast Iron Tube or Pipe Fittings - Complainant: Brazil	21 December 2000
4.	United States - Softwood Lumber - Complainant: Canada	13 September 2002
5.	United States - Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)- Complainant: European Communities	12 June 2003
6.	United States - Measures Relating to Zeroing and Sunset Reviews - Complainant: Japan	24 November 2004
7.	United States - Shrimp - Complainant: Ecuador	17 November 2005
8.	United States - Shrimp - Complainant:Thailand	24 April 2006
9.	United States - Stainless Steel - Complainant: Mexico	26 May 2006
10.	United States - Continued Existence and Application of Zeroing Methodology - Complainant: European Communities	2 October 2006
11.	United States - Certain Orange Juice - Complainant: Brazil	27 November 2008
12.	United States - Polyethylene Retail Carrier Bags - Complainant: Thailand	26 November 2008

13.	United States — Use of Zeroing in Anti-Dumping Measures Involving Products from Korea	24 November 2009
14.	United States - Certain Shrimp - Complainant: Viet Nam	1 February 2010
15.	United States - Corrosion-resistant carbon steel flat products - Complainant: Korea	31 January 2011
16.	United States - Shrimp and Diamond Sawblades - Complainant: China	28 February 2011
17.	United States - Certain Frozen Warmwater Shrimp - Complainant: Viet Nam	20 February 2012
18.	United States - Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China	3 December 2013

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