

**A CRITICAL ANALYSIS OF THE USE OF ANTI-DUMPING REGULATION IN
SOUTHERN AFRICAN CUSTOMS UNION (SACU): A CASE OF BOTSWANA**

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ACRONYMS

BLNS	Botswana, Lesotho, Namibia and Swaziland
BOBS	Botswana Bureau of Standards
GATT	General Agreement on Tariff and Trade
ITAC	International Trade Administration Commission of South Africa
SACU	Southern African Customs Union
SIIR	Standard Import Inspection Regulation
UNCTAD	United Nations Cooperation on Trade and Development
WTO	World Trade Organisation

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ABSTRACT

This paper critically analyses the use of anti-dumping regulation in the Southern African Customs Union (SACU) with specific reference to Botswana. Dumping takes place where products are 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. Anti-dumping duties are an internationally-recognised exception to three core WTO principles namely, bound tariff commitments, most-favoured-nation (MFN) and national treatment. The use of anti-dumping in SACU has always been in accordance with existing WTO rules. The new SACU Agreement has important implications for the anti-dumping regime within the customs union. It changed the way in which tariff decisions, including anti-dumping tariffs, are made and it also requires member states to develop legislation on contingency trade remedies such as anti-dumping for the region and to establish national bodies to administer these remedies within different countries. The SACU council has given mandate to the International Trade Administration Commission of South Africa (ITAC) to undertake all trade remedies investigations and imposition of the necessary duties. From the inception of ITAC till now ninety-five percent (95%) of all anti-dumping applications filed at ITAC alleging dumping are instituted by South Africa industries. Thus, only five percent (5%) of all anti-dumping applications are from Botswana, Lesotho, Namibia and Swaziland (BLNS countries). The findings in this paper reveal that Botswana has never filed an application seeking protection of any of its industries. In terms of Article 14 of the SACU Agreement Botswana is in the process of establishing its national body like ITAC. The argument is that, since Botswana has never filed for any trade remedy how effective will this national body going to be? Therefore, critically analyzing the use of anti-dumping regulation is very crucial for Botswana as a SACU member. Such analysis will help assess the effectiveness of SACU institutions such as the tariff board and the Botswana national body to be established.

CHAPTER ONE

1.1 Introduction

The World Trade Organisation Director-General Pascal Lamy, in launching the World Trade Report 2009 in Singapore on 22nd July 2009, said that well-balanced trade contingency measures such as antidumping duties or safeguards act as “safety valves” to help WTO members deal with various unanticipated market situations, although “they need to be used with care....especially so in times of crisis”.¹

Complaining about the unfairness of foreigners has become the most popular way for an industry seeking protection from imports to make its case to its government.² Anti-dumping has been from its beginning part of the rhetoric and part of the mechanics of ordinary protection. Constrained by these commitments, many countries have switched to other instruments to wield protection. Among these, antidumping duties are some of the most important. Although originally devised to combat unfair trade in the form of export prices below normal value (i.e., dumping), their wide and arbitrary applicability has led economists to conclude that antidumping “has nothing to do with keeping trade ‘fair.’ ... It is simply another form of protection”.³ In terms of Article VI of the General Agreement on Tariff and Trade (GATT), dumping takes place if a product is exported from one country to another at a price which is less than the price at which the product is sold for domestic consumption. Anti-dumping action may be taken only if it is found that a product is dumped in the importing country and that the dumping is causing

¹ WTO, World Trade Report 2009: http://www.wto.org/english/news_e/sppl_e/sppl133b_e.htm.

² Finger M J, *Antidumping, How it works and Who Gets Hurt*, The University Press of Michigan Press, United States of America 1993.

³ Hylke Vandenbussche, Department of Economics, Universite Catholique de Louvain, Belgium vandenbussche@core.ucl.ac.be and Maurizio Zanardi, Department of Economics, Tilburg University Netherland m.zanardi@uvt.nl, *Antidumping in the EU: the time of missed opportunities* available at <http://www.voxeu.org/index.php?q=node/917>.

material injury to the industry manufacturing a like product in the importing country.⁴ Clamping down on dumping is not just good for foreigners and their investment, but it also gives a boost to domestic industry and encourages it to come up with innovations that are themselves worthy of protection.

1.2 Background

Southern African Customs Union (SACU) is a customs union⁵ consisting of Botswana, Lesotho, Namibia, Swaziland and South Africa, providing for free trade in goods and a common external tariff.⁶ SACU is governed by the 2002 SACU Agreement as signed by Heads of State of its member states.⁷ SACU institutions consist of Council of Ministers, Customs Union Commission, Secretariat, Tariff Board, Technical Liaison Committees and an ad hoc Tribunal.⁸ The SACU Council has the authority to identify and address unfair trade practices such as anti-dumping by policies and instruments.⁹

The new SACU Agreement has important implications for the anti-dumping regime within the customs union.¹⁰ It changed the way in which tariff decisions, including anti-dumping tariffs, are made and it also requires member states to develop legislation on contingency trade remedies such as anti-dumping for the region and to establish

⁴ Brink Gustav F, *Anti-Dumping and Countervailing Investigations in South Africa: A Practitioner's Guide to the Practice and Procedures of the Board on Tariffs and Trade 2002*.

⁵ Established under Article XXIV of the General Agreement on Trade and Tariff.

⁶ Free trade in this context means the elimination of tariff duties and quantitative restrictions on importation and exportation.

⁷ Botswana Lesotho, Namibia, Swaziland and South Africa.

⁸ SACU Agreement Article 7.

⁹ SACU Agreement Article 8. See also, UNCTAD, *A Southern African Custom Union (SACU), Regional Cooperation Framework on Competition Policy and Unfair Trade Practices*, UNCTAD/DITC/CLP/2005/3, New York and Geneva 2005, Prepared by Dr James Mathis, Department of International Law, University of Amsterdam, H.H Mathis@uva.nl, available at www.unctad.org/competition.

¹⁰ Joubert Niel, *Managing The Challenges of WTO Participation: The Reform of South Africa's Anti-Dumping Regime*, Trade and Law Centre of Southern Africa (Tralac) Case Study 38, available at www.tralac.org.

national bodies to administer these remedies within different countries.¹¹ The SACU agreement sets no specific time frame within which to attain its targets.¹² The International Trade Administration Commission of South Africa (hereinafter referred to as ITAC) has been mandated to act as the tariff body for SACU in the interim, while waiting for the operation of a Tariff Board and establishment of national bodies of which ITAC will be the South African national body.¹³ Ninety-five percent (95%) of all anti-dumping applications are instituted by South Africa industries. Thus, only five percent (5%) of all anti-dumping applications are from Botswana, Lesotho, Namibia and Swaziland (BLNS countries). Therefore, critically analyzing the use of anti-dumping regulation is very crucial for Botswana as a SACU member. Such analysis will help assess how effective SACU institutions such as the tariff board and the Botswana national body¹⁴ to be established in future will be.

1.3 Problem statement

Botswana is a land locked country and rely heavily on alien commodities. The Botswana Government on the 12th of September 2008 gazetted a piece of legislation, the Standard Import Inspection Regulations (SIIR) in an effort to effectively deal with the dumping of substandard goods in the country.¹⁵ The purpose of SIIR is to clear the country of substandard and second-hand commodities, which move is expected to have a serious impact on the parallel motor vehicle market with imported cars from Japan and Singapore. Botswana will implement the regulation through the Botswana Bureau of Standards (BOBS).

¹¹ Jourbert Niel *supra*.

¹² Peter Draper, Durrel Halleson, Philip Alves, *SACU, Regional Integration and the Overlap Issue in Southern Africa: From Spaghetti to Cannelloni?* South African Institute of International Affairs (SAIIA), Published January 2007, available at www.saiia.org.za info@saiia.org.za.

¹³ http://www.sacu.int/main.php?include=council_of_ministers.html.

¹⁴ SACU Agreement Article 11 and 14.

¹⁵ *Sunday Standard Online Edition*, Botswana to implement Anti-Dumping Regulation, available at www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=62413&cat_id=0.

The problem is that if anti-dumping is not fully regulated in Botswana, it will be difficult for local industries to establish themselves and the existing industries will face serious competition from foreign industries. Further, it will impact the running of the national bodies in that the local industries will not be able to fully utilise such institutions. In many cases, the dumped products provide a boost to the local economy. However such practice is not in the country's long- term best interest. Clamping down on dumping is not just good for foreigners and their investment, but it also gives a boost to domestic industry and encourages it to come up with innovations that are themselves worthy of protection.

Accordingly, this research examines the use of anti-dumping regulation in the Southern African Customs Union (henceforth SACU) in particular Botswana by looking at the theory and practice of dumping, the jurisdiction, mandate and independence of ITAC, critically analysing the use of antidumping in Botswana and provide recommendation and conclusions.

1.4 **Thesis statement and research question (s)**

This research seeks to critically analyse the use of anti-dumping regulation by Botswana and answer the question: Has Botswana been able to fully utilise anti-dumping regulation and what are the future prospects of Botswana utilising its national body to regulate unfair trade practices through anti-dumping laws? The reasons for such an analysis are that ninety-five percent (95%) of all anti-dumping investigations by ITAC are instituted by South African industries. Further, the BLNS markets are far too small to allow the development of viable industries as an extensive import-substituting strategy.¹⁶ In analysing the use of anti-dumping in Botswana, the following questions will be answered to shed more light.

¹⁶ McCarthy Colin, *The Southern African Customs Union in Transition*, African Affairs (2003), 102,605-630, Royal African Society 2003.

- (1) What is the theory and practice of anti-dumping?
- (2) How is anti-dumping regulated in SACU?
- (3) How is the regulatory and institutional framework of trade in Botswana?
- (4) Has Botswana been able to fully utilise anti-dumping measures through ITAC?

1.5 Significance of research

This research is significant as it will add to the body of knowledge, especially because there is not much literature on SACU. Further, it will assist Botswana and other BLNS countries to fully utilise SACU institutions. This research will further enable the local industries in Botswana to fully establish themselves and get the protection they need from foreign producers. Furthermore, it will inform policy formulation in Botswana and influence decision making at SACU level. Finally, it will investigate the challenges faced by Botswana and ways to deal with them and add to the current discussions on mainstreaming multilateral agreements into national development plans.

1.6 LITERATURE REVIEW

1.6.1 Use of anti-dumping laws: unfair trade

In terms of Article VI of the GATT, dumping is a distortionary trade practice which must be combated through discriminatory duties that bring foreign prices up to their “normal” value.¹⁷ Under the GATT 1994, dumping is regarded as unfair trade and anti-dumping

¹⁷ Moore Michael O, Professor of Economics and International Affairs, The George Washington University: Paper prepared for *The Economics of the Doha Round and the WTO 2005*.

duties can be levied if (i) imports are sold at less than fair value and (ii) these imports cause material injury to the domestic industry (GATT 1994).¹⁸

1.6.2 Use of anti-dumping laws : Protectionist

Among economists anti-dumping is often regarded as a form of protectionism and its damage is widely acknowledged. Stegemann¹⁹ stated that :

“AD is inherently protectionist and should be thought of in the same way as other forms of protection - as just another device for assisting domestic industry against competition from imports.”

Michael Finger holds that anti-dumping is where protectionist action is today because it has proved to be broad and flexible enough to handle all the action.²⁰ That antidumping is another way to use customs valuation procedures as a weapon against imports. Further, he is of the view that antidumping reserves all the old tricks against the reform of customs valuation, reform that now constrain value for assessment of ad valorem customs duties to transactions value. Finger states that the best way to eliminate the serious problem raised by antidumping actions would be to simply repeal antidumping laws. He recognizes, however, that this would be difficult to achieve. This view is supported by Kerr William and Gaisford James.²¹ They support the economic theory of antidumping in terms of which economists argue that the only situation in which dumping should be punished is when such activities are conducted with a predatory intent. Therefore given the unlikely existence of predatory dumping, antidumping duties are no different from the tradition, protectionist tariff barriers that the GATT negotiations

¹⁸ Article 2 and 3 of the Agreement on Implementation of Article VI of the General Agreement on Tariff and Trade 1994.

¹⁹ Stegemann, Klaus 1980, *The Efficiency Rationale of Antidumping Policy and Order Measures of Contingency Protection*, *Institute for Economic Research*, Queens University, Canada, Discussion Paper No. 387.

²⁰ Finger M J, 21.

²¹ Kerr William A and Gaisford James D, *Handbook on International Trade Policy*, 2007,340.

had repeatedly struggled to cut back over the past 50 years. That the only difference between the traditional protectionist tariffs and antidumping is that antidumping appear to be here to stay.²²

Hylke Vandenbussche and Maurizio Zanardi are of the view that although originally devised to combat unfair trade in the form of export prices below normal value (i.e., dumping), their wide and arbitrary applicability has led economists to conclude that antidumping “has nothing to do with keeping trade ‘fair.’ ... It is simply another form of protection”.²³

Raj Krishna²⁴ is of the view that the alarming increase in the number of anti-dumping actions pursued by the developed and developing countries has caused considerable concern among economists and trade reformers. These concerns have led to the suggestions of substituting antitrust principles for antidumping laws and regulations or for using safeguard measures under Article XIX of GATT 1994. Prior to the conclusion of the Uruguay Round certain writers such as Barceló III advocated a single safeguard code “as the sole standard for relief against all injurious imports”.

In view of the above literature review, Botswana and other BLNS countries may be well off if they use safeguards instead of anti-dumping laws given that their market is too small and statistics show that of all anti-dumping cases, only 5% emanates from the BLNS countries. In other words, there might be no industry to protect, injured or retarded in the BLNS countries, in particular Botswana.

²² Kerr William A and Gaisford James D *Supra* 346.

²³ Hylke Vandenbussche, Department of Economics, Universite Catholique de Louvain, Belgium vandenbussche@core.ucl.ac.be and Maurizio Zanardi, Department of Economics, Tilburg University Netherland m.zanardi@uvt.nl, *Antidumping in the EU: the time of missed opportunities* available at <http://www.voxeu.org/index.php?q=node/917>.

²⁴ Krishna Raj, Former Legal Advisor, International Trade, World Bank, *Anti-dumping in law and practice*.

1.7 Research methodology

The approach in this research would be descriptive, analytical, and prescriptive. The descriptive approach would be used because there would be an overview of the existing situation with regard to the theory and practice of dumping and antidumping. The analytical approach would be used to evaluate the use of anti-dumping in Botswana. Lastly, the prescriptive approach would be used at the end in the form of recommendations aimed at encouraging the Botswana government to effect legislation with regard to anti-dumping. Further, the research will entail an interview with relevant institutions, intensive library research and desk-top literature based would be employed. This would entail gathering and analyzing available literature from the library and the internet.

1.8 Proposed structure

Chapter one: This chapter provides background to the study, research problem and questions, research methodology, significance of the research, chapter overview, delineations and limitations of the research.

Chapter two: The chapter examines the legal and economic definition of dumping, reasons for dumping, kinds of dumping, conditions of dumping, effects of dumping on the economy of the importing and exporting country. Further, international developments on anti-dumping laws in light of the current Doha Round of Trade Negotiations will be examined.

Chapter three: This chapter will look at the regulation of antidumping within SACU; examine the jurisdiction and mandate of ITAC, SACU institutions.

Chapter four: This chapter deals with the regulatory framework of trade in Botswana.

By generally examining the trade policy and the Standard Import Inspection Regulation. Further, it looks at the importance of the national body to be establishment in Botswana and other BLNS countries.

Chapter five: This chapter will conclude the research by looking at Botswana in general. The international trade will be observed by looking at import and exports. Further, it will assess whether Botswana has been using ITAC to deal with trade remedies in particular the use of anti-dumping measures.

1.9 Delineations and limitations

This research will focus on Botswana's use of anti-dumping laws. However, the research will in passing look at other BLNS countries. There are inherent obstacles in this research such as limitation to data collection due to the nature of information required to answer the research question.

1.10 Preliminary list of sources

1.10.1 Primary and secondary sources of information would be used.

The primary sources of information will include The General Agreement on Tariff and Trade in Goods (GATT), The Agreement on the Implementation of Article V1 of the GATT, International Trade Administration Act of South Africa and Antidumping Regulation of South Africa, SACU Agreement of 2002 and Botswana National policies and regulation. Secondary sources of information will include text books on trade law and international law, Journals on international trade law and internet sources and case law where necessary.

CHAPTER TWO

DUMPING AND ANTI-DUMPING: THEORY AND PRACTICE

2.1 Introduction

At the end of the 19th century and the beginning of 20th century, some European countries entered into anti-dumping agreements.²⁵ The introduction of anti-dumping legislation resulted from the experience of a number of countries that their industries had suffered damage from foreign competition often selling at price below cost of production.²⁶ Dumping was considered a trade practice which left domestic producers defenceless and which could ultimately, lead to the disappearance of domestic production of the merchandise concerned altogether.²⁷ It was therefore qualified as being 'unfair' and actionable.²⁸ When the first anti-dumping laws were enacted, the prevailing economic thought of the time condemned dumping as a predatory activity of monopolists. It was felt that dumping ought to be deterred to ensure a market system characterised by fair competition.²⁹

The aim of this chapter is to take a brief look at the international developments on anti-dumping rules, examine the definition of dumping, kinds of dumping, reasons for dumping, conditions of dumping, effects of dumping on the economy of the importing and exporting country and the legal effect of dumping. Further, the anti-dumping laws and antidumping in the Doha Round of Trade Negotiations will be examined.

²⁵ Chen Xinoying *International trade Law, Shanghai*; Lixin Accountant 2003:212.

²⁶ Muller Wolfgang Dr, Khan Nicholas, Neumann Hans-Adolf Dr, *EC Anti-Dumping Law - A Commentary on Regulation 384/96*, European Law Series, Published by John Wiley & Sons Ltd, West Sussex, England, 1998.

²⁷ Muller Wolfgang et al *supra* 3.

²⁸ Muller Wolfgang et al *supra* 3.

²⁹ Seavey WA *Dumping since the war, the GATT and national laws*, Oakland: Office Services Corp. 1970:1; Zhang Zhibin, Perfection of WTO regulation and China antidumping laws, *Report of Guangdong province international law seminar* 2002:1.

2.2 Dumping

There are various definitions of dumping. However, at least two definitions of dumping, namely economic and legal definition will be considered in this chapter.³⁰

2.2.1 Economic definition

In economics, dumping refers to the sale of goods at an unfairly discounted price, making the market unpredictable, and thus difficult for the competitors to operate in.³¹ Jacob Viner³² defined dumping as “price discrimination between national markets.” Specifically, price discrimination is a function of the manufacturer selling comparable products at different prices in different markets.³³ For example, if a United States of America (USA) company sells its television set in the USA market for \$10/unit and sells the same television set on the same terms for export to Botswana at an equivalent price of \$8/unit, it would be dumping the television sets in the Botswana market. This is sometimes referred to as “international price discrimination”.³⁴ Secondly, if it costs a Japanese company Yen900/unit to produce its watches sets and it sold those watches in Botswana at Yen850/unit, it would be engaged in dumping in Botswana in the amount of Yen50/unit. This is referred to as below-cost sales.³⁵

³⁰ Bryan G, *Taxing unfair international trade; a study of U.S. Antidumping and Countervailing Duty Laws*, LexiSngtonBooks, Lexington, Massachusetts and Toronto: DC Health and Company 1980:3; Shang Ming, *Anti-dumping: WTO regulation and China and foreign countries laws and practice*, Beijing Law, 2003:2-5, Wang Jingqi, *China and Foreign Countries Antidumping Laws and Practicality*, Beijing People’s Court, 2000:3-5.

³¹ Wang Jingqi 2000:3.

³² Viner, Jacob, *Dumping: A Problem in International Trade*, at 3 (Chicago IL: University of Chicago Press, 1923); See also Kerr William A and Gaisford 339.

³³ Viner 1923:3; Bryan 1980:3.

³⁴ Viner 1923:3.

³⁵ Das and Mohanty 1987, *Welfare of Dumping Country: A Comprehensive Ranking of Policies*, *Journal of Quantitative Economics*, 3(1), 13-34.

According to Lantz,³⁶ economists have found that for a firm to engage in price discrimination, the firm must operate under conditions where markets are separable, the firm has market power, and the two markets have different levels of demand for the product. When these conditions exist, price discrimination results in a firm maximizing its profits.³⁷ There are two forms of price discrimination between national markets. One is if the price in the importing country's market is higher than the price in the exporting country's market and the other is if the price in the importing country's market is lower than the price in the exporting country's market.³⁸ This study will consider the second form of price discrimination as only this form of dumping can injure and threaten the development of industries of the importing country.

2.2.2 Legal definition of dumping

In contrast to the economic definition, the legal definition includes both the act of price discrimination in international trade and the fact of an injury to a domestic industry.³⁹

The legal definition of dumping is provided in Article VI of the GATT which states that:

For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.⁴⁰

³⁶ Lantz R H, The search for consistency: treatment of non-market economics in transition under United States antidumping and countervailing duty laws, *American University Journal of International Law and Policy*, 1994-1995:997-998; Parkin M, *Economics*, 2nd ed. The United States of America: Addison-Wesley. 1993:975.

³⁷ Lantz 1994-1995:997-998.

³⁸ Bryan 1980:4; Economists call the former phenomenon "reverse dumping", and the latter "obverse dumping". See Chen Xiaoying 2003:212.

³⁹ Bryan 1980:3; Lowenfeld A F, *Public Controls on International Trade*, 2nd ed. New York: Matthew Bender, 1983:155.

⁴⁰ WTO Anti-Dumping Agreement Article 2.1.

Article VI of the GATT does not disallow acts of dumping altogether. It condemns dumping that causes material injury to a domestic industry;⁴¹ poses a threat of material injury to a domestic industry or causes material retardation of the establishment of a domestic industry.⁴² This legal requirement of injury to a domestic industry is not part of the economic definition of dumping, but can help to distinguish between those cases in which dumping should be prohibited and those situations in which duties should be imposed.⁴³ Dumping is considered to provide an unfair trade advantage to the exporter and therefore contrary to the canons of free trade.⁴⁴

2.2.3 Reasons for dumping

Oudsten divided the reasons for dumping into two groups.⁴⁵ First, “firm-oriented” reasons related to circumstances within the firm. For instance, the dumping firm may simply want to get rid of old stock, or of excess supply due to a decrease in demand.⁴⁶ Second, “market oriented” reasons related to the firm’s position on the foreign market.⁴⁷ A firm may be willing to accept initial low profits or even losses in order to gain a foothold in the market, to increase its market share, or drive out its competitors.⁴⁸

The other reasons for dumping is that certain goods may be “experience” goods, meaning that a producer will sell at a low (dumped) price as long as its products were unfamiliar to the consumer and then raise the price once people get to prefer it to a

⁴¹ WTO Anti-Dumping Agreement Article 3.1.

⁴² WTO Anti-Dumping Agreement. Article 3.7.

⁴³ Bryan 1980:5.

⁴⁴ Krishna Raj *supra*.

⁴⁵ Oudsten A D M Den, Undertaking in EEC Anti-dumping Law, *Florida International Law Journal*, 1989:325-346.

⁴⁶ Oudsten 1989; see also Booyesen Hercules, *International Trade Law on Goods and Services*, Interlegal 1999, 87.

⁴⁷ Oudsten 1989:325.

⁴⁸ Oudsten 1989:325.

traditional version.⁴⁹ Further, imperfect knowledge of the foreign market may force the exporter to price at a level he thinks the foreign market may be able to bear. Furthermore, by-products may be valued less than the products from which they are produced.

Conrad⁵⁰ lays down the following as some of the reasons for exporting companies to decide on dumping as a viable practice:

(a) Aggressive Dumping and defensive Dumping

The company can try to increase its share of the foreign market (aggressive market), or see itself forced into sinking its prices by a dumping pricing advance from a competitor (defensive dumping). In both cases, the exporting companies must finance their sales below average prices with profits from other markets or other products and will raise their prices as soon as the motivating competition disappears, which makes it a short-term dumping and thus damaging to the importing country. Aggressive dumping is the classic case of Viner's predatory pricing. The damaging effect comes from the exporter establishing himself as a monopolist by destroying the competition through dumping and subsequently raising his prices. The exporting company fights for its market shares in the importing country by defensive dumping because it expects that the future earning will compensate for the losses.

(b) Demand Compensation Dumping

As production is planned in advance and fixed costs are either unchangeable or capacities may be too costly to adjust, another motivation for price dumping is to

⁴⁹ Jackson John H and Vermulst Edwin A, *Antidumping Law and Practice*, A Comparative Study, Ann Arbor, The University of Michigan Press, 469.

⁵⁰ Christian A Conrad, Dumping and Anti-dumping Measures from Competition and Allocation Perspective, *Journal of World Trade* 36(3), 563-575, 2002.

compensate a temporary reduction of demand on the domestic market by increasing exports (demand compensation dumping). This is also short-term dumping in which the importing country suffers, and thus justifies anti-dumping measures.

(c) **Detour of Trade Dumping**

Detour of trade dumping is motivated by compensation of a reduction in sales caused by protectionist trade measures on the part of the importing country. The time frame of the dumping plays an important role, since the dumping could be long-term if the restrictive measures are as well, and thus have a positive net effect. Thus, the company would seek other markets where it could ask a higher price or increase production, and so have a damaging short-term dumping for which anti-dumping measures are legitimate.

(d) **Contribution Margin Dumping and Strategic Dumping**

The company can gain additional contribution margins, especially by decreasing unit costs (contribution margin dumping). This can take place long term or short term, depending on whether it is a tactical, short-term or strategic long-term decision (strategic dumping). If it plans to transfer part of its production over the long-term, it is beneficial for the importing country and an overall welfare gain, but if it is just to increase capacity, the effects are the same as those for a shift in demand. Therefore, since the plans of the exporter cannot be determined from an external observer, preventative anti-dumping measures are justified.

2.2.4 Kinds of dumping

Jacob Viner identifies three types of dumping situations: sporadic dumping, short-run or intermittent dumping and long-term or continuous dumping.⁵¹ In the case of sporadic dumping the motivation is to dispose of goods for a short-run to get rid of surplus shock. Short-run or intermittent dumping is not continuous and is motivated by entering into a new market, retaining the market share or driving away the competitors from the market. Long-term or continuous dumping is motivated by the intent to reach or maintain full production in large scale economies. Sporadic dumping is likely to result only in damage to the exporting or the importing country. Short-run dumping also does not necessarily hurt.⁵² Viner argued that anti-dumping authority may be needed to protect domestic consumers against predatory dumping. In predatory pricing a foreign firm or cartel attempts to drive away the domestic competitors then establishes a monopoly and subsequently increases the price. “Predatory Pricing”, thus, “refers to the use of short-run price cutting in an effort to exclude rivals on a basis other than efficiency in order to gain or protect market power.”⁵³ However, economists are not in full agreement as to the occurrence of predatory dumping. It is maintained that it is inconceivable for a firm to suffer losses over a long period of time and that as for predatory dumping a firm must establish a global monopoly, that too is difficult to conceive will happen in most industries.

⁵¹ Viner 1923:3; Shang Ming 2003:6-7; Krishna 2001:6-7; Willing 1998:67 identified two kinds of dumping: monopolizing and nonmonopolizing dumping.

⁵² J.W.T. 27 (1989, No. 5). James Devault says: “The phenomenon of dumping takes place when a firm sells a product abroad at a price which is beneath its fair value.” See Devault, “The Administration of US Antidumping Duties: Same Empirical Observations.” 13 *World Economy*, 75, (1990). For a rather elusive definition, see Finger, J. M, wherein the following definition is given: “The pragmatic definition of dumping is the following: dumping is whatever you can get the government to act against under the antidumping law.” at viii.

⁵³ Krishna Raj *supra*.

2.2.5 Conditions of dumping

In order for the dumping to take place, it is maintained that: (i) markets must be segmented so that exporters' home market is sealed against secondary sales, (ii) exporting firm acquires sufficient market power in at least one market to enable it to influence the price, and (iii) export market demand is more elastic than in the home market, i.e. the sales are responsive to lower price.⁵⁴

2.2.6 Effects of dumping on the economy

Dumping may also be analysed in terms of its effect on the particular economic interests of the countries directly involved: the country of origin of the dumped products, the importing country and the third country which produces or sell similar products to the importing country.⁵⁵ Conrad states that to determine the effects of dumping, we have to know how long the dumping takes place.⁵⁶ Further he states that we need to know the motivation of the companies to offer their goods on foreign market at a price below that of their own market or even their production costs.

2.2.7 Effects on the importing country

The effects of dumped products on the economy of the importing country are extensive, direct and maximal.⁵⁷ The one advantaged effect is that low prices benefit the consumers, importers, retailers and domestic manufacturers who use these dumped

⁵⁴ Hoekman, Bernard M. and Michael P. Leidy, "Dumping, Antidumping and Emergency Protection".

⁵⁵ Shang Ming 2003:7-9; Seavy 1970:8; Wang Jingqi 2000:11-14.

⁵⁶ Christian A Conrad, Dumping and Anti-dumping Measures from Competition and Allocation Perspective, *Journal of World Trade* 36(3), 563-575, 2002.

⁵⁷ Tao Meng, Dumping and antidumping regulations with specific reference to the legal framework in South Africa and China, University of the Free State 2006.

merchandises to manufacture finished added-value products in the importing country.⁵⁸ On the other hand, the most effects are negative.⁵⁹ The problem with dumping is that it distorts competition in the importing country.⁶⁰ Depending on the quantity of dumped products and the amount by which the goods are dumped, dumping can harm producers in importing country.⁶¹ The local industries can lose their competitiveness and their markets.⁶² The position of the domestic industry may be made even more difficult where the dumper is able to sustain losses on its export business for long periods because of its “guaranteed” home market profits.⁶³ The result is that the overall productivity and investment strength of the domestic industry may be weakened.⁶⁴

2.2.8 Effects on the exporting country

Provided the market for the exporting country is shielded against arbitrage or retaliation and a consequent price drop (which will neutralise the discrimination), dumping can have clear advantages for the individual exporter.⁶⁵ A profitable home (or third) market provides a platform which may be used to operate in export markets at prices much lower than could have been possible without market segregation.⁶⁶ The low export prices generate further sales which in turn lower the costs of production. Under such conditions, dumping becomes an economic behaviour of great efficiency, the benefits of

⁵⁸ Smit ea 1996; Wellhausen The Community interest test in anti-dumping proceedings of the European Union, *American University International Law*, 2001:1028-1029; Bhala R, Rethinking antidumping law, Geo Wash, *Journal of International Law and Economics*, 1995:11; Stewart Terence P, U.S.- Japan economic disputes: the role of antidumping and countervailing duty laws, *Arizona Journal of International and Comparative Law* 16(3) 689-750; see also Stewart Terence P, Markerl Susan G and Kerewin Michael T, *The GATT Uruguay Round: A Negotiating History (1986-19920: Antidumping, Kluwer Law and Taxation Publishers 7.*

⁵⁹ Osode P C, An assessment of the WTO-consistency of the procedural aspects of South African anti-dumping law and practice, *Pennsylvania State International Law Review* 22(1) 2003-2004:20.

⁶⁰ Booyesen Hercules 87.

⁶¹ Booyesen Hercules 87.

⁶² Booyesen Hercules 87.

⁶³ International Economic/Trade Law : JURM 421 Support material prepared by Saurombe A. 2008, 84.

⁶⁴ International Economic/Trade Law 84.

⁶⁵ International Economic/Trade Law 84.

⁶⁶ International Economic/Trade Law 84.

which do not necessarily reflect a genuine competitive advantage.⁶⁷ The benefits of dumping for the exporting country's economy are that domestic industries develop production capacities which far exceed the size of the national market.⁶⁸ This makes possible high economic growth and high production and employment levels, even in periods of domestic or global recession.⁶⁹

2.2.9 Effects on the third countries

If dumped products compete with products of the third country in the importing country's market, the demands for the products of the third country will decline.⁷⁰ This result in the third country losing its share in the importing country's market. Producers in the third country will consequently lose their profits.⁷¹ Article 14:1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, provides that an application for anti-dumping action on behalf of a third country should be made by the authorities of the third country requesting action.

2.2.10 The legal effect of dumping

Dumping is itself not illegal.⁷² It is not states which engage in dumping but private individuals and corporations.⁷³ There is no international legal obligation on private firms not to sell their products at dumped prices.⁷⁴ There is also no duty on states to prohibit their nationals from selling their products at dumped prices.⁷⁵ The GATT only

⁶⁷ International Economic/Trade Law 84.

⁶⁸ International Economic/Trade Law 84.

⁶⁹ International Economic/Trade Law 84.

⁷⁰ Seavy 1970:8.

⁷¹ Seavy 1970:8.

⁷² Booyesen Hercules 89; see also Hahn "Assembly-Dumping in der EG und den USA" 1991 (Heft 9) recht der Internationalem Wirtschaft 739 at 740.

⁷³ Booyesen Hercules 89.

⁷⁴ Booyesen Hercules 89.

⁷⁵ Booyesen Hercules 89.

condemns dumping if it causes or threatens material injury to an established industry in the territory of a state, or materially retards the establishment of a domestic industry.⁷⁶ In such a case, the importing state is allowed to adopt measures which will counter the effect of the dumping.⁷⁷

2.3 Anti-dumping laws

The successful dismantling of the tariff walls in the industrialised countries over the past forty years has led to increasing government recourse to other trade measure which previously posed little threat to the functioning of the international trade system. Viewed from a global perspective, the most popular among such trade measures undoubtedly is the use of antidumping laws.⁷⁸ Article VI of the GATT allows GATT member states to utilise “antidumping” duties to offset the margin of dumping of dumped goods, provided that it can be shown that such dumping is or threatens to cause “material injury” to competing domestic industries. Anti-dumping laws refers to a totality of acts and regulations that prohibit unfair competitive activities.⁷⁹ Anti-dumping laws although written and implemented at the national level, generally are governed by the General Agreement on Tariffs and Trade (GATT).⁸⁰ The aim is always to protect the domestic economy and industries from being harmed and safeguard the normal international trade order.⁸¹ Therefore, anti-dumping laws are the product of a conflict between two policy goals namely: the development and maintenance of open and nondiscriminatory world trade and the safeguarding of national industries and labour from unfair competition.⁸² Anti-dumping laws consists of two aspects. One is using the norm of the law to eliminate the injury that dumping causes effectively, protecting domestic

⁷⁶ GATT 1947 Article VI (1).

⁷⁷ GATT 1947 Article VI (1).

⁷⁸ Jackson John H and Vermulst Edwin A *supra*.

⁷⁹ Tao Meng 2006 :25 *supra*.

⁸⁰ Jagdish Bhagwati and Robert E Hudec , Fair Trade and Harmonisation. Prerequisites for Free Trade? Volume 2 Legal Analysis, The MIT Press, Cambridge, Massachusetts, London, England.

⁸¹ Oudsten 1989:329; Wang Jingqi 2000:17; Osode 2003-2004:21.

⁸² Bryan and Boursereau 1985:700.

producers' rights.⁸³ The other aspect is to align a country's anti-dumping laws with international standards, in order not to hamper international trade by abusing anti-dumping measures.⁸⁴

2.4 Characteristics of anti-dumping laws

Anti-dumping laws have four characteristics:⁸⁵

First, anti-dumping laws originate from domestic and international laws. Domestic laws refer to the specific laws regulations of a country, such as its foreign trade law, administrative decrees, or tariff laws. International laws refer to anti-dumping instruments of GATT, namely the GATT Anti-dumping Regulation and WTO anti-dumping Agreement. These two systems of laws affect each other in that domestic anti-dumping laws contextualize the development of international anti-dumping laws while international anti-dumping laws restrict the application of domestic anti-dumping laws.

Secondly, anti-dumping laws belong to the category of economic administrative law. That is, whether a country has a special law about anti-dumping or not, generally, some of the laws such as tariff law, foreign trade law, and administrative decrees, will contain anti-dumping provisions. At the same time, the administration of a country's anti-dumping laws usually is the implementation of anti-dumping international laws.

Thirdly, anti-dumping laws do not relate to the parties in an import and export contract, but to the exporter and producer of similar goods in the importing country. The acts of

⁸³ Tao Meng 2006:26.

⁸⁴ Wang Jingqi 2000:18-19.

⁸⁵ Wang Jingqi 2000:18-19; Shen Muzhu 2002:471, Tao Meng 2006:26.

the exporter can injure the interest of the producer. No other laws can safeguard this interest, only anti-dumping laws can do it.⁸⁶

Fourthly, the aim of anti-dumping laws is to protect the importing country's economy and industry. According to Lantz, anti-dumping duties serve three purposes namely; they protect domestic industry and jobs in the short run from the effects of unfair pricing from abroad. Because nations have a particular interest in protecting domestic industries from unfair competition, especially the governments of those nations rely heavily on the support of domestic industries for political power.⁸⁷ The second purpose is connected to the first namely, anti-dumping duties prevent foreign producers from dumping products into the importing country. Finally, anti-dumping duties ultimately, protect the consumer from higher prices. This is because after the firms of the importing country lose considerable market share or are driven from the market by the dumping of the foreign firms, the foreign firms will recoup their initial losses by charging higher prices.⁸⁸ Therefore anti-dumping instrument is a legal measure taken by the importing country to protect itself. However, this measure must be bound to reasonable constraints otherwise, it will be abused and become a barrier to international trade.⁸⁹

2.5 Anti-dumping as a trade policy

Anti-dumping is a trade policy where the filing, the legal decision and the protective impact is endogenous.⁹⁰ A foreign industry can almost guarantee that it will not be subject to anti-dumping duties if it charges sufficiently high prices in its export markets.⁹¹ On the other hand a domestic industry might resist lowering its prices because doing so

⁸⁶ Wang Jingqi 2000:17-18, Shen Muzhu 2002:471-472.

⁸⁷ Hamilton 2003:265; Osode 2003-2004:21.

⁸⁸ Lantz 1994-1995:998-999.

⁸⁹ Wang Jingqi 2000:19-20.

⁹⁰ Blonigen Bruce A and Prusa Thomas J 2001, *Antidumping*, Working Paper 8398, NBER Working Paper Series, National Bureau of Economic Research, available at www.nber.org/papers/w8398.

⁹¹ Blonigen Bruce A and Prusa Thomas J 2001 *supra*.

will increase chances of winning an anti-dumping case. In addition the same industry might lay-off workers than expected as doing so indicates injury.⁹²

Anti-dumping as a trade policy instrument has a long history. The first anti-dumping legislation was designed and brought into force by Canada in 1904 and subsequently in New Zealand (1905) Australia (1906), US (1916) and UK (1921).⁹³ However, it remained relatively seldom-used instrument of trade policy until well after the advent of GATT 1947.⁹⁴ Anti-dumping first became a significant GATT issue at the Kennedy Round. Anti-dumping policy has become one of the most controversial aspects of the post-war multilateral trading system.⁹⁵ It remains one of the few, but most frequently used, forms by which countries can impose new trade restrictions.⁹⁶ The general argument for the inclusion of anti-dumping in the multilateral trade regime can be broken into two distinct areas.⁹⁷ Advocates argue that dumping (as defined within the GATT) is an unpleasant trade practice which must be combated through discriminatory duties that bring foreign prices up to their “normal” value.⁹⁸ Others argue that anti-dumping is a useful “safety valve” for protectionist pressures in economies which have committed themselves to an open trading system. Critics of anti-dumping question the economic rationale behind the procedures by pointing out that price discrimination and selling below production costs are normal business practices in many situations.⁹⁹

⁹² Blonigen Bruce A and Prusa Thomas J 2001 *supra*.

⁹³ Bhat T P. Dr, *Spread of Anti-dumping, Containment and Reform*, Foreign Trade Review 2004; see also Gene M Grossman and Elhanan (1995), The Trade Wars and Trade Talks, *Journal of Political Economy*, 103(4), pp 675-708; Stewart Terence P, Markerl Susan G and Kerewin Michael T, The GATT Uruguay Round: A Negotiating History (1986-19920: Antidumping, Kluwer Law an Taxation Publishers,9.

⁹⁴ Bhat T P *supra*.

⁹⁵ Moore Michael O, Professor of Economics and International Affairs, The George Washington University: Paper prepared for The Economics of the Doha Round and the WTO 2005.

⁹⁶ Moore Michael 2.

⁹⁷ Moore Michael 5.

⁹⁸ Moore Michael 5.

⁹⁹ Moore Michael 5.

2.6 The prolific use of Antidumping

Anti-dumping is playing an increasingly important role in trade protection in that more anti-dumping laws are adopted and more investigations are initiated and measures imposed.¹⁰⁰ The past two decades have seen, inter alia, three changes in the world trading system: significant reduced traditional trade barriers such as tariff, the proliferation of the adoption of anti-dumping laws and of the use of anti-dumping instruments by national governments, and the dramatically increasing contribution by developing countries to that proliferation.¹⁰¹

Concern is growing internationally that anti-dumping is not being used in the spirit of the GATT rules, that it is operating as a *de facto* protectionist device rather than a means of preventing injury from imports priced below levels in the country of origin.¹⁰² Xuan Gao argues that the alleged rationale underlying anti-dumping i.e. to offset unfair and anti-competitive trade practices has little to do with fairness, nor with level playing fields. Further, that the discriminatory treatment of the dumped products of foreign companies is not only incompatible with national competition laws but also with the WTO.¹⁰³ Anti-dumping complaints have emerged as the most wide-spread impediments to international trade.¹⁰⁴ The WTO Secretariat reported that during the period 1 July — 31 December 2008, the number of initiations of new anti-dumping investigations showed a 17 per cent increase compared with the corresponding period of 2007.¹⁰⁵ The number of new measures applied also increased between these periods. In particular, during July — December 2008, 15 WTO Members reported initiating a total of 120 new investigations, compared with 103 initiations reported by 14 Members for the

¹⁰⁰ Gao Xuan, *The Proliferation of Anti-Dumping and Poor Governance in Emerging Economies; Case Studies of China and South Africa*, Discussion Paper 43, the author and Nordiska Afrikainstitutet 2009.

¹⁰¹ Moore Michael 7.

¹⁰² Finger M J, 189.

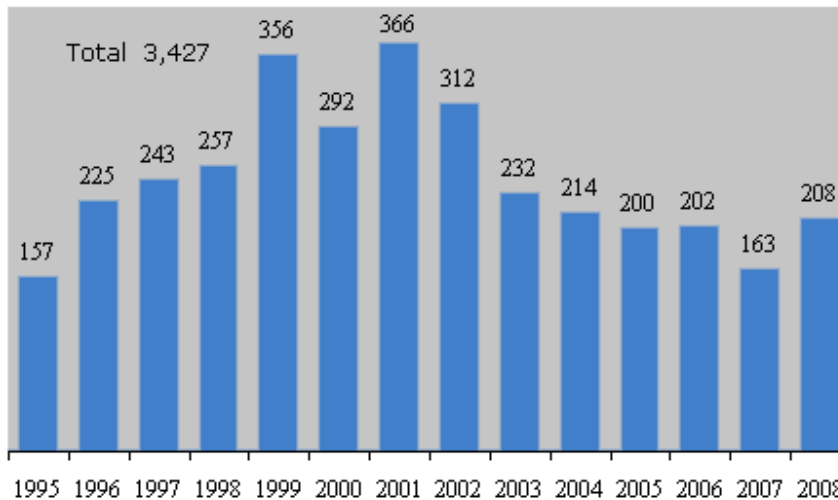
¹⁰³ Hindley 1988: Bhagwati Protectionism, MIT Press: Cambridge, 1988.

¹⁰⁴ Kerr William A and Gaisford James D, *Handbook on International Trade Policy*, Estey Centre for Law and Economics in International Trade, pg 341. See also Blonigen and Prusa 2003.

¹⁰⁵ WTO: 2009 Press Releases, Press/556, 7 May 2009, Anti-Dumping, available at www.wto.org.

corresponding period of 2007.¹⁰⁶ On a yearly basis, there were 208 initiations of new anti-dumping investigations in 2008, as compared to 163 in 2007 and 202 in 2006 (see chart 1).¹⁰⁷

Chart 1 ANTI-DUMPING NUMBER OF INVESTIGATIONS INITIATED 1995 — 2008



Source: WTO Press Releases: semi-annual reports of Members to the ADP Committee. The anti-dumping semi-annual reports by Members for the period 1 July - 31 December 2008 can be found under document series document series [\(G/ADP/N/180\)](#).

The Members reporting the highest number of new initiations during July-December 2008 were India, reporting 42, followed by Brazil, reporting 16, China (11), Turkey (10), Argentina and the European Communities (9 each), Indonesia (6), Ukraine (4), Pakistan and the United States (3), Australia and Colombia (2 each), and Canada, Korea and Mexico (1 each). China was the most frequent subject of the new investigations, with 34 new initiations directed at its exports.¹⁰⁸

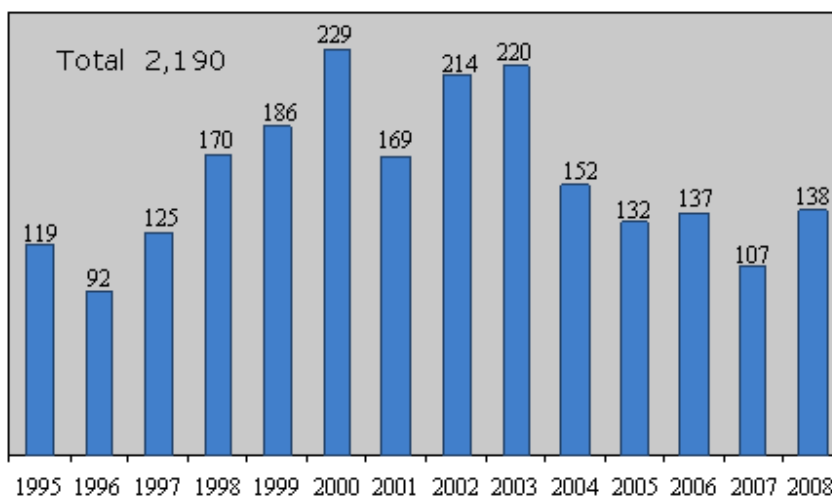
¹⁰⁶ WTO 2009 *supra*.
¹⁰⁷ WTO 2009 *supra*.
¹⁰⁸ WTO 2009 *supra*.

This was a 17 per cent decrease from 40 new investigations opened in respect of exports from China during July — December 2007. Concerning the products affected by these new investigations, the most frequent subjects during the second half of 2008 were in the base metals sector (43 initiations), the chemicals sector (22 initiations), textiles sector (19 initiations) and plastic and rubber sector (14 initiations).¹⁰⁹ A total of 11 Members reported applying 81 new final anti-dumping measures during the second semester of 2008, 45 per cent higher than the 56 new measures reported by 14 members for the corresponding period of 2007.¹¹⁰

On a yearly basis, there were 138 final anti-dumping measures in 2008 as compared to 107 in 2007 and 137 in 2006 (see chart 2).

Chart 2

ANTI-DUMPING NUMBER OF FINAL MEASURES 1995 — 2008



Source: WTO Press Releases: semi-annual reports of Members to the ADP Committee. The anti-dumping semi-annual reports by Members for the period 1 July - 31 December 2008 can be found under document series document series [\(G/ADP/N/180\)](#).

¹⁰⁹ WTO 2009 *supra*.

¹¹⁰ WTO 2009 *supra*.

The sector most frequently affected by the new measures applied during July — December 2008 was the chemicals sector, which accounted for 26 of 81 new measures reported.¹¹¹ The base metals sector was subject to 13 new measures, the plastics and rubber sector and the pulp and paper sector were tied for third place, subject to 11 new measures each.¹¹² They were followed by the textiles sector which was subject to 10 new measures and the machinery and electrical equipment sector, subject to 5 measures. India applied 13 of the 26 new measures on products in the chemicals sector, Japan and the United States applied 4 measures each, Korea applied three measures and the European Communities applied two measures, in respect of this sector.¹¹³

2.7 Why do countries adopt an anti-dumping law?

Countries may adopt and use anti-dumping laws because of a retaliation motive.¹¹⁴ In particular, some of the new users of anti-dumping today e.g. Brazil, China, India and Mexico) have been heavily targeted by anti-dumping measures in the 1980s and 1990s by traditional users like the European Union (EU) and the United States of America (USA).¹¹⁵ Therefore the proliferation of anti-dumping laws could be part of a “tit-for-tat” strategy where the adoption of anti-dumping laws is driven by the fact that they felt “victimised” by the use of anti-dumping by others against their exporters.¹¹⁶ The adoption of anti-dumping laws may entail a substitution effect i.e. when countries agree to permanently reduce tariffs, they may want to keep their options open and replace permanent tariffs with another form of trade protection that they can use when the need

¹¹¹ WTO 2009 *supra*.

¹¹² WTO 2009 *supra*.

¹¹³ WTO 2009 *supra*.

¹¹⁴ Hylke Vandenbussche, vandenbussche@core.ucl.ac.be and Maurizio Zanardi, Department of Economics, Tilburg University Netherland m.zanardi@uvt.nl, What Explains the Proliferation of Antidumping Laws? Draft June 2007.

¹¹⁵ Hylke Vandenbussche and Maurizio Zanardi *supra*.

¹¹⁶ Hylke Vandenbussche and Maurizio Zanardi *supra*.

arises to do so.¹¹⁷ As the number of countries with an anti-dumping law increases over time, it may become more attractive for a country without an anti-dumping law to implement one.¹¹⁸ Prusa referred to it as the “club effect”.¹¹⁹ Anti-dumping policies are popular because they are easy to launch and the domestic authorities have almost a free hand in calculating and imposing the duties. Only a few large firms in the importing-competing industries need to file a complaint, and different levels of anti-dumping duties could be imposed on specific products from specific firms from specific countries.¹²⁰

2.8 Effects of anti-dumping on trade

Anti-dumping protection can give rise to trade diversion.¹²¹ This implies that anti-dumping leads to a shift in trade for the country of origin. Anti-dumping protection results in depressed exports from the importing country to the benefit of exports from the exporting country.¹²² Anti-dumping laws not only effectively protect domestic industry, but also have a significant effect on exporters. Specifically, anti-dumping laws may create two crucial incentives for exporters.¹²³ First, anti-dumping law may distort an exporter’s marketing decisions.¹²⁴ An exporter might reduce its exports and increase its home market sales to minimize the risk of being named as a respondent in an anti-dumping action. In turn, the price of its product in the importing country rises, reducing competitive pressure on producers in that country, while the price of its product in its home market falls. Secondly, anti-dumping law may distort an exporter’s decision about

¹¹⁷ Hylke Vandenbussche and Maurizio Zanardi *supra*.

¹¹⁸ Hylke Vandenbussche and Maurizio Zanardi *supra*..

¹¹⁹ Hylke Vandenbussche and Maurizio Zanardi *supra*..

¹²⁰ Kerr William A and Gaisford James D. 341.

¹²¹ Hylke Vandenbussche, and Maurizio Zanardi *supra*.

¹²² *Ibid*.

¹²³ Bhala 1995:18.

¹²⁴ Bhala1995:18.

foreign direct investment.¹²⁵ If the importing country represents a significant market, the exporter may relocate its production facilities there.¹²⁶

2.9 Anti-dumping and the Multilateral System

The political importance of antidumping within the multilateral trading system is evident. In particular, antidumping duties are an internationally-recognised exception to three core WTO principles namely, bound tariff commitments, most-favoured-nation (MFN) and national treatment.¹²⁷ The Doha Round WTO Ministerial Declaration in 2001 succeeded in putting anti-dumping legislation back on the table for further negotiations.¹²⁸ The negotiating parties can be broadly divided into two groups, the US and a group of countries somewhat euphemistically called the 'Friends of Anti-dumping'.¹²⁹ WTO members have called for negotiations on anti-dumping measures in the Doha Development Round.¹³⁰ The desired reforms will be the first since the 1994 Uruguay Round Agreement on Anti-Dumping.¹³¹ The negotiations aim to clarify ambiguities in the agreement and foster greater transparency in the use and reporting of anti-dumping measures. However, WTO members are negotiating with disparate interests at heart. Some countries want to maintain the strength and efficacy of anti-dumping measures while others want reforms that will curtail the use of such measures.¹³²

¹²⁵ Bhala 1995:19

¹²⁶ Tao Meng 2006:28

¹²⁷ Moore Michael O, Professor of Economics and International Affairs, The George Washington University: Paper prepared for The Economics of the Doha Round and the WTO 2005.

¹²⁸ Kerr William A and Gaisford James D, 345.

¹²⁹ Kerr W and Loppachere L J 2004 Antidumping in the Doha Negotiations: 'Fairy Tales at the WTO,' *Journal of World Trade*, 38(2), 211-244).

¹³⁰ Global Trade Insights, Centre for International Development at Harvard University, available at www.cid.harvard.edu/cidtrade/index.html.

¹³¹ Global Trade Insights *supra*.

¹³² Global Trade Insights *supra*.

2.10 Conclusion

This chapter has shown that the introduction of a product into the commerce of another country at less than its normal value is unfair trade practice. WTO members are allowed to impose measures which are trade restrictive although such measures are against the cannons of the GATT which is trade liberalization. Further, although intended to prepare a level playing field in international trade, anti-dumping has been a tool used by governments to protect their domestic industries. This has lead economist to conclude that anti-dumping does not address unfair trade but protectionism of domestic industry. Furthermore, besides that dumping benefits the consumer and importers of intermediate inputs for production of final products, it is not in the long run interest of the country as it leads to trade diversion and depressed markets. For these reasons, the economists' view as will be clear from the following chapters, might not prove protectionism for domestic industry as most of SACU member states in particular Botswana has little or no industry at all to instigate an anti-dumping investigation.

CHAPTER THREE

REGULATION OF ANTI-DUMPING IN SACU

3.1 Introduction

World Trade Organisation (WTO) members are permitted to apply trade restrictive measures in certain exceptional circumstances.¹³³ For instance, a member may apply safeguard measures to protect its domestic industry from increased imports and may impose an anti-dumping duty to protect its industry from dumped imports. Trade remedies such as anti-dumping, countervailing and safeguard actions are instruments critical for any government to protect jobs and investment.¹³⁴ As such although these measures are, at first impression, contrary to the WTO's ultimate goal of trade liberalization, they serve essential functions, such as facilitating long-term trade liberalization by providing a temporary remedy for harm caused by certain imports or governmental measures.¹³⁵

Dumping, despite its name, has nothing to do with the importation of inferior, defective, or hazardous goods.¹³⁶ Dumping is defined as a situation where imported goods are being sold at prices lower than in the country of origin, and also causing financial injury to domestic producers of such goods.¹³⁷ Countervailing investigations are conducted to determine whether to impose countervailing duties to protect a domestic industry

¹³³ Yuka Fukunaga, An "Effect-Based Approach" To Anti-Dumping: Why Should we Introduce a "Mandatory Lesser Duty Rule"? *Journal of World Trade*, Vol 38 (3): 499, April 2004.

¹³⁴ www.itac.org.za.

¹³⁵ Yuka Fukunaga *supra*.

¹³⁶ www.itac.org.za.

¹³⁷ Act 71 of 2002 s1, WTO Anti-Dumping Agreement, Agreement On Implementation Of Article VI Of The General Agreement On Tariffs And Trade 1994, Article 1, Article VI of GATT 1994. See also SADC Trade Protocol on Trade Article 18.

against the unfair trade practice of proven subsidised imports from foreign competitors that cause material injury to a domestic producer.¹³⁸ The last trade remedy, the safeguard measure, can be introduced to protect a domestic industry against unforeseen and overwhelming foreign competition and not necessarily against unfair trade, like the previous two instruments.¹³⁹ In the WTO system, a member may take a safeguard action, which is, restricting imports temporarily in the face of a sustained increase in imports that is causing serious injury to the domestic producer of like products.¹⁴⁰ Safeguard measures are universally applied to all countries, unlike anti-dumping and countervailing duties that are aimed at a specific firm or country.¹⁴¹

In the SACU, ITAC is not as active in using countervailing and safeguards instruments as in antidumping actions.¹⁴² The new SACU Agreement has important implications for the anti-dumping regime within the customs union.¹⁴³ It provides for a number of new institutions for the custom union.¹⁴⁴ It requires member's states to develop legislation on contingency trade remedies such as anti-dumping for the region and to establish national bodies to administer these remedies within the different countries.¹⁴⁵ The new SACU Agreement makes provision for greater consultation on all matters of common concern, including matters pertaining to anti-dumping actions. The use of anti-dumping in SACU has always been in accordance with existing WTO rules. The SACU Council of Ministers has requested the Commission to continue taking all anti-dumping decisions on behalf of all SACU Members.¹⁴⁶ In undertaking anti-dumping

¹³⁸ Countervailing Agreement. WTO Legal Texts. See also www.itac.org.za.

¹³⁹ Safeguard Agreement, WTO Legal Texts.

¹⁴⁰ Safeguard Agreement *supra*..

¹⁴¹ www.itac.org.za.

¹⁴² Chief Commissioner of ITAC, Address To The 5th Anniversary of ITAC on 16th October 2008 Available at www.itac.org.za.

¹⁴³ Jobert Niel, *supra*.

¹⁴⁴ Jobert Nile *supra*.

¹⁴⁵ Jobert Niel *supra*.

¹⁴⁶ Brink 2008.

investigations, the whole of the SACU industry is taken into consideration.¹⁴⁷ This chapter gives an overview of SACU, examines the jurisdiction and mandate of ITAC, SACU institutions, and the regulation of antidumping within SACU.

3.2 An overview of SACU

The governing treaty in SACU is the SACU Agreement as signed by the Heads of State (or representatives of Member States)¹⁴⁸ on the 21 October, 2002 and came into effect in July 2004. The SACU Council of Ministers agreed that SACU should be notified to the WTO under Article XXIV of the GATT.¹⁴⁹ Following this, SACU was officially notified to the WTO on 25 June 2007, after ensuring legal and practical requirements for SACU to be notified to the WTO.¹⁵⁰

The five Members of the SACU have close economic relations going back over a century.¹⁵¹ The defining characteristic of the SACU is the economic dominance of South Africa in contrast to the size of the other four members.¹⁵² The BLNS depend heavily on South Africa for a significant proportion of their trade, investment and in some cases (migrant) employment.¹⁵³ According to the trade policy review of SACU published by the WTO Secretariat on 4th November 2009, intra-SACU trade has been on the increase since 2003. However, more than 95% of the commercial flows within

¹⁴⁷ Remarks by Dr Alistair Ruiters, Director-General, Department of Trade and Industry, South Africa, on behalf of SACU, *SACU Trade Policies, Trade policies by measure*.

¹⁴⁸ Entered into between the Governments of Botswana, Lesotho, Namibia, Swaziland and South Africa, the Preamble to the SACU Agreement 2002

¹⁴⁹ SACU Factual Review by the World Trade Organization, (WTO), Committee on Regional Trade Arrangements (CRTA), 20 – 21 April 2009, Geneva, Switzerland.

¹⁵⁰ WTO Committee on Regional Trade Arrangements (CRTA), SACU Factual Review by the World Trade Organization, 20 – 21 April 2009, *supra*

¹⁵¹ Robert Kirk, Trade Policy Adviser, SADC Secretariat E-mail: rkirk@sadc.int, Matthew Stern, Economist, World Bank, South Africa Country Office E-mail: mstern@worldbank.org The New Southern African Customs Union Agreement Africa Region Working Paper Series No. 57 June 2003.

¹⁵² Robert Kirk, and Matthew Stern, *supra*.

¹⁵³ Robert Kirk, and Matthew Stern, *supra*.

the customs union involved South Africa as a destination or supplier.¹⁵⁴ South African companies dominate the business landscape in the BLNS. The BLNS also source most of their imports from South Africa, although their exports are more geographically diverse. Moreover, the commodity pattern of South Africa's exports to the BLNS differs significantly from its exports to the rest of the world. Whereas South Africa continues to export predominantly resource-based goods, the BLNS represent a significant market for South African consumer goods and services.¹⁵⁵

3.3 SACU institutions.

The establishment of the SACU institutions is an integral part of the achievement of the SACU objectives as outlined in Article 2 of the SACU Agreement. In particular, these institutions underpin the principle of joint decision making on SACU matters. For instance, the Tariff Board will allow for all member states to participate equally on tariff setting.

3.3.1 SACU Council of Ministers

The Council of Ministers¹⁵⁶ consists of Ministers of Finance and Trade from each Member State. It is the supreme governing body that guides the policy direction and functioning of SACU. One of the Council's functions is to approve customs tariff and duty rebates, refunds and drawbacks, as well as trade related remedies such as anti-dumping actions.

¹⁵⁴ Willemien Denner, *tralac* Researcher, Non-tariff barriers to intra-Southern African Customs Union (SACU) trade. Available at www.tralac.org

¹⁵⁵ Robert Kirk, and Matthew Stern *supra*.

¹⁵⁶ SACU Agreement s8.

3.3.2 SACU Commission

The Commission¹⁵⁷ consists of senior officials at the level of Permanent secretary, Directors General, Principal Secretaries or other officials of similar rank from the Ministries of Finance and Trade from each Member State. The Commission is responsible for the implementation of the 2002 SACU Agreement and facilitates the implementation of the decisions of the Council. The Commission supervises and oversees the work of the SACU Secretariat.

3.3.3 The Secretariat

The Secretariat¹⁵⁸ is responsible for the day-to-day administration of SACU, co-ordinate and monitor the implementation of Council and Commission decisions and assists in the harmonization of national policies that relate to SACU.

3.3.4. Tariff Board

The Tariff Board¹⁵⁹ is an independent institution consisting of experts drawn from the Member States. The Tariff Board is responsible for making recommendations to the Council on the level and changes of customs, anti-dumping, countervailing and safeguard duties on goods imported from outside the Common Customs Area, and rebates, refunds, or duty drawbacks based on the directives given to it by the Council as provided for in Article 8 of the SACU Agreement. The Tariff Board is yet to be established. According to the SACU Executive Secretary, Tswelopele Moremi, it was

¹⁵⁷ SACU Agreement s9.
¹⁵⁸ SACU Agreement s10.
¹⁵⁹ SACU Agreement s11.

anticipated that the Tariff Board would be operational by the end of 2009.¹⁶⁰ However, at the time of writing this paper, it had not been established.

3.3.5. Tribunal

The 2002 SACU Agreement makes provision for the establishment of an ad hoc Tribunal, which reports directly to the Council. It will adjudicate on any issue concerning the application or interpretation of the 2002 SACU Agreement or any dispute arising there under at the request of the Council. Its determinations will be final and binding. The Tribunal will also, at the request of the Council, consider any issue and furnish the Council with its recommendations. It was anticipated that it will be operational by March 2009.¹⁶¹ However at the time of writing this paper, it is still not operational. In the interim all disputes have been resolved bilaterally.¹⁶²

3.3.6. Technical Liaison Committee

There are five Technical Liaison Committees, which have to assist and advise the Commission in its work. They include Agriculture, Customs, Trade and Industry, Transport and Finance liaison committee.

¹⁶⁰ SACU Composition: http://www.sacu.int/main.php?include=council_of_ministers.html. See also SACU consolidates Before Centenary, an interview of SACU Executive Secretary, Tswelepele with New Era on 20th March 2009.

¹⁶¹ SACU Composition *supra*.

¹⁶² Brink, Gustav (2007), International Trade Dispute Resolution: Lessons from South Africa, ICTSD Dispute Settlement and Legal Aspects of International Trade series, International Centre for Trade and Sustainable Development, Geneva, Switzerland.

3.3.7 National Bodies

In addition to the above supranational institutions, the Agreement also requires member states to establish specialized, independent and dedicated national bodies.¹⁶³ The National Bodies are to carry out preliminary investigations and recommend any tariff changes necessary to the Tariff Board. It will then be possible for companies or applicants in each of the SACU states to bring such applications directly to their “National Bodies” (which will investigate the matter and refer it to the Tariff Board) as opposed to the present dispensation that it can only be done via ITAC in South Africa.¹⁶⁴ National Bodies are in the process of being developed. Common procedures and capacity is being developed to ensure efficient and transparent functioning of the National Bodies.

3.4. Jurisdiction and mandate of ITAC

ITAC is a juristic person and a statutory body that bears specialist responsibility for the administration of international trade.¹⁶⁵ The International Trade Administration Act (ITA Act)¹⁶⁶ established the International Trade Administration Commission of South Africa (ITAC).¹⁶⁷ ITAC has jurisdiction throughout the Republic, it is a juristic person and exercise its functions in accordance with the Act and other relevant law.¹⁶⁸ The purpose of the Act is to provide for the functions of the Commission and for the regulation of its procedures; to provide for the implementation of certain aspects of the Southern African Customs Union (SACU) Agreement in the Republic; to provide, within the framework of

¹⁶³ SACU Agreement s14.

¹⁶⁴ Riaan de Lange and Gerhard Erasmus Trade Law Centre for Southern Africa (tralac) South Africa, Doing Business in the Southern African Customs Union (SACU): A Brief Analysis of South African Legislation, International Trade Centre UNCTAD/WTO, Background Working Paper Series, World Export Development Forum, October 2007.

¹⁶⁵ International Trade Administration Commission v Scaw South Africa (Pty) Ltd and Bridon International Limited, CCT 59/09 [2010] ZACC 6,

¹⁶⁶ Act 71 of 2002.

¹⁶⁷ Act 71 of 2002 ss 7 (1), see also ITAC Annual Report 2008-2009 available at www.itac.org.

¹⁶⁸ Act 71 of 2002 ss 7(1).

the SACU Agreement, for continued control of import and export of goods and amendment of customs duties; and to provide for matters connected therewith.¹⁶⁹

The mandate of ITAC is to foster economic growth and development in order to raise incomes and promote investment and employment in the Republic and within the Common Customs Area by establishing an efficient and effective system for the administration of international trade subject to the Act and the SACU agreement.¹⁷⁰

ITAC has the function of conducting investigations of anti-dumping protection, countervailing duties to counteract subsidisation in foreign countries, and safeguard measures when a surge of imports is threatening to overwhelm a domestic producer, in accordance with domestic law and regulations and consistent with WTO rules.¹⁷¹ Thus, the core function of ITAC is to conduct investigations on the following international trade instruments: customs tariffs and rebates; trade remedies (i.e. anti-dumping; countervailing measures and safeguards); as well as import and export control.¹⁷² During the 5th Anniversary of ITAC, in 2008, the Chief Commissioner said that actions against injurious dumping remained a critical government intervention to protect jobs and sustain investments, in cases where action is warranted.¹⁷³ However, he stated that it is important that the instrument is used to level the playing field and not to stifle healthy global competition. The aim of anti-dumping action is to promote fair trade and thereby enhance economic growth and development.¹⁷⁴

In respect of the other two trade remedies instruments i.e. countervailing measures against subsidized imports that cause injury and safeguards against unforeseen import surges that cause serious injury, the Chief Commissioner stated that the Commission is

¹⁶⁹ The Preamble to Act 71 of 2002.

¹⁷⁰ ITAC Act s2; see also Address To The 5th Anniversary Of Itac By The Chief Commissioner on 16 October 2008, available at www.itac.org.za.

¹⁷¹ Act. 71 of 2002 s26; see also Trade remedies available at www.itac.org.za.

¹⁷² Act 71 of 2002 s26..

¹⁷³ Chief Commissioner of ITAC, Address To The 5th Anniversary of ITAC held on 16th October 2008, available at www.itac.org.za.

¹⁷⁴ Chief Commissioner of ITAC address *supra*.

not as active as in antidumping actions. He further stated that countervailing action is a politically sensitive instrument to use as it subjects to scrutiny a foreign government's policies and behavior whereas on antidumping you are examining only enterprise behaviour. Safeguards are actions against fair trade that a domestic industry is unable to cope with, which differentiates it from antidumping and countervailing measures that are actions against unfair trade.¹⁷⁵ Safeguards are used against an unforeseen surge of imports that causes serious injury and are temporary measures to allow the domestic industry to adjust and improve its competitiveness level.¹⁷⁶ Safeguard measures are universally applied to all countries, unlike anti-dumping and countervailing duties that are aimed at a specific firm or country.¹⁷⁷

ITAC is the South African national body under article 14 of the SACU Agreement. The enactment of the ITA Act was followed by the promulgation of detailed anti-dumping regulations in November 2003 to guide ITAC in conducting its anti-dumping investigations.¹⁷⁸ At present all anti-dumping investigations and findings in SACU are undertaken and made by ITAC. ITAC is responsible for decision on trade remedies such as anti-dumping in South Africa and the common customs area. Currently ITAC functions under the enabling clauses in the legislation that allow it to operate as the SACU tariff body pending the full operation of SACU institutions.¹⁷⁹ The SACU anti-dumping law comprises, the WTO Anti-dumping Agreement¹⁸⁰ the ITA Act¹⁸¹, the Anti-Dumping Regulation and the Customs & Excise.¹⁸² South Africa is the only SACU member with anti-dumping law and regulation.¹⁸³

¹⁷⁵ Chief Commissioner of ITAC Address *supra*.

¹⁷⁶ Chief Commissioner of ITAC Address *supra*.

¹⁷⁷ www.itac.org.za

¹⁷⁸ Jobert Niel, *supra*.

¹⁷⁹ Jobert Niel *supra*.

¹⁸⁰ GATT 1994.

¹⁸¹ Act 71 of 2002.

¹⁸² Act 91 of 1964.

¹⁸³ Government Gazette 14th November 2003, General Notice, Notice No. 3197 of 2003.

3.5 The independence of ITAC

ITAC itself is an independent statutory body responsible for international trade administration, including tariff and rebate applications, trade remedies and import and export control.¹⁸⁴ Section 7(2) (3) of the ITAC Act states that:

- (2) The Commission-
 - (a) is independent and subject only to-
 - (i) the Constitution and the law;
 - (ii) any Trade Policy Statement or Directive issued by the Minister in terms of section 5; and
 - (iii) any notice issued by the Minister in terms of section 6; and
 - (b) must be impartial and must perform its functions without fear, favour or prejudice.
- (3) Each organ of state must assist the Commission to maintain its independence and impartiality, and to exercise its authority and carry out its functions effectively.

As an autonomous body it advises the Minister of Trade and Industry on trade policy for SACU, a function that will, when operational, be taken over by the SACU Tariff Board. Should the Minister of Trade and Industry accept the recommendation of the ITAC Commission it is forwarded to the Minister of Finance for implementation. On acceptance by the Minister of Finance, the Commissioner for Customs is instructed to amend the Schedules in the Customs & Excise Act 91 of 1964 by notice in the

¹⁸⁴ Brink, Gustav 2007 *supra.*.

*Government Gazette*¹⁸⁵. The Commission makes a determination of an application independent of political or economic considerations. The Minister of Trade and Industry considers the political and economic considerations and may decide not to impose anti-dumping duties. For example, where the product is essential or needed at the time. In the case of *International Trade Administration Commission v Scaw South Africa (Pty) Ltd with Bridon International Limited*, the Constitutional Court stated that:

Nothing obliges the Minister to follow slavishly the reasoning and findings of ITAC. It is open to the Minister, in making a decision, to weigh in polycentric considerations such as diplomatic relationships, the country's balance of payments, the regional or global trading conditions, goods needed to foster economic growth and so forth. Thus, the recommendation of ITAC may be important but it is not the sole predictor of what the Minister is likely to decide.

It is clear that ITAC only recommends to the Minister of Trade and Industry who has discretion whether to or not to impose anti-dumping after the consideration of the above conditions before asking the Minister of Finance to lift or impose anti-dumping duties on specified goods introduced into the commerce of the customs union area.

3.6 Substantive Elements

Article 1 of the WTO Anti-Dumping Agreement requires that members will only apply anti-dumping measures under circumstances provided for in Article VI of the GATT 1994 and only after investigations which have been initiated and conducted in accordance with the provisions of the Agreement.¹⁸⁶

¹⁸⁵ Customs & Excise Act ss48 and 56.

¹⁸⁶ Jobert Niel, *supra*.

3.6.1. Determination of dumping

Dumping is defined by the ITA Act as the introduction of goods into the commerce of the Republic or the Common Customs Area (being the combined areas of the members of SACU), at an export price that is less than the normal value of those goods.¹⁸⁷

3.6.1.1 Export Price

The first step in any anti-dumping investigation should be the determination of the export price.¹⁸⁸ Export price is defined as ‘the price actually paid or payable for goods sold for export, net of all taxes, discounts and rebates actually granted and directly related to the sale.’¹⁸⁹ This follows from the fact that the exported product is the product under investigation and that all comparisons should therefore be made to this product and its price.¹⁹⁰ Where the export price is unreliable, the export price may be construed on the basis of the price at which the imported products are first resold to an independent buyer.¹⁹¹

3.6.1.2 Normal Value

Once the export price has been calculated, the normal value must be calculated. To calculate the anti-dumping margins that are to be applied, it is necessary to determine what constitutes a “normal price” against which the dumped price must be compared.¹⁹² Normal value is defined as (i) the comparable price payable in the ordinary course of

¹⁸⁷ Act 71 of 2002 s1.

¹⁸⁸ Act 71 of 2002 ss 32(3); Anti-Dumping Regulation s11 and WTO Anti-Dumping Agreement Article 2.4; see also Brink Gustav 2008.

¹⁸⁹ Act 71 of 2002 ss.32(2)(a); see also Bentley Phillip and Silberston Aubrey, Anti-Dumping and Countervailing Action: Limits Imposed by Economic and Legal Theory 12.

¹⁹⁰ Brink Gustav 2008 *supra* 258.

¹⁹¹ Bentley Phillip and Silberston Aubrey 12.

¹⁹² William A Kerr and Laura J Loppacher, Anti-Dumping in the Doha Negotiations: Fairly Tales at the World Trade Organisation, *Journal of World Trade*, Vol 38 (2): 218, April 2004.

trade for like goods intended for consumption in the exporting country or country of origin; or (ii) in the absence of information on a price contemplated in (i), either: (a) the constructed cost of production of the goods in the country of origin when destined for domestic consumption, plus a reasonable addition for selling, general and administrative costs and for profit; or (b) the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative.¹⁹³ The normal value is usually taken to be a comparable price for the 'like' product on the domestic market of the exporting country.¹⁹⁴ However, if the price on the domestic market is not reliable, the normal value can be determined as the comparable price of export of the like product when exported to an appropriate third country, or as the constructed normal value, namely the costs of production plus a reasonable amount for administrative, selling and general costs and for profits.¹⁹⁵

3.6.1.3 Fair comparison

The ITA Act, the Regulation and the Anti-dumping Agreement all require that a "fair comparison" be made between the domestic selling price and the export price.¹⁹⁶ This requires that adjustments must be made to properly compare the prices to each other, including for differences in physical characteristics, taxes and terms and conditions of trade.¹⁹⁷ The Agreement provides that the dumping margin is "normally" to be established by comparing weighted average of domestic price with weighted average of all comparable export prices or by comparison of prices on transaction - to - transaction basis.¹⁹⁸ Weighted average domestic sales prices may be compared with individual export transactions if authorities find a pattern of export prices which differ significantly

¹⁹³ Act 71 of 2002 ss 32(2) (b); see also Stephen Meltzer, Meluleki Nzimande and Robert Wilson SA Trade Relationships and Anti-Dumping, available at www.wwb.co.za/wwb/view/wwb/wwb/en/2011.

¹⁹⁴ Bentley Phillip and Silberston Aubrey *supra* 10.

¹⁹⁵ Bentry Phillip and Silberston Aubrey *supra* 10.

¹⁹⁶ Brink Gustav 2008..

¹⁹⁷ WTO Anti-Dumping Agreement Article 2.4; see also Brink Gustav 2008 *supra*, at 261,

¹⁹⁸ WTO Anti-Dumping Agreement 2.4.2; see also Krishna Raj, Antidumping In Law and Practice, Former Legal Advisor, International Trade, World Bank.

among different purchasers, regions or times and if an explanation is provided why such differences cannot be taken into account in weighted-to-weighted or transaction-to-transaction comparison.¹⁹⁹

3.6.1.4 Margin of dumping

The, margin of dumping is the difference between the normal value and the net export price.²⁰⁰ For this purpose it will be useful to keep the following equation in mind:²⁰¹

Domestic Price		Export Price		Margin
Or	minus	=	of	
Home Market Price				Dumping

The margin of dumping is used to determine the anti-dumping duties to be applied.²⁰² The dumping margin must be calculated as accurately as possible to assess an anti-dumping duty equal to the amount by which the normal value exceeds the export price.²⁰³ Further, the dumping margin serves as an upper limit to the antidumping measures.²⁰⁴

Under the ITAC Anti-dumping Regulation, in cases where only one product is under investigation, the margin of dumping is determined as the amount by which the normal value exceeds the export price.²⁰⁵ On the other hand, in cases where more than one product is under investigations, the Commission normally determines the margin of dumping as follows:

¹⁹⁹ Krishna Raj, *supra*.

²⁰⁰ WTO Anti-Dumping Agreement Article 2.4.2; see also Brink Gustav 2008 *supra*; Bhala 1995:10.

²⁰¹ Krishna Raj *supra*.

²⁰² William A Kerr and Laura J Loppacher, 216.

²⁰³ Oudsten 1989:328; Lantz 1994-1995:998.

²⁰⁴ Oudsten 1989:328.

²⁰⁵ Anti-dumping Regulation S12 (1).

- (a) In the case of products that can be separately identified by the South African Revenue Services, a separate margin of dumping is calculated for each product.
- (b) In the case of products that cannot be separately identified by the South African Revenue Services, the Commission normally;
 - (i) Calculate the margin of dumping for each product separately; and
 - (ii) Determine the weighted average margin of dumping for all products on the basis of the individual export volume of each products.

3.6.2 Determination of injury

Mere existence of dumping is not sufficient for levying antidumping duty. Dumping must also result in material injury to domestic industry producing a like product.²⁰⁶ Dumping is not an uncommon business practice and it is not criminal.²⁰⁷ That is why it is also not prohibited by the WTO Agreement.²⁰⁸ The problem arises when dumping causes injury²⁰⁹ to the domestic manufacturers of the like product. According to WTO Anti-dumping Agreement, as well as ITAC Anti-dumping Regulations²¹⁰ the injury to the importing country's industry can take three form namely, the dumping causes material injury to an established industry, or it threatens material to an established industry and finally it materially retards the establishment of a domestic industry. Thus, even if the exported product constitutes dumping in the SACU industry, the Commission has to determine whether or not such product causes injury to the SACU industry.²¹¹

²⁰⁶ Krishna Raj *supra*.

²⁰⁷ Chief Commissioner of ITAC Address *supra*.

²⁰⁸ Chief Commissioner of ITAC Address *supra*.

²⁰⁹ That is for example loss of market share; decrease in prices; decrease in profits; job losses etc.

²¹⁰ WTO Anti-dumping Agreement Article 3 and ITAC Anti-dumping Regulation s13,14,15.

²¹¹ Bryan and Boursereau 1984-1985:648.

3.6.2.1 Material injury

The basic requirement of determination of material injury is that there be an objective examination of both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products.²¹² This involves the examination of the volume of dumped imports and their effect on domestic prices of like product and the consequent impact of these imports on domestic producers.²¹³ In examining the effect of such imports, the authorities are required to consider whether there has been a significant price-undercutting by dumped imports, or the prices are depressed significantly or price increases, which otherwise would have occurred, were prevented to a significant degree, or whether there has been a significant increase either in absolute terms or in relation to domestic production or consumption.²¹⁴ For considering the impact on domestic industry, the factors to be considered are: actual and potential decline in output, sales, profits, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices, magnitude of margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, and the ability to raise capital or investments.²¹⁵ This list is not exhaustive and no one or several of these factors can necessarily give decisive guidance.²¹⁶ According to the GATT rules there must be a determination of economic injury before anti-dumping duties are levied.²¹⁷ Section 13(1) of the ITAC Anti-dumping Regulation require that in determining material injury to the SACU industry, the Commission should consider whether there has been a significant depression and/or suppression of the SACU industry's prices. In the determination of material injury, the

²¹² WTO Anti-Dumping Agreement Article 3.1

²¹³ Krishna Raj *supra*.

²¹⁴ Krishna Raj *supra*.

²¹⁵ Krishan Raj *supra*.

²¹⁶ Krishan Raj *supra*.

²¹⁷ Blonigen Bruce A and Prusa Thomas J 2001, *Antidumping*, Working Paper 8398, NBER Working Paper Series, National Bureau of Economic Research, available at www.nber.org/papers/w8398.

Commission should further consider whether there have been significant changes in the domestic performance of the SACU industry in respect of the potential injury outlined in section 13(2).²¹⁸

3.6.2.2 Threat of material injury

Article 3.7 of the WTO Anti-dumping Agreement prescribes four factors as illustrative of what the authorities should consider to make a determination of the existence of a threat of material injury. These are:

- (a) a significant rate of increase of dumped imports indicating the likelihood of substantially increased importation;
- (b) substantial increase in the capacity of the exporter indicating likelihood of substantially increased dumped exports to domestic markets taking into account availability of other export market to absorb additional exports;
- (c) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would increase demand for further imports; and
- (d) inventories of the product being investigated.

The list of factors to be considered is not exhaustive consequently national laws may include other factors which are not mentioned in the WTO Anti-dumping Agreement. In terms of the ITAC Regulation a determination of threat of material injury should be

218 These are sale volume, profit and loss, output, market share, productivity, capacity utilization, return on investigations, cash flow, inventories, wages, employment, growth, ability to raise capital and investments.

based on facts and not merely on allegation or remote possibility.²¹⁹ The change in circumstances which would create a situation in which dumping would cause material injury must be clearly foreseen and imminent.²²⁰ For example, if there is convincing reason to believe that there will be, in the immediate future, substantially increased imports of the product at dumped prices.²²¹ Where the Commission makes a determination that the dumping is not causing material injury, the investigation is terminated. On 19 February 2010 the preliminary determination in respect of the investigation into the alleged dumping of picks originating in or imported from India was published.²²² The application was lodged by Usseher Inventions (Pty) Ltd trading as Lasher Tools. According to the release a preliminary determination was made that picks was being dumped on the Southern African Customs Union (SACU) market, but there is currently no threat of material injury to the SACU industry. Accordingly, a preliminary determination recommendation was made to the Minister of Trade and Industry to terminate the investigation.

3.6.2.3 Material retardation of the establishment of an industry

In terms of the ITAC Anti-dumping Regulation, no investigation may be initiated on the basis of the material retardation of the establishment of an industry unless the industry or proposed industry has supplied the Commission with a comprehensive business plan indicating the establishment of such industry in the absence of dumping.²²³ The Commission may request a provisional payment or recommend an anti-dumping duty where the establishment of such industry is materially retarded by dumped imports.²²⁴ However, if significant progress has not been made to establish an industry as

²¹⁹ Anti-Dumping Regulation s14(1).

²²⁰ Anti-Dumping Regulation *supra*.

²²¹ Krishna *supra*.

²²² Tralac available at http://www.tralac.org/cause_data/images/1694/20100222BLNSNotification.pdf.

²²³ Anti-Dumping Regulation s15(1).

²²⁴ Anti-Dumping Regulation s15(2).

proposed above, within one year following the imposition of an anti-dumping duty, the Commission may recommend that the anti-dumping duty be withdrawn.²²⁵

3.6.3 Causality

Another requirement for the determination of injury is that there should be a causal relationship between the dumping and the injury. The WTO Anti-Dumping Agreement require that there must be a demonstration that the dumped imports are, through the effects of dumping, causing injury.²²⁶ 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.²²⁷ The WTO Anti-Dumping Agreement further requires that authorities examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry. Where an injurious dumping is alleged in SACU, there should also be a demonstrated causal link between the dumping and the injury experienced.²²⁸ In considering whether there is a causal link between the dumping and the material injury, the Commission is required to consider all relevant factors including but not limited to:²²⁹

- (a) The change in the volume of dumped imports, whether absolute or relative to the production or consumption in the SAACU market;

²²⁵ Anti-Dumping Regulation s15(2).

²²⁶ WTO Anti-Dumping Agreement Article 3.

²²⁷ WTO Anti-Dumping Agreement *supra*.

²²⁸ ITAC Anti-Dumping Regulation, s16.

²²⁹ Anti-dumping Regulations s16(1).

- (b) The price undercutting experienced by the SACU industry *vis-à-vis* the imported products.
- (c) The market share of the dumped products;
- (d) The magnitude of the margin of dumping; and
- (e) The price of undumped imports available in the market.

The Commission is required to consider all relevant factors other than dumping that may have contributed to the SACU industry's injury and the injury caused by such other factors are not to be attributed to the dumping provided that an interest party has submitted, or the Commission otherwise has, information on such factor or factor. Finally, the Commission should determine whether there is a causal link between dumping and the material injury determined.²³⁰

3.6.4 SACU industry

Article 4 of the WTO Anti-dumping Agreement interprets the term domestic industry as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

- (i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;
- (ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers

²³⁰ Anti-dumping Regulation s16(4).

within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

A complaint against dumping has to be made by or on behalf of the domestic industry.²³¹ In all cases, the injury determination is made in reference to a domestic industry.²³² Thus the extent of the domestic industry has an important influence on the determination of injury.²³³ An application for anti-dumping is brought by or on behalf of the SACU industry.²³⁴ SACU industry means the domestic producers in the SACU as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.²³⁵ A SACU industry excludes a producer related to the importer, exporter or the foreign producer or itself an importer of the productions under investigations.²³⁶ An application is regarded as brought by or on behalf of the SACU industry if at least 25% of the SACU producers by domestic production volume support the application and of those producers that express an opinion on the application, at least 50% by domestic production volume support such application.²³⁷ Therefore any SACU based industry is at liberty to apply to the International Trade Administration Commission of South Africa (ITAC) for a reduction or increase in the rate of duty on products or product inputs and for trade remedies.

²³¹ WTO Anti-Dumping Agreement, Article 4.

²³² Bryan and Boursereau 1984-1985:650

²³³ Tao Meng 2006:82.

²³⁴ Anti-Dumping Regulation ss.7(1).

²³⁵ Anti-Dumping Regulation s.1.

²³⁶ Anti-Dumping Regulation ss 7(2).

²³⁷ Anti-Dumping Regulation ss.7(3).

3.7 Procedural elements

A principal objective of the procedural requirements of the Anti-dumping Agreement is to ensure transparency of proceedings, a full opportunity for parties to defend their interests and adequate explanations by investigating authorities or their determinations.²³⁸ Anti-dumping actions are initiated in domestic institutions.²³⁹ As mentioned above, ITAC is mandated in the interim, to carry out investigations on behalf of all SACU members.

3.7.1 Initiation of anti-dumping investigation

Launching an anti-dumping investigation is not difficult. In many countries, all that is necessary is to petition the government to launch an investigation.²⁴⁰ In SACU, an anti-dumping investigation may be initiated by way of a written application in the form prescribed by the Commission by or on behalf of the SACU industry.²⁴¹ The Commission is also empowered in terms of the Regulations to initiate an investigation without having received a written application if it has sufficient evidence of, or if there is a significant change in circumstances relating to, dumping, material injury, as well as a causal link between such dumping and material injury.²⁴² Once the Commission is satisfied that an application discloses prima facie case of injurious dumping to the SACU industry caused by imports²⁴³, it initiates an investigation by publishing an initiation notice in the Government Gazette.²⁴⁴ The Commission's investigating procedure requires it to, among other things; notify the trade representative of the country from which the dumped imports originate, and to provide a non-confidential

²³⁸ Anti-Dumping Agreement.

²³⁹ William A Kerr and Laura J Loppacher, *supra* 216.

²⁴⁰ Robert W. McGee, February 2002, *Anti-Dumping Laws*, Freedom Daily, Available at <http://www.fff.org/freedom/fd0202f.asp>.

²⁴¹ Anti-Dumping Regulation ss.21.1; see also ss. 26 (1) (c) (i).

²⁴² Anti-Dumping Regulation ss. 3.(3)

²⁴³ Anti-Dumping Regulation ss.26.

²⁴⁴ Anti-Dumping Regulation s. 28.

version of the application to all interested parties.²⁴⁵ The Commission is also required to send questionnaires to all known importers and exporters, for completion by a specified date (usually 30 days from the date of receipt of the questionnaire).²⁴⁶ The purpose of the questionnaires is to enable the Commission to obtain all the information required to make a determination. The Commission usually verifies the information it receives from interested parties.²⁴⁷ During an investigation, any interested party may request an opportunity to make oral representations to the Commission in addition to any of its written representations.²⁴⁸

In terms of Section 30 of the ITA Act, the Commission may make recommendations to the SACU Tariff Board that the application be approved or rejected. The Tariff Board, in turn, will make a recommendation to the SACU Council of Ministers as to the duty, if any, to be imposed.²⁴⁹ The Council of Ministers shall, on such recommendation, approve the duties.²⁵⁰ Section 30 of the ITA Act is currently not in operation as to date no appointments have been made to the SACU Tariff Board.²⁵¹ The SACU Council of Ministers has requested the Commission to continue taking all anti-dumping decisions on behalf of all SACU Members. In practice, the Commission makes its recommendations to South Africa's Minister of Trade and Industry, who upon making a decision, requests the Minister of Finance to implement. Ultimately the implementation is done by the South African Revenue Service (SARS).²⁵² All anti-dumping investigations are required, in terms of the Regulations, to be finalised within 18 months of their initiation.²⁵³ The Commission has revised the time it takes to finalise

²⁴⁵ Anti-Dumping Regulation s. 27.
²⁴⁶ Anti-Dumping Regulation s 29(3).
²⁴⁷ Anti-Dumping Regulation s 19(1)
²⁴⁸ Anti-Dumping Regulation s 26.
²⁴⁹ SACU Agreement s 11(2).
²⁵⁰ SACU Agreement s 20(1).
²⁵¹ Brink Gustav 2008.
²⁵² Chief Commissioner of ITAC Address supra.
²⁵³ Anti-Dumping Regulation s 20.

investigations, down from twelve to six months in the case of tariffs and down from twelve to nine months in the case of trade remedies.²⁵⁴

3.7.2. De Minimis Dumping Margin

Article 5.8 of the WTO Anti-dumping Agreement requires the termination of antidumping investigations if dumping margins are found to be de minimis, which is defined as less than 2% of the export price. Also, investigation shall be immediately terminated where volume of dumped imports is negligible, i.e., if such volume from a particular country is less than 3% of imports in the country, unless countries which individually account for less than 3% of imports collectively account for more than 7% of imports of the like product. In this respect also the WTO Anti-dumping Agreement makes a very positive advance.²⁵⁵

3.7.3 Provision measures

In terms of the Article 7 of the WTO Anti-Dumping Agreement, provisional measures may be applied only if an investigation has been initiated, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments, a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry and the authorities concerned judge such measures necessary to prevent injury being caused during the investigation. Provisional measures may take the form of a provisional duty or, preferably, a security by cash deposit or bond equal to the amount of the anti dumping duty provisionally estimated, being not greater than the provisionally estimated margin

²⁵⁴ ITAC Annual Report 2008-2009 available at www.itac.org.

²⁵⁵ WTO Anti-dumping Agreement Article 5.8. See also Krishan Raj *supra*.

of dumping.²⁵⁶ Provisional duties may be imposed if a provisional affirmative determination has been made of dumping and consequent injury to the domestic industry.²⁵⁷ In SACU, if the Commission makes a preliminary determination that dumping is causing material injury, it will request the Commissioner for the South

African Revenue Service (SARS) to impose a provisional payment in the amount and for the period requested by the Commission.²⁵⁸ Provisional measures may not be imposed within less than 60 days after initiation of an investigation.²⁵⁹ They are normally imposed for a period of six months however, they may be extended to nine months on request of any interested exporter.²⁶⁰

3.7.4 Price undertakings

Price undertaking refers to an agreement between exporters and the authority of the importing country.²⁶¹ The exporters undertakes to voluntarily raise their prices so as to eliminate the margin of dumping or cease to export to the area in question at dumped prices so that the authority is satisfied that the injurious effect of the dumping is removed.²⁶² Proceedings may be suspended or terminated following the receipt of a satisfactory price undertaking from any exporter to revise its prices or to cease exports to the SACU at dumped prices so that the Commission is satisfied that dumping or the injurious effect is eliminated.²⁶³ If an undertaking is violated, the Commission may take expeditious action against such exporter, including the immediate request to the Commissioner of South African Revenue to impose provisional payments.²⁶⁴

²⁵⁶ WTO Anti-dumping Agreement Article 7.2.

²⁵⁷ Bentry Phillip and Silberston Aubrey 14.

²⁵⁸ Customs Act s 57A(1).

²⁵⁹ Anti-Dumping Regulation s.33(1).

²⁶⁰ Anti-Dumping Regulation s.33(2) and (3).

²⁶¹ Oudsten 321.

²⁶² Seavey 130; Bryan and Boursereau 657.

²⁶³ Anti-Dumping Regulation s 39(1).

²⁶⁴ Anti-Dumping Regulation s 39(4).

3.7.5 Definitive anti-dumping duties

An Anti-dumping duty is very similar to an import tariff.²⁶⁵ Duties may be imposed only after a full investigation which has led to a definitive finding of injurious dumping and not by judicial decree.²⁶⁶ Duties are remedial and punitive and for that reason are imposed on a fixed term and may be extended on proof of dumping that causes injury to the home industry affected after a conclusive and fair investigation by a specialist body established for that purpose.²⁶⁷ Anti-dumping duty is provided for in Part 1 of Schedule No.2 and in Sections 55 and 56 of the Customs & Excise Act. It is paid in addition to the customs duty on goods that were “dumped” into South Africa and SACU.²⁶⁸ Definitive anti-dumping duties²⁶⁹ may be imposed after the final determination of the Commission that the imported products constitutes dumping and has caused injury to the SACU industry.²⁷⁰ Thus, the purpose of imposing an anti-dumping duty upon the import of a product is to compensate for the amount by which the product is dumped.²⁷¹ Once the Commission has made an affirmative final determination, it will recommend to the Minister of Trade and Industry that an anti-dumping duty be imposed. The Minister of Trade and Industry will then request the Minister of Finance to impose the applicable anti-dumping duty.²⁷² In terms of the ITA Act, however, all final recommendations should be made to the Southern African Customs Union (SACU) Tariff Board, which, in turn, will make a recommendation to the SACU Council of Ministers. To date no appointments have been made to the SACU Tariff Board.²⁷³ The SACU Council of Ministers has requested the Commission to continue taking all anti-dumping decisions

²⁶⁵ Konings Jozef and Hylke Vandenbussche, Catholic University of Leuven (KULeuven), Department of Applied Economics, Naamsestraat 69, 3000 Leuven, Belgium; hylke.vandenbussche@econ.kuleuven.ac.be.

²⁶⁶ International Trade Administration Commission v Scaw South Africa (Pty) Ltd and Bridon International Limited, CCT 59/09 [2010] ZACC 6.

²⁶⁷ International Trade Administration Commission v Scaw South Africa (Pty) Ltd *supra*.

²⁶⁸ Riaan de Lange and Gerhard Erasmus Trade Law Centre for Southern Africa (tralac) South Africa. Doing Business in the Southern African Customs Union (SACU): A Brief Analysis of South African Legislation. Background Paper Series WEDF International Trade Centre UNCTAD/WTO. 2007.

²⁶⁹ WTO Anti-Dumping Agreement Article 9.

²⁷⁰ ITAC Anti-Dumping Regulation s38.

²⁷¹ Bentley Phillip and Silberston Aubrey 10.

²⁷² Customs Act, ss.55(2) and 56(1).

²⁷³ Brink 2008.

on behalf of all SACU Members.²⁷⁴ These duties may only remain in force for a period of five years from the date of publication of the Commission's final recommendation, unless otherwise specified or unless reviewed prior to the lapse of the five year period.²⁷⁵

3.7.6 Sunset Reviews

In terms of the WTO Anti-dumping Agreement no anti-dumping duty may remain in place for a period exceeding from its imposition or the last substantive review thereof.²⁷⁶ If a sunset review has been initiated prior to the lapse of an anti-dumping duty, such anti-dumping duty remain in force until the sunset review has been finalized.²⁷⁷ A notice indicating that an anti-dumping duty will lapse on a specific date unless a sunset review is initiated is published in the Government Gazette six (6) months prior to the lapse of such anti-dumping duty.²⁷⁸ The Commission informs all interested parties known from the original investigation or last review of the subject product of the imminent lapse of the anti-dumping duty as soon as the notice has been published.²⁷⁹ Interested parties have 30 days from the publication of the notice to request a sunset review.²⁸⁰ If the SACU Industry requests that anti-dumping duty should be maintained, it is required to provide the commission with a proper application containing the necessary information to establish a prima facie case that the removal of the anti-dumping duty will be likely to lead to the continuation or recurrence of injurious dumping.²⁸¹ Thus before an anti-dumping duty may be maintained following a sunset review, it must be shown that there is a likelihood that both dumping and material injury

²⁷⁴ Brink 2008.

²⁷⁵ Anti-dumping Regulation s38.

²⁷⁶ WTO Agreement on the Implementation of Article VI of the General Agreement on Tariff and Trade 1994; see also ITAC Anti-dumping Regulations s53(1).

²⁷⁷ Anti-dumping Regulations s 53(22).

²⁷⁸ Anti-Dumping Regulation s54(1).

²⁷⁹ Anti-Dumping Regulations s 54(2)

²⁸⁰ Anti-Dumping Regulations s 54(3)

²⁸¹ Anti-Dumping Regulation s54(4)

will recur if the duty were to be removed.²⁸² The Commission's recommendation may result in the withdrawal, amendment or reconfirmation of the original anti-dumping duty.²⁸³ In 1998, the sole domestic producer of carbon black lodged an application against the alleged dumping of the products from Egypt, India and Korea. The investigation was initiated on 21 August 1998 and provisional duties were imposed on 5th February 1999. Definitive duties were imposed against all producers in all three countries on 10th September 1999. Since duties remain in place for a period of five years from the date of imposition, the duties would remain in place until 10 September 2004. On 30th May 2004 ITAC published a notice in the Gazette indicating that the anti-dumping duties on carbon black were due to lapse in 2004 and that the industry had 30 days in which to indicate whether it would request a sunset review to be conducted. The domestic industry gave notice that it would request a sunset review to be conducted in respect of Egypt and India but not in respect of Korea, and was granted until 10th March 2004 to submit its properly documented application. On 23rd July 2004, ITAC initiated the sunset review along with an interim review requested by the Egyptian exporter. The final determination of the sunset review was made on the 17th February 2006 which was more than 18 months after the initiation of the review finding that there was no likelihood that dumping would occur if the duties were to be removed. ITAC made its decision available to the industry prior to making a recommendation to the Minister. On this basis, the applicant lodged a judicial review on 19th June 2006. On 21st May 2007 the High Court ruled against ITAC finding that its methodology to determine the likelihood of a recurrence of dumping was flawed.

²⁸² Anti-Dumping Regulations s57(2); see also Brink, G, 2007 *Sunset Reviews in South Africa: New Direction given by the High Court*. Tralac Trade Brief No XXX, Stellenbosch US Printers.

²⁸³ Anti-Dumping Regulation s59.

3.8 Judicial review

WTO Members having antidumping legislation are required to maintain independent judicial, arbitral, administrative tribunals or procedures for, inter alia, the prompt review of administrative actions relating to final determinations and decisions of relating to the duration of Anti-dumping agreement or undertakings.²⁸⁴ The ITAC Anti-dumping Regulation specifically provided for review of preliminary determination. In terms of the Amendment to ITAC Anti-dumping Regulation, interested parties may no longer challenge preliminary decisions or the Commission's procedures prior to the finalization of an investigation in a court of law. A claimant affected by a determination of the Commission may appeal against that determination to a High Court.²⁸⁵

3.9 Conclusion

The SACU Council of Ministers has in the interim asked ITAC to act on behalf of the SACU industry in the investigation of injurious imports and imposition of trade remedy measures such as anti-dumping and safeguards. The reason is that most of SACU institutions are not yet in place. ITAC has on a number of occasions imposed or used anti-dumping measures to remedy the injurious effects of imports to the SACU than other remedies. However, based on the fact that for anti-dumping measures to be imposed, there should be injury to the SACU industry, and taking into account Botswana market size together with the fact that it heavily relies on alien commodities, it might be difficult to prove material injury. The governing trade legislation and policies will be analysed in the next chapter to ensure that the interests and obligations of Botswana both under SACU and WTO are effective.

²⁸⁴ WTO Anti-Dumping Agreement Article 1; see also Krishna supra.

²⁸⁵ Act 71 of 2002 s35.

CHAPTER FOUR

REGULATORY FRAMEWORK OF TRADE IN BOTSWANA

4.1 Introduction

The preamble to the SACU Agreement recognizes the different economic development levels of the member states as well as the need for their integration into the global economy.²⁸⁶ The Government of Botswana views trade as a major engine of growth.²⁸⁷ The recognition that trade plays a significant role in attaining economic growth means that Botswana will continue to advocate for a global environment which supports her strategy to more actively and effectively participate in the global trade. Botswana's participation in the global trade environment and its adoption of relatively open trade policies have been significant factors in promoting economic growth and alleviating poverty.²⁸⁸ The domestic policies define the context in which trade policy will be implemented in the economy.²⁸⁹ Botswana is a member of the WTO and SACU. AS a result it has international and regional obligations which arise from such membership. These obligations are honoured through domestic legislation that governs the imposition of anti-dumping duties and other trade remedies.²⁹⁰ This chapter looks at the regulatory framework of trade. It examines the Standard Import Inspection Regulation (SIIR) and the 2009 Trade Policy to find out if the national body to be established will be effective and its importance.

²⁸⁶ UNCTAD, A Southern African Custom Union (SACU), Regional Cooperation Framework on Competition Policy and Unfair Trade Practices, UNCTAD/DITC/CLP/2005/3, *supra*.

²⁸⁷ World Trade Organisation, Trade Policy Review Body, Trade Policy Review Reports By The Members Of The Southern African Customs Union, WT/TPR/G/222, 30 September 2009, available at www.wto.org.

²⁸⁸ World Trade Organisation, Trade Policy Review Body, Trade Policy Review Reports By The Members Of The Southern African Customs Union, *supra*.

²⁸⁹ World Trade Organisation, Trade Policy Review Body, Trade Policy Review Reports By The Members Of The Southern African Customs Union, *supra*.

²⁹⁰ International Trade Administration Commission v Scaw South Africa (Pty) Ltd *supra*.

4.2 General regulatory framework of trade in Botswana

The Ministry of Trade and Industry retains primary responsibility for formulating and implementing trade and industry policies, especially in areas not covered by SACU Agreement. Within the Ministry the Department of Trade and Consumers Affairs handles foreign trade policy, including multilateral, regional, and bilateral relations; consumers' protection and education; and issues on import permits.²⁹¹ The Department of Industrial Affairs formulates and implements industrial policy including support measures, issues manufacturing licence and is Secretariat to the National Industrial Licensing Authority.²⁹² In essence, the Ministry comprises the Trade Section, which is made up of the International Trade and Internal Trade Directorates and the section for Industry and Cooperative Affairs, which is made up of the Registrar of Companies; Directorate of Industrial Affairs, and Cooperative Development Commissioner.²⁹³ Other institutions that also have important input into trade-related policies include the ministries responsible for finance; mineral resources; transport and communications; and agriculture; as well as the Bank of Botswana.²⁹⁴

4.3 Trade Policy

The Department of International Trade (DTI) was established in September 2003 as a result of the re-organisation of the Ministry of Trade and Industry in recognition of the complexity of international trade issues.²⁹⁵ The Department is responsible for trade policy formulation and its implementation, import control, trade negotiations as well as implementation of international trade agreements. The basic objective of the Department is to ensure that Botswana's exports have improved access to foreign

²⁹¹ World Trade Organization, World Trade Policy Review 2003 SACU, *supra*.

²⁹² World Trade Organization, World Trade Policy Review 2003 SACU *supra*.

²⁹³ World Trade Organisation, Trade Policy Review by SACU- Botswana Report *supra*.

²⁹⁴ World Trade Organisation, Trade Policy Review by SACU- Botswana Report *supra*.

²⁹⁵ Ministry of Trade and Industry, Department of International Trade, Trade Policy and Research available at http://www.mti.gov.bw/index.php?option=com_content&view=article&id=38&Itemid=20.

markets as well as Botswana benefits from her membership to international trade organisations.²⁹⁶ The Department of International Trade consists of four Divisions, namely: the Multilateral Trade (MT), the Regional and Bilateral Trade (RBT), the Trade Policy and Research Division and the General Administration Division that include support staff. The Multilateral Trade Division is the principal section responsible for coordinating the implementation of the WTO Agreements. This division is subdivided into two units, namely; the trade Negotiations in Goods Unit and the Trade Negotiations in Services Unit. Of importance to this paper is the Trade Negotiations in Goods Unit. This unit coordinates the implementation of the GATT, that is, trade in goods and associated agreements *inter alia* trade remedies. The Trade Policy and Research Division deals with the Trade Policy Review Mechanism (TPRM) of the WTO, import and export control, trade remedies (subsidies, antidumping and safeguards).²⁹⁷ Notifications as well as management of the common external tariffs envisaged in the new SACU Agreement and will represent Botswana in the SACU Tariff Board.²⁹⁸ The Trade Policy and Research is also responsible for trade policy formulation and implementation, development of the National Export Strategy, management of the National Committee on Trade Policy Negotiations (NCTPN) and coordinator of the work of the Technical Committees, trade capacity building and training, undertake analytical work and research required for trade negotiations.²⁹⁹ Botswana has a well-established consultative process for formulating trade policies.³⁰⁰ The highest level of this process is the High Level Consultative Council, chaired by the President, and comprising the Vice-President, Ministers, and private-sector representatives.³⁰¹ The Government of Botswana also established a National Committee on Trade Policy and Negotiations in 2003, whose mandate is to provide a forum for stakeholders to discuss and identify

²⁹⁶ Ministry of Trade and Industry, Department of International Trade, Trade Policy and Research *supra*.

²⁹⁷ Ministry of Trade and Industry, Department of International Trade, Trade Policy and Research *supra*.

²⁹⁸ Ministry of Trade and Industry, Department of International Trade, Trade Policy and Research *supra*.

²⁹⁹ Ministry of Trade and Industry, Department of International Trade, Trade Policy and Research *supra*.

³⁰⁰ WTO (2003).

³⁰¹ World Trade Organisation, Trade Policy Review by SACU- Botswana Report *supra*.

positions for Botswana's trade negotiations, and to coordinate the formulation and implementation of trade policy for the implementation of the WTO obligations and regional trade negotiations. Private-sector input in trade and industrial policy (including from small and medium-sized businesses) is channelled through the Botswana Confederation of Commerce, Industry and Manpower (BOCCIM).³⁰²

Botswana's trade policy had been set at regional level until 2010 when its parliament adopted the 2009 National Trade Policy. This National Trade Policy is expected to deal with trade remedies such as anti-dumping. Botswana had never had a national trade policy document to guide her trade relations with other countries. Trade policy positions had been based on various pieces of legislation, official documents, trade negotiation positions and statements by national leaders.³⁰³ The policy intends to facilitate access to markets for Botswana's export of goods and services and enable consumers' access to a wider choice of international goods and services on the best possible terms.³⁰⁴ Presenting the motion, Minister of Trade and Industry, Ms Dorcus Makgato-Malesu said Botswana had never had a national trade policy document to guide her trade relations with other countries.³⁰⁵ She stated that trade policy positions had been based on various pieces of legislation, official documents, trade negotiation positions and statements by national leaders. Therefore, the proposed policy would serve as a framework for Botswana's trade agenda.³⁰⁶ According to Ms Makgato-Malesu, the policy highlighted government stance on trade matters through specific policy statements, guidelines and pronouncements on trade and trade related issues including export development, market access, import substitution, trade facilitation, and rules of origin and customs procedures. The underlying principles for the proposed policy included, among others, the need to achieve export diversification, economic

³⁰² World Trade Organisation, Trade Policy Review by SACU-Botswana Report *supra*.

³⁰³ AGOA News, available at www.agoa.info.

³⁰⁴ BOPA, Parliament Adopts National Trade Policy, available at http://www.gov.bw/cgi-bin/news.cgi?d=20100406&i=Parliament_adopts_national_trade_policy.

³⁰⁵ BOPA, Parliament Adopts National Trade Policy, *supra*.

³⁰⁶ BOPA, *Daily News*, Parliament Adopts National Trade Policy, *supra*.

diversification, free market economy, global competitiveness, private sector development, citizen economic empowerment and poverty reduction.³⁰⁷ She said the policy was shaped by the domestic legislation and policies, as well as Botswana's international trade arrangements. On the domestic front, the policy was influenced by national vision, the national development plan, and the industrial development and competition policies. The policy was further shaped by other initiatives such as the development of the national export strategy for Botswana, the investment strategy for Botswana and the private sector development strategy.³⁰⁸ The policy would be supported and complemented by several pieces of legislation such as the trade and competition acts, the control of goods, Prices and Other Charges Act, industrial property and copy rights and neighbouring acts.³⁰⁹ Some of the core elements in the policy were tariff based measures to support industrial development, achieve balance of payments, and protect domestic producers from unfair trade practices as well as non tariff measures that were ordinarily not meant to restrict trade.³¹⁰

4.4 The Standard Import Inspection Regulation

In April 2009 the Government of Botswana implemented the Standard Import Inspection Regulations (SIIR) in an effort to effectively deal with the dumping of substandard goods in the country.³¹¹ The regulation is aimed at clearing the country of substandard and second-hand commodities.³¹² As mentioned earlier, Botswana is a landlocked country and heavily depends on alien products. This position makes Botswana vulnerable to dumping of goods. If Botswana had a reasonable amount of industries, the position would have been different. The promulgation of the SIIR came in the wake of realizing that the country was being used as a dumping site by unscrupulous traders because of

³⁰⁷ BOPA, Daily News Parliament Adopts National Trade Policy, *supra*.

³⁰⁸ BOPA Daily News, Parliament Adopts National Trade Policy, *supra*.

³⁰⁹ BOPA, Daily news, Parliament Adopts National Trade Policy, *supra*.

³¹⁰ BOPA, Daily news Parliament Adopts National Trade Policy, *supra*.

³¹¹ Sunday Standard Online Edition, *supra*.

³¹² Sunday Standard Online Edition, *supra*.

its dependence on alien commodities.³¹³ Thus, Botswana decided to tighten its rules. As stated above Botswana is through BOBS, implementing the SIIR whose main purpose is to reduce importing of substandard goods into this country and also to protect the health and safety of our people, animals, plants and environment and to discourage deceptive practices in line with the international regulations.³¹⁴ It is submitted herein that the Standard Regulation only deals with dumping of substandard goods that is, quality, which is not an element when establishing dumping. However, with the national body to be established in Botswana, the SIIR will be reinforced by such other trade remedy legislation such as anti-dumping, safeguards and countervailing.

4.5 Is SACU model good for BLNS countries in particular Botswana?

The question as to whether the SACU model is good for BLNS countries in particular Botswana is based on the fact that these countries are not at par with South Africa economically. South African industries and trade dominates the BLNS countries hence the chances that the national bodies in the BLNS countries will be useful and effective are little. The obligations of SACU in the area of policy development are contained in Part Eight of the Agreement which deals with Common Policies. Specific areas include industrial policies and strategies³¹⁵, agricultural policies,³¹⁶ competition policies, laws and regulations,³¹⁷ and policies and instruments to address unfair trade practices.³¹⁸

4.6 Implementation of WTO Agreement on anti-dumping

Botswana intends to implement legislation on anti-dumping, safeguards, and countervailing measures, although in view of the 2002 SACU Agreement this must, ultimately, be coordinated at the SACU level. Enhancing Botswana's capacity to

³¹³ *Sunday Standard Online Edition, supra.*

³¹⁴ *Sunday Standard Online Edition, supra.*

³¹⁵ SACU Agreement. Article 38.

³¹⁶ SACU Agreement. Article 39.

³¹⁷ SACU Agreement. Article 40.

³¹⁸ SACU Agreement. Article 41.

develop such rules-based trade measures may contribute to stable and predictable trade policies.³¹⁹ Under the SACU Agreement, Botswana, Lesotho, Namibia, and Swaziland apply import duties and related measures set by South Africa in consultation with BLNS countries. In practice, ordinary customs duties, excise duties, tariff exemptions and concessions, valuation methods, non-preferential rules of origin, and contingency trade remedies are, so far, the only trade policy measures harmonized throughout SACU.³²⁰ The WTO agreements on trade in goods allow WTO members to protect themselves against unfair trade in goods. Anti-dumping or countervailing duties may be imposed in respect of dumped or subsidised imports.³²¹ Apart from anti-dumping and countervailing measures, imports into a particular territory may also be subject to safeguard measures. Unlike anti-dumping and countervailing measures, safeguard measures are a fair trade remedy available to WTO members and essentially constitute emergency action against imports of particular products. The measures can be introduced against an unforeseen surge in imports that threatens to or causes serious injury to a domestic industry. Safeguard measures are temporary measures with timelines to allow a domestic industry to adjust and improve its competitiveness. Since its inception, ITAC initiated one safeguard investigation and that was in 2007.

In accordance with Article 26 of the SACU Agreement, Botswana set its tariffs at high levels to protect infant industries. The protection accompanied price controls to protect the consumer by linking the domestic price to that of former imports from South Africa.³²² Infant industry protection has not proved effective in creating new industries in Botswana, although the industries concerned, except milled products, have generally adjusted to the removal of temporary protection. Safeguard measures are temporary measures³²³ explicitly designed to slow rapidly increasing imports in order to allow the

³¹⁹ World Trade Organisation, Trade Policy Review by SACU-Botswana Report WT/TPR/S/222/BWA *supra*.

³²⁰ World Trade Organisation, Trade Policy Review by SACU-Botswana Report *supra*.

³²¹ SA Trade Relationships and Anti-Dumping, available at www.wtb.co.za.

³²² World Trade Organisation, Trade Policy Review by SACU- Botswana 2003 *supra*.

³²³ Such as tariff or quotas.

domestic industry to adjust to the heightened competition.³²⁴ GATT's safeguard provision, Article XIX, recognizes a country's right to withdraw or modify concessions granted earlier or to impose new restrictions if a product is "being imported in such increased quantities as to cause or threaten serious injury to domestic producers" and to maintain such restrictions "for such time as may be necessary to prevent or remedy such injury." Safeguard measures differ in one important aspect from the other two trade remedies available to WTO Members, that is, anti-dumping and countervailing measures, in that whereas those remedies are aimed against *unfair* injurious international trade, safeguards are aimed at protecting the domestic industry against injury caused by *fair* trade.³²⁵ The ITA Act defines 'safeguard measure' as a remedy or procedure for use in response to disruptive competition. Essential concepts recognised in international law on safeguard measures are set out in greater detail in Article XIX GATT, 1994 and the WTO Agreement on Safeguards promulgated pursuant to Article XIX³²⁶ and the Safeguard Regulations promulgated under the ITA Act.³²⁷

South Africa, the dominant regional power, views regional integration via SACU as a priority.³²⁸ The BLNS have a strong interest in service sector liberalisation in order to import low cost services.³²⁹ Currently, by virtue of South Africa's economic dominance, they are locked into importing relatively high-cost services from South Africa owing to the fact that most key South African service sector markets exhibit concentrated oligopolistic market structures. South Africa remains reluctant to liberalise its service sectors, primarily for political reasons. Therefore harmonising and deepening policies

³²⁴ Trade Resource Centre, available at www.businessroundtable.org

³²⁵ Brink 2008 (c), BCom, LLM LLD, Extraordinary Lecture in Merchantile Law, University of Pretoria, A Nutshel Guide to Safeguard Action

³²⁶ Safeguard Agreement, Legal Text, World Trade Organisation, Switzerland.

³²⁷ ITAC Safeguard Regulation.

³²⁸ SACU, Regional Integration and the Overlap Issue in Southern Africa, Trade Policy Report No 15, Published in January 2007 by The South African Institute of International Affairs, available at www.saiia.org.za.

³²⁹ SACU, Regional Integration and the Overlap Issue in Southern Africa, Trade Policy Report No 15, *supra*.

will be challenging indeed.³³⁰ Capacities in the BLNS in particular are very weak. Enlargement would stretch these capacities even thinner than they currently are.³³¹ South Africa's economic dominance fosters resentments, particularly owing to the fact that economic activity agglomerates there.³³² Botswana therefore, remains committed to the multilateral trading system and holds the view that deliverables of the Doha Development Agenda must positively impact on developing countries as they work towards integration into the global economy.³³³ Botswana, like many other small developing countries, faces considerable challenges in dealing with the volume of work involved in the WTO work programme, especially in light of the Doha Development Agenda (DDA) negotiations.³³⁴

4.7 Conclusion

The SIIR promulgated by Botswana deals mainly with substandard and second-hand commodities and does not lay any basis for the imposition of any trade remedy measures such as anti-dumping, safeguards or countervailing. It is further submitted that Botswana will have more of safeguards measures than anti-dumping. This will be due to the fact that imports to Botswana are not injurious in nature as such in the sense to cause material injury to trigger anti-dumping. Further, the imports to Botswana are not injurious in that there has been no industry affected by dumping as evident from the fact that since the inception of ITAC Botswana has never filed for anti-dumping measures. Accordingly it is recommended that Botswana use safeguards measures. It will be clear from the following chapters that the Botswana heavily relies on imports hence there has been little or no application instituted by an industry from Botswana.

330 SACU, Regional Integration and the Overlap Issue in Southern Africa, Trade Policy Report No 15 *supra*.

331 SACU, Regional Integration and the Overlap Issue in Southern Africa, Trade Policy Report No 15, *supra*.

332 SACU, Regional Integration and the Overlap Issue in Southern Africa, Trade Policy Report No 15, *supra*.

333 World Trade Organisation, Trade Policy Review by Members of the Southern African Customs Union, Report WT/TPR/G/222 *supra*.

334 World Trade Organisation, Trade Policy Review by SACU-Botswana Report WT/TPR/S/222/BWA *supra*.

CHAPTER FIVE

THE USE OF ANTI-DUMPING MEASURES BY BOTSWANA

5.1 Introduction

Trade is the engine of growth and prosperity.³³⁵ Botswana as well as other BLNS member depends heavily on South Africa for a significant proportion of their trade, investment and in some cases (migrant) employment.³³⁶ As indicated in the previous chapter, intra-SACU trade has been on the increase since 2003. However, more than 95% of the commercial flows within the customs union involved South Africa as a destination or supplier.³³⁷ South African companies dominate the business landscape in the BLNS. Whereas South Africa continues to export predominantly resource-based goods, Botswana and other BLNS countries represent a significant market for South African consumer goods and services.³³⁸

Accordingly, this chapter will look at Botswana in general, by looking at the economy, analyzing imports and exports to assess whether the size of market warrants the imposition of anti-dumping measures. Further it will examine the SACU provisions dealing with the protection of infant industries and the establishment of national body which is in the process. The question is whether we should anticipate for the first time anti-dumping or safeguard applications filed through the upcoming national body.

³³⁵ Stephane Nolan, US Ambassador to Botswana, US-Africa Trade and Botswana's Economic Growth, Remarks at ABC Breakfast held at Gaborone Sun Hotel on the 18th November 2008, Available at http://botswana.usembassy.gov/ambsp_11182008.html.

³³⁶ Robert Kirk, SADC Secretariat E-mail: rkirk@sadc.int, Matthew Stern, Economist, World Bank, South Africa Country Office E-mail: mstern@worldbank.orgThe New Southern African Customs Union Agreement Africa Region Working Paper Series No. 57 June 2003.

³³⁷ Willemien Denner, tralac Researcher, Non-tariff barriers to intra-Southern African Customs Union (SACU) trade. Available at www.tralac.org.

³³⁸ Robert Kirk, and Matthew Stern, *supra*.

5.2 An overview of Botswana

Botswana is centrally located in the heart of Southern Africa. It shares borders with Zambia in the north, Namibia in the north and north-west, Zimbabwe in the north-east and South Africa in the south and south-east. Consequently, Botswana is a land locked country.³³⁹ But that has not crippled trade in this country.³⁴⁰ The country surface area is 581 730 square kilometers. Botswana is 84% covered by Kgalagadi desert. The capital city is Gaborone, which is in the south-east near the border with South Africa.³⁴¹ One of the world's most impoverished nations at the time of independence, the discovery of commercially exploitable diamonds in 1967 paved the way for economic prosperity, with Botswana becoming a shining example of an African success story.³⁴²

The population of Botswana is 1.8 million and is growing at the rate 3.5% per annum.³⁴³ The population is heavily skewed towards the urban areas. Botswana has a small population size compared to most SADC countries, which has necessitated the government to consider an export led industry. Languages include Setswana, English and a variety of minority languages. However, English is the official language for education, business and government and is widely spoken by the general population.³⁴⁴ Botswana straddles the Tropic of Capricorn, located in the southern hemisphere. It is within the high-pressure belt in the southern African interior, away from oceanic influences. In consequence, the rainfall is low and the temperatures are high.³⁴⁵ In the lower elevations of the northeast are the large salty clay expanses of the Makgadikgadi Pans. Due to the predominantly semi-arid land, most rivers and streams inside the country are ephemeral with most valleys usually dry, except during the wettest months

³³⁹ World Economic Factbook, 17th ed, Western and Southern Europe Euromonitor International, Published by Western and Southern Europe, P/C 60-61 Briton Street, London EC1M 5UX, 2010.

³⁴⁰ Botswana Export Development and Investment Authority (BEDIA), available at www.bedia.co.bw/article.php?lang=&id_mnu=38.

³⁴¹ BEDIA *supra*.

³⁴² BEDIA *supra*.

³⁴³ BEDIA *supra*.

³⁴⁴ BEDIA *supra*.

³⁴⁵ BEDIA *supra*.

which are normally January and February.³⁴⁶ Minerals, especially diamonds, have been the mainstay of Botswana's economy since independence in 1966, helping propel the country's high rate of economic growth.³⁴⁷ The sector accounts for 90 per cent of national foreign exchange earnings and provides the single largest single source of GDP, as well as of government revenues. Mining thus provides the basis for the Botswana economy, giving it a position of stability from which to plan ahead for a more diversified economic future.

The overall size of the economy of Botswana at current prices increased by 15.2 percent from P49.6 billion in 2004/05 to P57.1 billion in 2005/06. At constant prices, total GDP decreased marginally from P22.9 billion in 2004/05 to P22.7 billion which is a decline of about 0.8%. This decline came about as a result of the decline in the contribution of mining industry to GDP which went down by 4.4%. However, diamond mining continues to be the largest contributor to GDP accounting for 41.4% of GDP in 2005/06.³⁴⁸ The non-mining sectors have also shown significant growth, though agriculture has been sluggish.³⁴⁹ In 2007/08, the mining sector depicted poor growth, registering a sharp decline of 3.5 percent in real terms compared to 4.7 percent growth realized in 2006/07. The non-mining sector grew by 8 percent in 2007/08 from 5.7 percent registered in 2006/07. According to the 2009 National Budget Speech, the acceleration in non-mining sector reflects the positive gains from the economic diversification programme. In 2007/08, the economy grew by 3.3 percent in real terms compared to 5.3 percent growth realized in 2006/07, which was revised downwards from an initial estimate of 6.2 percent.³⁵⁰ The slowdown in the economy is attributed to the sluggish performance by the mining sector, which was hard hit by low consumer demand, resulting in a sharp decline in commodity prices. According to the 2009

³⁴⁶ BEDIA *supra*.

³⁴⁷ BEDIA *supra*.

³⁴⁸ BEDIA *supra*.

³⁴⁹ Southern African Customs Union Annual Report 2008/2009. Available at www.sacu.int.

³⁵⁰ Southern African Customs Union Annual Report 2008/2009 *supra*

Budget Speech, the volume of diamond sales recorded a 17 percent decline in 2008 compared to 2007.³⁵¹

5.3 Trade Agreements

Botswana is an original member of the WTO, and is committed to a fair trade regime based on multilaterally agreed principles. Jointly with the other SACU members, Botswana notified the 2002 SACU Agreement to the WTO in 2007.³⁵² Goods exported from Botswana to any other country will, where applicable, be charged customs duties and local taxes at the destination country unless there is a Trade Agreement between Botswana and that country exempting goods coming from Botswana from such payment.³⁵³ To that end, Botswana has entered into some Trade Agreements through which certain goods under some given conditions enjoy some customs duty and quota concessions when exported there. Companies wishing to enjoy these benefits are required to register with the Department of Customs and Excise.³⁵⁴ Botswana exporters may export their eligible products under the African Growth Opportunity Act (AGOA) scheme because Botswana government has rectified all requirements of the Act. Under the AGOA scheme, Botswana traders can export to USA under benefit of preferential treatment on customs duty and quotas until 2015. Products that can be traded under this scheme are both non-textile and textile products.³⁵⁵ Goods originating from Botswana can enjoy some preferential treatment when exported to developed countries under the General System of Preference (GSP) scheme. Goods that qualify under this scheme are those that have been wholly obtained or produced in Botswana.³⁵⁶ These are goods/materials extracted in Botswana, animals born and raised in Botswana, as well as plants grown in Botswana. Goods produced from non-originating materials will

³⁵¹ Southern African Customs Union Annual Report 2008/2009 *supra*.

³⁵² World Trade Organisation, Trade Policy Review by SACU-Botswana Report WT/TPR/S/222/BWA available at www.wto.org/english/tratop_e/tp_r_e/tp322_e.htm.

³⁵³ BEDIA *supra*.

³⁵⁴ BEDIA *supra*.

³⁵⁵ BEDIA *supra*.

³⁵⁶ BEDIA *supra*.

only qualify if the materials are subjected to a sufficient manufacturing process that will change their tariff heading. Since every importing country may have its own tailor-made preferential scheme, it is beneficial for a trader to check prevailing requirements of the product s/he intends exporting.³⁵⁷ The SADC Trade Protocol provides that SADC Member States shall accord each other Most Favoured Nation Treatment on goods traded between them. This covers import and export duties, non-tariff barriers as well as quantitative import and export restrictions. This means that goods originating from Botswana and destined for any of SADC member states will on arrival at country of destination enjoy reduced tariff rates, no non-tariff barriers and reduced quantitative restrictions. In order for the goods to enjoy this trade concession, they must be sufficiently worked as per the SADC Trade Protocol.³⁵⁸ Botswana and South Africa have a long history of trade partnership that existed over the years under the SACU trade agreement.³⁵⁹

Botswana is one of the most competitive countries in Africa according to World Economic Forum 2008/2009 Competitiveness Report, with position three in Africa and 56 in the World.³⁶⁰ Botswana has a reputation as the best-performing economy in Africa.³⁶¹ From the '60s to the '90s Botswana made an impressive leap from being one of the poorest nations in the world to becoming a middle income country and therefore has been compared to the South East Asian "tiger" economies. In 2007 per capita income for Botswana was around US\$6500, the highest in mainland sub-Saharan Africa.³⁶² To maintain the economic growth rates, the Botswana government is now implementing a well planned policy of economic diversification.³⁶³ In terms of ease of doing business, Botswana was rated third among African countries and number 38 out

³⁵⁷ BEDIA *supra*.

³⁵⁸ BEDIA *supra*.

³⁵⁹ BEDIA *supra*.

³⁶⁰ Botswana Innovation Hub available, at <http://www.bih.co.bw/aboutus.php?page=Why%20Botswana>.

³⁶¹ Botswana Innovation Hub *supra*.

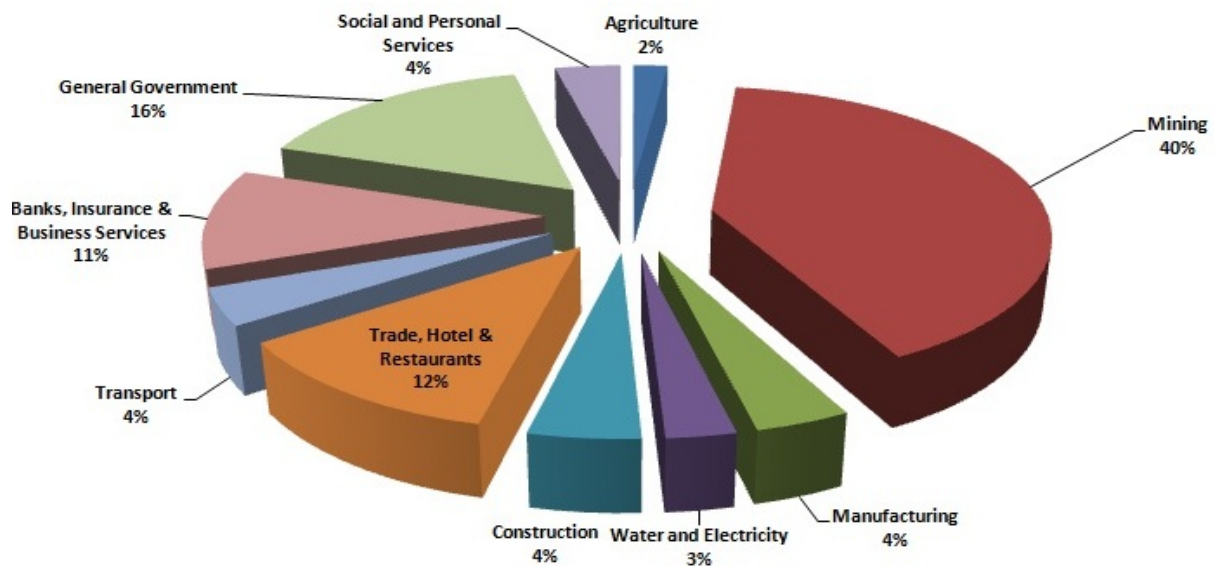
³⁶² Botswana Innovation Hub *supra*.

³⁶³ Botswana Innovation Hub *supra*.

of 181 countries worldwide by the World Bank survey of “Doing Business” in year 2009.³⁶⁴ Consistent rating by Transparency International Organisation as one of the least corrupt countries in the world (ranked 36 out of 179 in 2008), and the least corrupt country in Africa.³⁶⁵

5.4 Botswana GDP by Economic Activity (2007/08)

Chart 2



Source: Botswana Central Statistics Office

The economic chart clearly indicates that the manufacturing and agriculture sectors did not contribute much to the Botswana GDP in the period under review. Tourism is an increasingly important industry in Botswana, accounting for approximately 12% of GDP in 2008.³⁶⁶ The global economic downturn impacted negatively on the Botswana

³⁶⁴ Botswana Innovation Hub *supra*.

³⁶⁵ Botswana Innovation Hub *supra*.

³⁶⁶ Tourism, Travel Document Systems, available at <http://www.traveldocs.com/bw/economy.htm>.

economy.³⁶⁷ The main risk to the economy is on mineral exports, in particular, diamond sales, which started to fall significantly in 2008.³⁶⁸ In addition, there has been a sharp decline in commodity prices for other minerals like copper, nickel and gold. As a result, a slow-down in economic growth and a significant decline in government revenues which started from the end of 2008/2009 is expected to run until 2010/2011.³⁶⁹

5.5 Botswana imports

Botswana is a net food importer.³⁷⁰ The country imports about 80-90% of its cereal requirements, 44% of fruits and vegetables, 67% of fresh milk, and almost all other dairy products, mostly from South Africa.³⁷¹ Manufacturers of UHT milk have received "infant industry" protection since 2007.³⁷² During December 2009, 80.7 percent (P2, 080.1 million) of total imports (P2, 578.3 million) came from South Africa. SACU as a region supplied 81.6 percent (P2, 103.5 million) of total imports during the same month.³⁷³ Imports from the European Union were valued at P207.8 million during December 2009, representing 8.1 percent of total imports into Botswana during the month.³⁷⁴ During this period the United Kingdom and Germany supplied P117.7 million (4.6 percent) and P26.7 million (1.0 percent) worth of imports in that order to Botswana imports.³⁷⁵ Asia as a block provided imports valued at P164.4 million during December 2009,

³⁶⁷ World Trade Organisation, Trade Policy Review Body, Trade Policy Review Reports By The Members Of The Southern African Customs Union, WT/TPR/G/222, 30 September 2009, available at www.wto.org.

³⁶⁸ World Trade Organisation, Trade Policy Review Reports By Members of the SACU *supra*.

³⁶⁹ World Trade Organisation, Trade Policy Review Reports By Members of the SACU *supra*.

³⁷⁰ World Trade Organisation, Trade Policy Review by SACU-Botswana Report *supra*. Botswana is listed as a Net Food-Importing Developing Country under the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (WTO document G/AG/5/Rev.8, 22 March 2005).

³⁷¹ *BOPA Daily News*, "Ministry increased food reserves", 6 August 2008 available at: <http://www.gov.bw/cgi-bin/news.cgi?d=20080806>.

³⁷² World Trade Organisation, Trade Policy Review by SACU-Botswana Report WT/TPR/S/222/BWA available at www.wto.org/english/tratop_e/tp_r_e/tp322_e.htm.

³⁷³ Botswana External Trade Monthly Digest, December 2009, Central Statistics Office, Issue No. 11 of 2009/10, available at www.cso.gov.bw.

³⁷⁴ Botswana External Trade Monthly Digest, December 2009, *supra*.

³⁷⁵ Botswana External Trade Monthly Digest, December 2009, *supra*.

representing 6.4 percent of total imports during the month.³⁷⁶ Imports from China alone represent 3.7 percent (P94.3 million) of total imports. The Southern Africa Customs Union supplied imports representing 84.5 percent (P2, 457.5 million) of total imports (P2, 910.0 million) during November 2009, with South Africa alone contributing 83.6 percent (P2, 432.7 million).³⁷⁷ During the same month, imports from the European Union were valued at P87.1 million, representing 3.0 percent of total imports.³⁷⁸ Botswana imported P70.8 million worth of goods from the United States of America during November 2009, translating to 2.4 percent of total imports for the month.³⁷⁹ Botswana sourced 8.4 percent (P243.3 million) of total imports from Asia during November 2009, with 4.2 percent (P121.3million) coming from China and 1.2 percent (P33.5 million) from India.³⁸⁰ In the year 2009 total imports were valued at P33, 362.4 million, having decreased by P2, 065.0 million (5.8 percent) from the value of P35, 427.4 recorded in 2008.³⁸¹

5.6 Botswana exports

With Botswana, export earnings are heavily dependent on proceeds from mineral exports such as diamond.³⁸² The major destination for Botswana's exports is the United Kingdom (62.0 percent) as displayed by Chart 3.2. During the third quarter of 2009, the United Kingdom received 61.9 percent (P3, 222.3 million) while the European Union as a whole got 68.0 percent (P3, 539.1 million), refer to Chart 3.2 and Table 3.2. Asia as a whole received 4.7 percent (P246.6 million) of Botswana's exports during the same quarter.³⁸³ During the third quarter of 2009, Diamonds exports represented 69.9

³⁷⁶ Botswana External Trade Monthly Digest, December 2009, *supra*.

³⁷⁷ Botswana External Trade Monthly Digest, December 2009, *supra*.

³⁷⁸ Botswana External Trade Monthly Digest, December 2009, *supra*.

³⁷⁹ Botswana External Trade Monthly Digest, December 2009, *supra*.

³⁸⁰ Botswana External Trade Monthly Digest, December 2009, *supra*.

³⁸¹ Botswana External Trade Monthly Digest, December 2009, *supra*.

³⁸² External Trade Quarterly Digest, 3rd Quarter 2009, Central Statistics Office, Printed by the Botswana Government Printer, Gaborone.

³⁸³ External Trade Quarterly Digest, 3rd Quarter 2009, Central Statistics Office, *supra*.

percent (P3, 639.8 million) of total exports (P5, 206.6 million).³⁸⁴ This value (P3, 639.8 million) shows a decrease of 52.1 percent (P3, 956.8 million) from the value of P7, 596.6 million recorded during 2008 third quarter.³⁸⁵ Diamonds export value contributed 70.8 percent (P7, 596.6 million) to total exports value (P10, 733.4 million) recorded during 2008 third quarter.³⁸⁶ Total exports were valued at P1, 842.2 million during December 2009, giving a decrease of 28.9 percent (P750.4 million) as compared to the value of P2, 592.6 million recorded during the previous month.³⁸⁷ As compared to the same month during the previous year, December 2009 total exports show an increase of P350.8 million (23.5 percent) from P1, 491.3 million to P1, 842.2 million.³⁸⁸ Total exports value of P2, 592.6 million recorded for November 2009 gives an increase of more than twofold as compared to P1, 153.8 million recorded during November 2008.³⁸⁹ Total exports for the year 2009 were valued at P24, 031.2 million, having decreased by P8, 857.9 million (26.9 percent) from the value of P32, 889.1 recorded in 2008.³⁹⁰

5.7 Protection of Infant Industries

Botswana is a member of the Southern African Customs Union (SACU) and as a result shares common tariffs with the members. Governments have taken steps to protect the country's basic industries and as a result follows the stipulations of the infant industry clause of the SACU.³⁹¹ An Infant industry means an industry which has been established in the area of a Member State for not more than eight (8) years.³⁹² The SACU Agreement allows the Government of Botswana, Lesotho, Namibia or Swaziland to levy additional duties on goods imported into its area to enable infant industries in its

³⁸⁴ External Trade Quarterly Digest, 3rd Quarter 2009, Central Statistics Office *supra*.

³⁸⁵ External Trade Quarterly Digest, 3rd Quarter 2009, Central Statistics Office *supra*.

³⁸⁶ External Trade Quarterly Digest, 3rd Quarter 2009, Central Statistics Office *supra*.

³⁸⁷ Botswana External Trade Monthly Digest, December 2009, Central Statistics Office printed by Botswana Government Printer, Gaborone.

³⁸⁸ Botswana External Trade Monthly Digest, December 2009, Central Statistics Office *supra*.

³⁸⁹ Botswana External Trade Monthly Digest, December 2009, Central Statistics Office *supra*.

³⁹⁰ Botswana External Trade Monthly Digest, December 2009, *supra*.

³⁹¹ SACU Agreement Article 26. See also Mbendi Information Services, An overview of Botswana, available at www.Mbendi.com.

³⁹² SACU Agreement Article 26(2).

area to meet competition from other producers or manufacturers in the Common Customs Area.³⁹³ In terms of this they provide tariff protection by levying import duties on the member countries. Botswana has applied seasonal or temporary quantitative restrictions on imports of dairy products, poultry products, grains and some vegetables, to protect domestic producers.³⁹⁴ The aim of this is to allow domestic industries to compete effectively with the SACU.

Botswana has used the possibility available to BLNS countries under the SACU Agreement to protect infant industries on three occasions.³⁹⁵ These were to protect the Kgalagadi Soap Industry (KSI) during the 1970s (by an additional tariff of 100%), the Kgalagadi Breweries Ltd during the 1980s and early 1990s (by a 50% additional tariff) and Bolux Milling Pty Ltd (by quotas for the first five years, and then an additional tariff of 75% for three years). In each case, the temporary protection was provided for the maximum period of eight years permitted under the SACU Agreement. These industries still exist, Kgalagadi Soap Industry is exporting to such countries as Malawi, Namibia, and occasionally South Africa, while Bolux Milling Pty Ltd is facing intensive competition from South African suppliers and is seeking further protection against "dumping".³⁹⁶ The additional levy is a temporary measure, provided that such they are levied equally on goods grown, produced or manufactured in other parts of the Common Customs Area and like products imported from outside that area, irrespective of whether the latter goods are imported directly or from the area of another Member State and subject to payment of the customs duties applicable to such goods on importation into the Common Customs Area.³⁹⁷ Protection afforded to an infant industry in terms of paragraph Article 26 (1) is for a period of eight (8) years unless otherwise determined by the Council.³⁹⁸ Overall, Botswana's economy lacks significant technological

³⁹³ SACU Agreement Article 26(91)..

³⁹⁴ *Mbendi Information Services*, An overview of Botswana, available at www.Mbendi.com.

³⁹⁵ World Trade Organisation Trade Policy Review SACU-Botswana 2003. Available a www.wto.org.

³⁹⁶ World Trade Organisation Trade Policy Review SACU-Botswana 2003 *supra*.

³⁹⁷ SACU Agreement Article 26(3).

³⁹⁸ SACU Agreement Article 26 (4).

capabilities.³⁹⁹ The mandate of the government-funded Botswana Technology Centre (BOTECH) is to foster industrial and scientific development through research and technology innovation in collaboration with the private sector.⁴⁰⁰

5.8 Anti-Dumping applications with ITAC

As noted in the previous chapters, ITAC is in the interim acting on behalf of the SACU Commission to carry out investigations of anti-dumping, safeguards and countervailing measures. Further, it acts as a Tariff Board for SACU. Article 1 of the Anti-Dumping Agreement read with Article VI of the General Agreement on Tariffs and Trade,⁴⁰¹ makes it clear that anti-dumping duties are exceptional, remedial measures that may be imposed only if a duly conducted investigation reveals that dumping has taken place and that it causes or poses a threat of material injury to the local industry. From the interviews conducted with the Botswana Department of International Trade, Botswana has never filed any application with ITAC seeking protection of any industry except where Soda Ash Botswana (Botash) submitted an application to the South African courts. As indicated earlier, 95% of all anti-dumping applications emanates from South African companies. This means the 5% of anti-dumping applications come from the rest of the BLNS countries excluding Botswana. The question is, should we anticipate any application for anti-dumping by Botswana industries in future through the national body to be established?

Botswana developed a Competition Policy in 2005 and is at an advanced stage of completing the related legislation that will establish a competition authority.⁴⁰² These developments are expected to encourage the establishment of industries in Botswana

³⁹⁹ World Trade Organisation, Trade Policy Review by SACU-Botswana Report *supra*.

⁴⁰⁰ World Trade Organisation, Trade Policy Review by SACU-Botswana Report *supra*.

⁴⁰¹ GATT 1994.

⁴⁰² World Trade Organisation, Trade Policy Review by Members of the Southern African Customs Union, Report WT/TPR/G/222, 30 September 2009.

during NDP10.⁴⁰³ According to the Department of International Trade of Botswana, the National Development Plan (NDP) 10 emphasises the need for economic diversification. Therefore, it is anticipated that the economic diversification will lead to the establishment of industries that will need protection from injurious imports. Consequently, it is anticipated that anti-dumping legislation will assist in the protection of infant industries.

5.9 National Body of Botswana

The 2002 SACU Agreement provides for the establishment of a national body in each member country to be responsible for all SACU issues (including tariff changes) at the national level.⁴⁰⁴ The National Bodies are to carry out preliminary investigations and recommend any tariff changes necessary to the Tariff Board. The Tariff Board will consider submissions by the national bodies of the respective member states and make recommendations to the Council of Ministers, which as supreme governing body of SACU “shall approve customs tariffs, rebates, refunds or drawbacks and trade related remedies”⁴⁰⁵

The Assistant Minister of Finance and Development and Planning, Mr Charles Tibones told Parliament in December 2009 that member states were currently making arrangements to establish their national bodies so as to make the provision operational.⁴⁰⁶ These national bodies will work with the SACU Tariff Board to ensure full implementation of the agreement in determining customs duty tariffs. The Assistant

⁴⁰³ World Trade Organisation, Trade Policy Review by Members of the Southern African Customs Union, Report *supra*.

⁴⁰⁴ SACU Agreement Article 14; see also World Trade Organisation, Trade Policy Review by SACU-Botswana Report WT/TPR/S/222/BWA available at www.wto.org/english/tratop_e/tpre/tp_322_e.htm.

⁴⁰⁵ SACU Agreement Article 14.

⁴⁰⁶ BOPA, *Daily News Online*, MPs approve Customs, Exercise Duty Act amendments, BOPA available at www.gov.bw.

Minister added that until SACU Tariff Board and the national bodies were operational, the member states would be obliged to continue applying laws relating to customs and exercise duties which are similar to those in South Africa.⁴⁰⁷ The Tariff Board is no yet constituted. During an interview with the author herein, the SACU Tariff Coordinator stated that the Council directed that the Tariff Board be set within 24 months, the period which started April 2009.⁴⁰⁸ The process of setting it up is underway. The Tariff Board Coordinator stated that, in terms of helping Member States to set up their national bodies, the Secretariat is coordinating the process. The Member States are required to enacted the requisite laws and regulations. The Secretariat developed models laws and regulations that Member States can modify and adopt in enacting their national laws and regulations. In addition to enacting laws, Member States have to make budgetary provision for the operations of their national bodies, and physically set up and staff the offices. There are also capacity interventions ongoing such that ITAC is busy training officials from BLNS on tariff investigations and trade remedies.⁴⁰⁹ The establishment of national bodies in the BNLS countries and in particular Botswana is of great importance in the protection of infant industries and regulation of trade remedies. It will assist in making filing of applications against injurious imports effective and efficient. Botswana is in the process of establishing its national body to administer international trade including trade remedies.⁴¹⁰

5.10 The importance of a national body

Botswana, Lesotho, Namibia, and Swaziland apply the anti-dumping, countervailing, and safeguard measures determined by South Africa, a leading initiator of anti-dumping

⁴⁰⁷ BOPA, MPs approve Customs, Exercise Duty Act amendments, BOPA *supra*.

⁴⁰⁸ Interview conducted by the author herein with the SACU Tariff Coordinator through email dated 17th May 2010.

⁴⁰⁹ Tswelopele Moremi, The Executive Secretary of SACU, Namibian African Ambassadors And High Commissioners Monthly Meeting held on 30th November 2007, available at <http://www.sacu.int/main.php?include=docs/speeches/2007/sp1130a.html>.

⁴¹⁰ World Trade Organisation, Trade Policy Review Body, Trade Policy Review Reports By The Members Of The Southern African Customs Union, *supra*.

actions among WTO Members.⁴¹¹ As stated in the previous chapters, at present all anti-dumping investigations and findings are undertaken and made by ITAC, a South African government organ. As pointed out, South Africa dominates the SACU economy to the extent that almost all imports into the BLS countries and in particular Botswana come from South Africa. Such a situation makes the BLS countries a ready market for South African products. Further, out of all anti-dumping applications to ITAC, 95% of them are filed by South African Industries. This means only 5% of anti-dumping applications come from the BLS countries. In order to impose anti-dumping duties, material injury to a SACU industry must be demonstrated. The challenge is when the dumper is a SACU member.

South Africa has had occasion to deal with a number of regional disputes, having been accused of dumping products into SACU Member States, e.g. beer into Namibia and flour into Botswana.⁴¹² Further, the local dairy industry in Namibia had suffered because of cheap imports from South Africa?⁴¹³ But it was, for the purposes of a SACU industry, too small to trigger the anti-dumping protection of its South African counterparts, and Namibia has no equivalent of ITAC.⁴¹⁴ How then was the Namibian Industry (in whatever form) to be protected if South African firms dominate in SACU? Article 26 of the SACU agreement which protects infant industries in SACU is a possibility but a limited one.⁴¹⁵ Industries automatically mature after 8 years. Prof Erasmus noted that the longer the tariff board and national bodies are postponed the longer the neglect of the BLS interests could continue.⁴¹⁶ Article 41 of the SACU Agreement provides for the development of “policies and instruments to address unfair trade practices between Member States”. However, these policies and instruments have

⁴¹¹ World Trade Net Programme: Business Briefing 2009: WTO: Trade Policy Review, Country Profile: Southern African Customs Union, available at http://www.intracen.org/btp/wtn/newsletters/2009/tpr_sacu.htm.

⁴¹² Brink, Gustav 2007 *supra*.

⁴¹³ Gerhard Erasmus Prof, a tralac Associate, Why are the SACU Organs not being put in place? available at, http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=42895&cat_id=1071.

⁴¹⁴ Gerhard Erasmus Prof, a tralac Associate, *supra*.

⁴¹⁵ Gerhard Erasmus Prof, a tralac Associate, *supra*.

⁴¹⁶ Gerhard Erasmus Prof, a tralac Associate, *supra*.

not yet been finalized and still need to be addressed on an *ad hoc* basis.⁴¹⁷ As under the WTO rules dumping does not occur in a customs union, these disputes are to be settled at a political level as the SACU Agreement makes no provision for taking anti-dumping measures against a fellow customs union member.⁴¹⁸

5.11 Anti-dumping and European Partnership Agreements (EPA's)

Botswana has signed the European Partnership Agreement with the European Union (EU). This agreement is in compliance with the WTO rules of reciprocity. This means that as the EU has granted Botswana a quota free duty free (QDFD) access to its market, Botswana has also to open up its borders for EU products. The concern is that with the opening up of its borders, will Botswana industries be able to compete with the subsidized products from the EU? During a workshop for stakeholders in Francistown, the former president of the Botswana Confederation of Commerce, Industry and Manpower (BOCCIM), Igbal Ibrahim asked the business community think about implications of the Economic Partnership Agreements (EPAs).⁴¹⁹ He stated that there has been many opportunities to export to Europe and America, however that has to be done without compromising citizens and their businesses. Mr Ibrahim stated that it was hard for Botswana to explore opportunities, given its population of only two million people. Botswana is a small and developing market, and opening borders would raise issues of capacity as demanded by bigger markets. Ibrahim warned opening borders could result in closing down local businesses. His concern was that Botswana has a small market and a small community and as the EU was opening its borders to Botswana, the country had to reciprocate and that constitute a challenge. Making a presentation at the same workshop, the Executive Director of Delta Dairies, Howard Sigwele, stated that subsidised EU exports to Botswana should be subject to existing

⁴¹⁷ Brink, Gustav 2007 *supra*.

⁴¹⁸ Brink, Gustav (2007), *supra*.

⁴¹⁹ *Mmegi Online*. EPA workshop hears of anti-dumping measures <http://www.mmegi.bw/index.php?sid=4&aid=18&dir=2009/August/Friday7>.

domestic and SACU laws and anti-dumping measures adopted in order to protect local companies and their products.

Therefore, the establishment of a national body in Botswana and other BLNS countries is important in that like ITAC, its functions will include adopting measures for the continued control of imports and exports of goods and the regulation of customs duties.⁴²⁰ It will be clothed with the power to investigate, evaluate and make recommendations to the Tariff Board on the imposition, amendment or removal of customs, anti-dumping and countervailing duties. Further, it will assist in the protection of infant industries and it will increase the industrial base of BLNS countries so that they become self reliant and reduce imports as they will be assured of protection. The national bodies will grant applicants filing for anti-dumping and safeguards easy and effective access to trade remedies.

5.12 Conclusion

This chapter has clearly shown that Botswana heavily relies on imports and the major exports is minerals, in particular diamond. It has been revealed through the interviews conducted with the Department of International Trade of Botswana that Botswana has never filed for anti-dumping with ITAC. The reliance on South Africa for most of its imports indicates that the industries in Botswana are very small. The same, is the challenge of the BLNS countries in that their industries are small hence they cannot trigger anti-dumping investigations. All these challenges are coupled with the fact that these countries are land locked and their economies are small. Botswana is in the process of establishing its national body to administer international trade including investigation of trade remedies such as anti-dumping. The infant industry protection

⁴²⁰ International Trade Administration Commission v Scaw South Africa (Pty) Ltd *supra*.

provided in Article 26 of the SACU Agreement is limited as the industry automatically matures after eight years. It is the recommendation herein that with the establishment of national bodies there shall be more trade remedy measures taken up with the national bodies of BLNS countries in particular Botswana. The Department of International Trade of Botswana anticipates that the diversification of economy in the NDP10 will see a number of infant industries coming up which will require protection from injurious imports.

5.13 Recommendations

The industry base and market size of Botswana is small. Further Botswana heavily relies on imports and the only major export is Diamond. Most of applications for injurious imports with ITAC are filed by South African industries. Botswana is in the process of establishing its national body to deal with trade remedies including anti-dumping. Therefore, it is recommended that there be a public awareness of the upcoming national body and on trade remedies through workshops and seminars. This will assist stakeholders to be aware of these institutions and make informed decisions.

Doing research in Botswana is a challenge and difficult due to unavailability of data. Most of the trade data has been collected from outside sources. Botswana is a SACU member and yet most of the information which is expected to be found in the concerned institutions is not there. Most of the questions have been referred to either ITAC or SACU secretariat. Further, it is the recommendation herein that students, scholars and practitioners in the area of trade be encouraged to engage in more research on Botswana.

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