

**The impact of Anti-dumping and Anti-dumping
regulations between South Africa, the European
Union and China: A comparative study**

by

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DECLARATION

I declare that “The impact of Anti-dumping and Anti-dumping regulations between South Africa, the European Union and China: A comparative study” is my own work, that it has not been submitted before for any degree or examination in any other University, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Jacques Clarence Duvenhage



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“Be strong and do not give up, for your work will be rewarded.”

2 Chronicles 15:7

ABSTRACT

This mini-dissertation critically analyse the use of anti-dumping regulations between South Africa, the European Union and China. South Africa, the European Union and China are all members of the World Trade Organisation. Dumping is legally defined in terms of Article VI of the General Agreements Act on Tariffs and Trade as “a product that is exported from one country to another at a price less than a price at which like goods are sold from domestic consumption in the exporting country”. The only way to protect a country from dumping is to use their universal, legal instruments set out by the World Trade Organisation, namely the most commonly used trade remedy, anti-dumping, countervailing and subsidies and lastly safeguards.

On the 14th of November 2003, South Africa promulgated their anti-dumping regulations that had a broader overview regarding dumping than the previous legislation on this matter. Although there had been several opportunities to properly legislate anti-dumping substance and procedures, the existing South African legislation including the International Administration Act, still does not conform to the requirements and standards of the World Trade Organisation.

In the early 20th Century, a number of European countries came together and formulated an Anti-dumping Agreement and was also known as the European Union. The European Union is seen as one of the biggest trade actors in the world. In 1994 the European anti-dumping laws were laid down. Regarding to non-market economies, the European legislation did not have a lot of change during the last decade. The European Union conforms to the requirements and standards set out by the World Trade Organisation.

On 25 March 1997 the state council of the People’s Republic of China promulgated anti-dumping and countervailing regulations. At this point in time, China is undergoing an economic transformation, but before China plays an important part in the World Trade Organisation, it must learn to use the World Trade Organisation and integrate the World Trade Organisation laws

that are directly related to China by looking at the international trade's advantages and disadvantages. China is under severe dumping and anti-dumping status quo, which is directly paired with the development of China's anti-dumping legislation where new demands are being brought forward.

South Africa's relationship regarding China, lead to a Memorandum of Understanding in December 1999 where the regional trade protocol was signed between the two countries in terms of textiles, that South Africa won't impose any duties against China until December 2013, but antidumping duties can be imposed on any other country. South Africa and the European Union have not yet created such a relationship of that between South Africa and China, but South Africa and the European Union, both signed the Trade Development and Co-operation Agreement. This was the first bi-lateral framework agreement between South Africa and the European Union. The final ratification occurred in 2004 and was revised in March 2007.

The international trade war against China and the European Union has been won by China, because the WTO recently came to the conclusion that the European Union's trade policies against China were discriminatory. It should be mentioned that these three countries will play an important role in the development and implementation of international trade relations and regulations and by their collusion, it could only improve the visions of international trade.

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CHAPTER 1

INTRODUCTION

Overview of the study

In this study, we will look at the effectiveness of anti-dumping regulations and the impact of it on the European Union,¹ China and South Africa.

Anti-dumping regulations were imposed to erase the rush of dumped imports which have been found to be injuring developing countries such as South Africa.² In recent years, the global economy has experienced a few financial crashes and booms,³ and with trade on the increase, in this day of globalisation, it means that the relationship between the European Union, China, South Africa and the World Trade Organisation,⁴ is of special interest.⁵

The European Union, China and South Africa are members of the WTO and promulgated several anti-dumping regulations to combat dumping. In the past few years, the European Union has taken action against goods that were sporadically, intermittent and continuously dumped by China. The European Union even applied an anti-dumping policy against China and has been criticised for being discriminatory.⁶ On the other hand, South Africa signed a regional trade protocol agreement with its Southern African Developing Countries partners in 1996 and therefore South Africa and China has a more open relationship when it comes to international trade regarding textiles.⁷ The agreement was ratified in December 1999 and the implementation began in

¹ Hereafter referred to as the EU.

² Viner "Anti-dumping: A problem in International Trade" (1966) 3 <www.linkinghub.elsevier.com/retrieve/pii> (accessed on 14 March 2010).

³ Chaing "Essays on Monetary Policy of International Trade" (2008) 1-2 <www.enl.isc.edu/-hiizhang> (accessed on 14 March 2010).

⁴ Hereafter referred to as the WTO.

⁵ *Ibid.*

⁶ Cornells "The EU anti-dumping policy towards China" (2005) 1 <www.coleurope.eu/file/content> (accessed on 3 March 2010).

⁷ Thondhlana "China's now South Africa's new major trading partner" (1999) <www.dailynews.co.zw/business> (accessed on 3 March 2010).

December 2000.⁸ Regarding the agreement between South Africa and the European Union, both signed the Trade Development and Co-operation Agreement.⁹ This was the first bi-lateral framework agreement between South Africa and the European Union. The final ratification occurred in 2004 and was revised in March 2007.

Problem statement

The predicament that South Africa is facing regarding the European Union and China is twofold. Firstly, until late 2003, South African procedural and substantive anti-dumping laws were nearly non-existent. Secondly, the Anti-Dumping Regulations do not cover all aspects that should be covered and may not be harmonious with South Africa's international obligations regarding other provisions. The requirements of the World Trade Organisation regarding trade must be taken into account. One must also take into perspective the current legislation, regulations and procedures of the European Union, China and South Africa as well as those aspects that are peculiar to South Africa.¹⁰

The underlying problems of this study are the relationship between South Africa and China as well as South Africa and the European Union. The relationship between South Africa and China were established by signing a protocol for the free trade of textiles and it should be mentioned that the European Union does not have the same relationship with South Africa regarding trade. As China is a new member to the World Trade Organisation, it must still provide the same level of standards as set out by the World Trade Organisation regarding trade. In recent years the European Union has applied trade policies against China, which is seen through the World Trade Organisation as discriminatory. In this study, these predicaments will be addressed.

⁸ *Ibid.*

⁹ Hereafter referred to as the TDCA.

¹⁰ *Supra* note 60.

Purpose of the study

The purpose of this study is to discover where dumping predicaments had its origins and to compare the European Union, China and South Africa's anti-dumping regulations. South Africa signed the Protocol Agreement to open its doors in the textile industry with China and furthermore signed the Trade Development and Co-operation Agreement with the European Union to improve South Africa's import and export and therefore making South Africa the biggest trade country on the African continent.

The following questions will be answered in this comparative study concerning dumping:

1. What are the remedies against dumping and which is the most commonly used?
2. When did South Africa promulgate anti-dumping regulations against dumped goods?
3. When did the EU promulgate anti-dumping regulations?
4. When did China promulgate anti-dumping regulations?
5. Is the European Union's anti-dumping policy discriminatory against China, and if so, the reason therefore?
6. What is the relevance of trade agreements between the European Union, China and South Africa?
7. Can South Africa's anti-dumping regulations be compared with other World Trade Organisation members such as the European Union and China to determine whether South Africa's regulations is on the same standard as these World Trade Organisation members and if not, how we can promulgate more strict regulations on dumped goods?

Division of the study

Chapter 1 – Introduction

Chapter 2 – Historical foundations of dumping and Anti-dumping as the most commonly used trade remedy

- Introduction
- History of dumping
- What is dumping?
- Defining dumping
- Anti-dumping
- What is anti-dumping?
- The impact of anti-dumping on the world's trade
- The like product
- Normal value
- Injury
- Material injury
- Export prices
- Anti-dumping in South Africa
- The impact of anti-dumping on South African Trade
- South African anti-dumping laws
- Historical amendments
- The International Trade Administration Act 2000 and the International Trade Administration Commission anti-dumping regulations
- Predicaments of the South African anti-dumping laws
- South African anti-dumping investigations
- Anti-dumping applications
- Preliminary investigations
- Final investigation
- Conclusion

Chapter 3 – Anti-dumping in the European Union and China and the impact thereof

- Introduction
- The European Union's anti-dumping legislation
- The imposition of European Union's anti-dumping duties
- The European Union's anti-dumping procedures
- The complaint

- European Union investigation proceedings
- Who is responsible for investigating anti-dumping complaints?
- Where can imposing duties be challenged?
- Confidentiality
- Exporting non-market economy countries
- Other restrictions to access the European Union market
- China's anti-dumping legislation
- China's investigation process
- Trade agreement between South Africa and China
- Trade agreement between South Africa and European Union
- Conclusion

Chapter 4 – Other international remedies which deals with unfair trade

- 
- Introduction
 - Remedies
 - Different types of subsidies
 - World Trade Organisation provisions on subsidies
 - What does this all mean for Africa and developing countries?
 - Countervailing
 - Safeguard Measures
 - Conclusion

Chapter 5 – Conclusion and Recommendations

*As we enter the new millennium, we must make trade work for the poor. We must show sensitivity to the needs and concerns of the weaker partners in the global trading system. Kofi Annan – Former UN Secretary.*¹¹

¹¹ Lebero "Safeguard Dilemmas: The need for Practical special and differential treatment for developing Countries" (2006) <http://etd_gen8Srv25Nme4_5093_1> (accessed on 4 March 2010).

CHAPTER 2

HISTORICAL FOUNDATIONS OF DUMPING AND ANTI-DUMPING AS THE MOST COMMONLY USED TRADE REMEDY

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2.1 Introduction

In the years leading up to the Second World War, countries imposed excessive custom tariffs to protect their domestic markets. During the Second World War, countries acted to impose excessive custom tariffs to protect their domestic markets. After the Second World War some of the countries came to the conclusion that the only way to promote international trade would be to reduce tariffs in a more comprehensive way. The result of the negotiations on tariffs was the implementation of the General Agreement on Tariffs and

Trade.¹² In this chapter a brief overview of the history on dumping and the special provisions that GATT provided for cases of dumping will be provided as well as the impact of anti-dumping and anti-dumping legislation in South Africa.¹³

2.2 History of dumping

The first use of the term dump seems to be in 1868 in the Commerce and Financial article (VI 326/i) where it was said: “New stock secretly issued (was) dumped on the market for what it would fetch.” It is arguable however that for our purpose the genesis of the term “dumping” can be pinned down to a US Congressional debate in 1884.¹⁴ It was reported that early in the twentieth century, dumping was mostly common in Germany.¹⁵

Canada, in 1914, was the first country to introduce a bill aimed specifically at dumping. The Canadian Minister marked as follows:¹⁶

“We find today that the high tariff countries have adopted that method of trade which has become known as slaughtering, or perhaps the word more frequently used is dumping; that is to say, that the trust or combine, having obtained command and control of its own markets and finding that it will have a surplus of goods, sets out to obtain command of a neighbouring market, and for the purpose of obtaining control of a neighbouring market will put aside all reasonable considerations with regard to the cost or fair price of the goods; the only principle recognized is that the goods must be sold and the market obtained... this dumping then, is an evil and we propose to deal with it.”

¹² Hereafter referred to as GATT.

¹³ R Dale “Anti-dumping law in Liberal Trade Order” (1980) 3-21 <www.jstor.org/stable> (accessed 30 June 2010).

¹⁴ Congressional record (1884) 3663, see supplement to oxford dictionary, vol 1 A-G 884 (1972).

¹⁵ Viner “Anti-dumping: A problem in International Trade” (1966) 51-66 <www.linkinghub.elsevier.com/retrieve/pii> (accessed on 14 March 2010).

¹⁶ Speech by Minister of Finance, WS Wielding in June 1904 as quoted in US tariff communication information concerning dumping, 22.

In any event the Canadian Act which was customised in 1907 and again in 1921 became a model which much of the subsequent Canadian national anti-dumping legislation was based on.¹⁷ Therefore, it provided for the imposition by custom authorities of dumping duties equal to the margin of dumping (subject to a limit fixed initially at 15% *ad volarum*)¹⁸ goods of a class or kind not made or produced in Canada being specifically exempted.

This procedure was an automatic mechanism in the sense that injury to a domestic industry or market did not have to be proved before any dumping duties were imposed. The first proper anti-dumping law however, was incorporated in sections 800 -1 of the Revenue Act of 1916 in response to the alleged threat of predatory dumping from Germany.¹⁹ The statute was a criminal offence, it presented a number of interpretive difficulties, particularly in respect of imports “commonly and systematically sold at dumping prices and it required proof of predatory intent on part of the importer.”²⁰

In 1919 the tariff commission confirmed the abovementioned.²¹ The limitations of the revenue act led to the implementation of the Anti-dumping Act of 1921, which had a broader scope. The act followed the Canadian example in providing for the imposition of dumping duties equal to the margin of dumping (without limit), but unlike the Canadian Act, incorporated a requirement that the dumped imports must be shown to be actually or potentially injurious to an industry or market.²²

Fear of voracious competition of Germany was again cited as justification for Britons first anti-dumping statute, the Safeguarding of Industries Act of 1921. Australia had enacted measures in 1906 and aimed exclusively at predatory dumping, but in 1921 both Australia and New-Zealand introduced legislation

¹⁷ *Supra* note 14 at 50.

¹⁸ Latin for ‘according to value’. www.investorwords.com (accessed 30 September 2010).

¹⁹ *Supra* note 12 at 10.

²⁰ *Ibid.*

²¹ *Supra* note 14 at 51-66.

²² *Ibid.*

based on the Canadian model.²³ Meanwhile South Africa had also followed the Canadian experience in its anti-dumping law of 1914, the dangers of predatory dumping being once again cited for the reason of its enactment.

The Act of 1921 however became the standard law in the US which was used to counter “dumping” by firms in other countries. This act provided for the application of “anti-dumping duties” to counteract a margin of dumping which could be demonstrated to exist on products imported in the US.²⁴ During the early 1930’s, the US embarked on its mutual trade agreements negotiating about thirty bilateral²⁵ treaties for the mutual reduction of tariff barriers. These agreements opened a door, way to the understanding of dumping and which predicaments it could bring to international trade.

It was not until the end of the Second World War that necessary and binding international rules were developed. These rules were negotiated in 1947, where a special condition was adopted for cases of dumping and was included in the General Agreement on Tariffs and Trade. Article VI of GATT allows GATT contracting parties to develop “anti-dumping duties” to counteract the margin of dumping or dumped goods, provided that it can be shown that such dumping is or threatens to cause “material injury” to competing domestic industries.²⁶ Following the 1958 GATT secretariat study

²³ *Supra* note 12 at 11-12.

²⁴ See Sidak (1982) “A framework for administering the 1916 Anti-dumping act: lessons from anti-trust economics.” <www.papers.ssrn.com/sol3> (accessed on 30 June 2010).

²⁵ According to the Oxford dictionary, “between two parties”.

²⁶ “Anti-dumping and Countervailing Duties” reads as follows:

1. the contracting parties recognise that dumping, by which the products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a Contracting Party or materially retards the establishment of a domestic industry. For the purpose of this article, a product is to be considered as being introduced into the commerce of an exporting country at less than its normal value, if the price of the product exported from one country to another:
 - (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
 - (b) in the absence of such a domestic price, is less than either,

of national anti-dumping laws, a group of experts that was established in 1960, agreed on certain general interpretations of indefinite terms of article VI. Between 1962 and 1967 an anti-dumping code was negotiated during the 1967 Kennedy round and seventeen parties signed.²⁷ Although during the Tokyo round, negotiations in GATT (1973 – 1979), the subject of dumping was not on the agenda, a rather sudden turn of the events late in that negotiation caused the negotiators to take up the dumping subject and moderately to provide evenness with the drafting which had occurred in the code dealing with subsidies, the GATT parties developed a new code dealing with anti-dumping issues.²⁸

Although the 1979 code was not clearly mentioned in the ministerial declaration starting the Uruguay round,²⁹ during the negotiations a number of GATT contracting parties, particularly the US, Japan, Korea, Hong Kong and the European community³⁰ proposed changes – sometimes essential ones to the 1979 code. These led to a new Anti-dumping Agreement. Until the 1990's, there were four GATT members that actively used their anti-dumping laws as a means of protecting domestic industries against injuriously dumped imports namely Australia, Canada, European communities and the US.³¹ These countries mostly applied the measures against developing countries. Article VI of the GATT 1994, states that anti-dumping measures shall only be

-
- (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
 - (ii) the cost of production of the product in the country of origin plus reasonable addition for selling cost and profit.

²⁷ The agreement on the implementation of art VI (1967 code).

²⁸ See Louis & Matsushita "The world trading system: Law and policy of International Economics" (1997) 7, *Fordham International Law Journal* <www.books.google.com/books?ISBN> (accessed on 20 September 2010).

²⁹ The ministerial declaration on the Uruguay round (1986).

³⁰ See the new Anti-dumping code through its negotiating history. Bourgeois, Berrod & Fournier "Trade law experienced: Pottering about in the GATT in WTO" (2005) 20, *International Court of Justice Reports* <www.books.google.com/books?ISBN> (accessed on 20 September 2010).

³¹ See GATT Uruguay round (1986 – 1992).

applied under this position and behaviour in accordance with the provisions of this agreement.

In the course of the last 15 years however, more and more countries have adopted anti-dumping laws and started using them, according to the World Trade Organisation,³² thus there are 104 members.³³

2.3 What is dumping?

2.3.1 Defining dumping

Dumping is legally defined, in terms of article VI of the GATT as “a product that is exported from one country to another at the price less than the price at which like goods are sold from domestic consumption (normal value) in the exporting country”³⁴, i.e., if a product sells for a R100 in South Africa and it’s exported to another country (for instance China) for less than a R100.³⁵ Dumping takes place when a lower price is charged for goods (export price) in a foreign market than those prices charged for the same goods (normal value) in a domestic market. Foreign competitors are therefore allowed to sell their goods at an inexpensive price than what you may sell it on the domestic market or industry, but they are restricted from selling goods at prices below what they would charge on their own market or industry. This allows an industry to protect itself against “unfairly” low priced imports. In order to justify anti-dumping measures it has to be established that (1) *dumping*, which (2) *caused* (3) *injury* has taken place.³⁶

³² Hereafter referred to as the WTO.

³³ WTO annual report 45-47 (WTO Geneva).

³⁴ Art VI(1) on the General Agreements Act on Tariffs and Trade (GATT).

³⁵ Board on Tariffs and Trade Act 107 of 1986.

³⁶ Tao “Dumping and antidumping regulations with specific reference to the legal framework in South Africa and China” (2006), 31 May 2006 <<http://etd.unovs.ac.za/ETD-db//theses/available/etd-03062007-134229/unrestricted/TaoM.pdf> (accessed on 5 March 2010).

An application needs to be supported by 25% of the local manufacturers' domestic production volume.³⁷ Those producers expressing a view on the application must also constitute at least 50% of all manufacturers' expressing either support or opposition to the application. Therefore, it is only required that a *prima facie* case of dumping, injury and a causal link between the two is made out, for an investigation to be initiated.³⁸ The notion of *dumping* is very simple. However, actually determining the extent of dumping by reference to normal value and export price is extremely complicated.

Economically, dumping is divided into three categories, namely:³⁹

- (i) Sporadic: "dumping of production overruns" or "fire sales";
- (ii) Intermittent: "predatory dumping by an exporter wishing to drive the domestic producer in the importing country out of the market with the aim of subsequently increasing prices";
- (iii) Long term of continuous dumping: "profit maximisation through attaining the desired economies of scale".

Economists regularly indicate the benefits of dumping to the importing country, *inter alia* arguing that, "dumping presents lower prices to consumers which results in more competition and improved industrial performance, and acts as an anti-inflationary mechanism of price control."⁴⁰

The following diagram is an illustration of how the margin of dumping is determined:⁴¹

³⁷ Erasmus & Hendry "The Limits of the Use of Anti-dumping Measures" (2009), <http://www.bowman.co.za/LawArticles/Law-Article.asp?id=1152693543> (accessed on 4 March 2010).

³⁸ *Ibid.*

³⁹ See Barchello "Anti-dumping law 61" (2002), who indicates that it is a common misconception that a low dumping price is necessarily unfair if it's below average total cost (unit cost) <www.questia.com/pm> (accessed on 14 April 2010).

⁴⁰ Fisher "Law and policy of international business" (1977) 86-93 <www.bartfisher.com/publications.html> (accessed on 14 April 2010).

⁴¹ *Ibid.*



The legal definition of dumping is broadly interpreted by the world's economists and therefore it excludes certain practices which are described as dumping, including some which involves price discrimination. They are the following:

(i)Service dumping: This term is used to describe the practice of providing services in the export market at prices lower than those charged in their domestic market.

(ii)Freight dumping: This practice is set to occur when discriminatory freight rates are applied, the cost of export freight being lower than the normal rates.⁴²

(iii)Exchange dumping: This term was originally used to describe a situation in which the currency of a country was subject to the progressive devaluation and where, in consequence, its internal purchasing power was higher than its external purchasing power.⁴³

(iv)Bounty dumping: This is an outdated term used to describe dumping which results from the grand of export bounties.⁴⁴

(v)Social dumping: This term is used when the cheapness of the imports is due to the low labour costs involved in their production.⁴⁵

The abovementioned can indicate price discrimination between domestic and export markets.⁴⁶ Any positive difference between the marginal cost of

⁴² *Supra* note 14 at 17. Freight rates have proved to be a problem however, and the commission has therefore recently suggested that special rules be adopted to deal with it. See Draft Council Regulations on unfair pricing practices and maritime transport OJ No. C212 of August 23, 1985 at 12.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Supra* note 14 at 44.

production and the export price increases the exporter's total profit. It is submitted that nearly all international trade takes place at dumped prices.⁴⁷ The reason for this is that the efficient producer has to consume both the freight charges and the customs duty in an importing country, if it wishes to compete with an efficient producer in that country.⁴⁸ There are many reasons why a manufacturer will dump its products in another country's market.

The reason why manufacturers dump products abroad can vary to a great extent from case to case and in some severe cases from sale to sale and therefore dumping have different aims and motivations. Sometimes it is to sell and to get rid of excessive products in order to keep the business to grow and improve their positions. It can also be to earn foreign exchange in order to produce a balance in income and expenses. Sometimes it is to compete for clients or to gain a share in foreign markets and test the response of foreign markets when a low price is introduced. Sometimes it can be used to oust competitors and to hold a monopolistic status.

The aims and motivations that were mentioned above cannot legally be reproached by manufacturers and firms, because the laws including the laws of the GATT and anti-dumping laws does not consider aims and motivations. The laws only observe the facts and outcome. The reasons for dumping are divided into two groups, namely:⁴⁹

- (i) **firm-orientated:** deals with circumstances within the firm, for example, the firm or manufacturer just wants to get rid of old merchandise or a excess supply thereof when there is a decrease in demand; and
- (ii) **market-orientated:** reasons related to the firms position in a foreign market, for example, a firm will except low profits or even

⁴⁷ Bhala "Rethinking anti-dumping law" (2005) 4 <www.library2.nida.ac.th> (accessed on 14 March 2010).

⁴⁸ *Ibid.*

⁴⁹ Oudsten "Undertakings in EEC Anti-dumping law" (1985) <www.heinonlinebackup.com> (accessed 20 April 2010).

losses in order to gain a grip in the market, to increase their market share and to oust its competitors.

If there is no manufacturer in the importing country, dumping can be to the benefit of importing countries, as it will receive the product at a lower price.⁵⁰ Dumping could still take place to the importing country, as the exporter in one country may have to compete against exporters situated in other countries. A prime example of dumping is the international steel price which is lower than the price in any other steel manufacturing country.

2.4 Anti-dumping

2.4.1 What is Anti-dumping?

Trade remedies are legal instruments which businesses may use to safeguard themselves against unfair foreign competition. The first and most commonly used instrument is anti-dumping, which is used against injurious dumping. The second instrument, which forms the basis of this Trade Brief, is Countervailing and Subsidies.⁵¹ The second instrument will be discussed later on. The third instrument is known as Safeguards and furthermore Tariff amendments can be used as a remedy of trade. These instruments will be discussed in Chapter 4.

Anti-dumping duties are the internationally acceptable countermeasure to injurious dumping.⁵² The various procedures that have to be followed when introducing an anti-dumping action are contained in the Uruguay Round Anti-dumping Agreement (URRA), which forms part of the Multilateral Trade Agreement signed in 1994, and which falls under the supervision of the World Trade Organisation. If it can be shown that an exporter is dumping and that the said dumping is causing material injury to the relevant import-competing industry, then an anti-dumping duty is imposed on the dumped product.⁵³ The

⁵⁰ *Ibid.*

⁵¹ Art 1(1) of the Board Act.

⁵² Bekker "The strategic USE of anti-dumping in International Trade" (2001) <<http://www.essa.co.za>> (accessed on 3 March 2010).

⁵³ *Ibid.*

purpose of anti-dumping is therefore to counter the unfair trading practice known as “injurious dumping”.⁵⁴ In some instances it has been found that imports, although it is more inexpensive than those produced locally, it does not satisfy all the requirements for anti-dumping measures to be imposed.⁵⁵

It is often easy for local industries to show that they have suffered injury. However, when ITAC conducts its investigation it sometimes finds that the more inexpensive imports is not being dumped, i.e. the domestic price of the exporter is not greater than its export price, and then the investigation will be terminated.⁵⁶ Increasingly dumping investigations are also being terminated because of a *lack of a causal link* between imports and the injury being suffered by the local industry.⁵⁷ In most of these instances it is found that factors other than imports are causing the injury, therefore detracting from the causal link between the dumping and the material injury. As stated above, all relevant factors other than dumping that may have caused the injury must be considered. Such factors may include the volume and prices of imports not sold at dumped prices, contraction in demand or changes in the patterns of consumption, trade restrictive trade practices of and competition between the foreign and local producers, developments in technology, other factors affecting the local prices, the industry’s export performance, and the productivity of the local industry.⁵⁸

Dumping may also be said to occur when the export price of a product is below the price of manufacturing.⁵⁹ Domestic industries often pressure their governments to charge anti-dumping duties on dumped goods; these duties should be equal to the “dumping margin” - the difference between the prices charged on the home market and the export market. The intent of anti-dumping is thus to restore fairness to international trade by protecting firms

⁵⁴ *Ibid.*

⁵⁵ *Supra* note 36 at

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Tillman “The Fishy Business of Anti-dumping” (2008) <<http://www.policyinnovations.org/ideas/briefings/data/000038>> (accessed on 15 April 2010).

from voracious dumping, and by giving industries time to adjust to increase the levels of competition.⁶⁰

2.4.2 The impact of anti-dumping on the world's trade

The process of multilateralism, negotiated under the support of the World Trade Organisation, is being increasingly exposed by trade-distorting practices which serve to undermine the prospects of free trade. One such practice relates to the occurrence of dumping. An unfair trade practise denies the levelling of playing fields to the domestic industry or market and is sought to be effectively restricted by the imposition of sufficient protective anti-dumping duties, which have been subscribed as a safety net under the guidelines of the World Trade Organisation.⁶¹

In fact, between 1992 - 1993 and 1996 - 97, anti-dumping duties were recommended in 19 cases, which rose to 60 between 1997 - 98 and 2000 - 2001. Again, between 1992 and 1997, imposition of duties was recommended against 50 countries, which rose to 78 countries in the two subsequent years. The products recommended levies of anti-dumping duties including chemicals, petrochemicals, pharmaceuticals, steel, metals and consumer goods. The countries that figure frequently in anti-dumping cases and investigations, are India, US, European Union, Korea and Russia.⁶² It includes both dispute settlement instigation as well as national trade remedy actions reported as per anti-dumping agreements. As per World Trade Organisation report, India stands first in terms of anti-dumping duties in force.⁶³ It is precisely the expanding membership of the World Trade Organisation that has assist a shift on the part of many members towards the use of "ad hoc", non-tariff measures to shelter their domestic procedures, because along with accession comes the right to institutionalising anti-dumping statutes. Not surprisingly, exporters find their products being

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² See Annexure A.

⁶³ *Ibid.*

increasingly subject to non-tariff barriers which obstructs their exports to major trading partners in the more developing parts of the world.⁶⁴

Notwithstanding the merits of imposing anti-dumping duties, the crucial impact is to undermine the wellbeing effects of free trade which encourage inadequacy in production and in the process hurt consumers in countries that imposes such duties. It is important for developing countries to decrease the use of anti-dumping measures. If the crucial aim is to increase gains from trade, it is our overall interest to push for reform in the present anti-dumping establishment.⁶⁵ An area of concern relates to article 15 of the World Trade Organisation Agreement, which recommends that special consideration be given by developed countries and beneficial remedies be explored before applying anti-dumping duties on developing country members. However, in practice, the developed country members have hardly ever explored the possibility of beneficial remedies before taking anti-dumping action against exports from developing countries.⁶⁶

To resolve the problem, it should be suggested that the agreement be reviewed to limit the scope for replicating anti-dumping investigations on the same product. When there is an investigation resulting in non-imposition of anti-dumping duties, there should be a gap of at least a year before another investigation on the same product can be initiated.⁶⁷

In view of the increasing volume of goods being exported by the developing nations, it is recommended that the maximum limit be increased from 3 per cent to 7 per cent for imports from developing countries and that the provision for the association of imports from different countries within the maximum limit for applying the collective duty of 7 per cent should be terminated. On the contrary, the agreement does not provide a time limit within which it has to be

⁶⁴ Chu & Prusa "The reasons for and the impact of anti-dumping protection" Published by East-West Centre Working Paper <www.estecentre.ca/journal/j-html.giv> (accessed on 1 March 2010).

⁶⁵ *Ibid.*

⁶⁶ See art 15 of the WTO Agreement.

⁶⁷ *Ibid.*

determined whether the volumes of dumped imports are negligible or within the prescribed threshold. A uniform time-frame of 12 months should be fixed to reduce the scope of arbitrary dumping decisions.⁶⁸

Article 5.8 of the World Trade Organisation Agreement also provides for immediate termination of investigation in case the volume of imports is negligible or when the margin of dumping is *de minimus*. The *de minimus* dumping margin limit has been prescribed at 2 per cent of export price, which is the same for both the developed and developing countries. There is a proposal to maximise the *de minimus* dumping margin to 5 per cent for developing countries which may, in many cases, have a cost advantage over developed countries due to the labour-intensive nature of production.⁶⁹

The developing countries find the process of investigation on dumping, expensive and burdensome. Vast legal costs weigh down heavily on exporting companies, and ties up their products for almost a year. It is suggested that the agreement be simplified to prevent its abuse by the domestic industry or market. Investigations must be initiated against developing countries, only if the petition has the support of at least 50% of the domestic industry or market of the developed country.⁷⁰

Article 9.1 of the World Trade Organisation Agreement leaves it to the judgment of the anti-dumping authorities to impose duties equal to the full margin of dumping or less. A large number of developed countries apply duties to the full level of the margin of dumping and, thereby, provide additional protection to the domestic industry. Article 9.1 should be amended to make it compulsory for imposing fewer duties if it is satisfactory to remove injury to domestic industries rather than leaving it to the judgment of the importing country. In addition, norms and criteria should be established to

⁶⁸ *Ibid.*

⁶⁹ Art 5 and 6 of the WTO Agreement.

⁷⁰ *Ibid.*

operationalise the 'lesser duty' route in terms of the satisfaction to remove injury.⁷¹

A major draw back of the agreement is the standard of review contained in Article 17.6 of the World Trade Organisation Agreement, which has severely limited the role of the World Trade Organisation Dispute Settlement Panel. Article 17.6 stipulates that if the panel finds that the authorities have recognised and evaluated the facts properly, objectively and without prejudice, it shall not overturn the conclusion reached by the authorities. Article 17.6 needs to be reviewed to ensure that the same standard of review is applied to disputes relating to anti-dumping as under other World Trade Organisation Agreements.⁷²

It is doubtful and would be impractical to expect major changes in the anti-dumping establishment in the next round that has been scheduled. The developed countries are unlikely to agree to a significant amendment of the World Trade Organisation Agreement on anti-dumping. After all, even a limited progress in the direction of reform would be a significant step forward for developing countries.⁷³

2.4.3 The Like Product

The Like Product is the product sold on the domestic market that is like the exported-dumped-product.⁷⁴ Article 2.6 of the Anti-dumping Agreement⁷⁵ stipulates more in general that throughout the Anti-dumping Agreement, the Like Product is a product which is identical, i.e., a like in all respects to the product under consideration or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

⁷¹ See art 9.1 of the WTO Agreement.

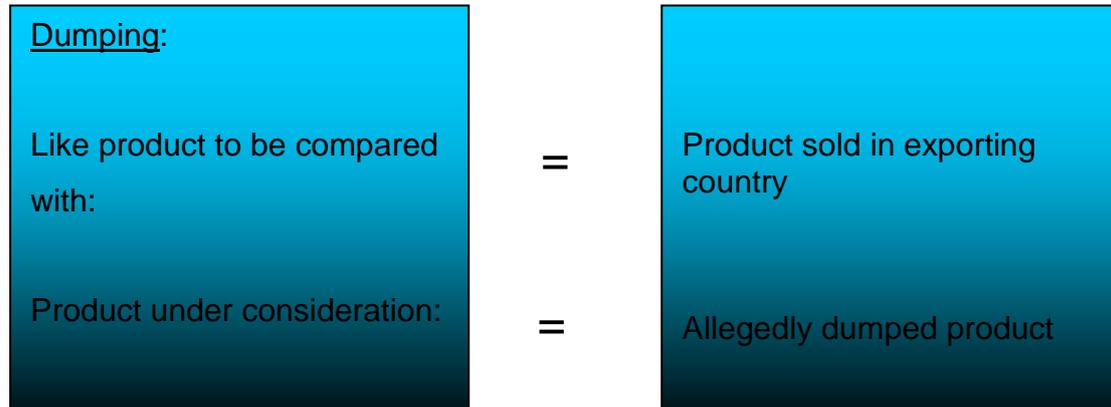
⁷² Art 17.6 of the WTO Agreement.

⁷³ *Ibid.*

⁷⁴ Art 2.1 of Anti-dumping Agreement.

⁷⁵ Anti-dumping Agreement. Compare US-softwood lumber from Canada II, panel, 7.152.

Article 2.6 of the Anti-dumping Agreement not only defines Like Products, but also clarifies that the definition is applied throughout the Anti-dumping Agreement. For example:



2.4.4 Normal Value

Normal values may be determined in several ways according to public legislation and the GATT anti-dumping code, but the commission is restricted to make free choices about the normal values.⁷⁶ There are requirements to establish the normal value on the basis of the domestic price in exporting countries. Where such a price does not occur, or where sales on the domestic market do not permit to proper comparison, then it is possible to base the normal value either on the price of the product when exported to a third country, or on the constructed value of the goods. Only in special circumstances the normal value can be established on another base.

It may be based on prices or costs in market economy countries, or where the product is sold at a loss on the home market, and then the criteria other than the domestic prices may be used. Only in very exceptional circumstances, reference may be made to basic prices, dumping being presumed where imports are made below a predetermined price or cost for the product,⁷⁷ because GATT and public legislation may not lay down binding rules on normal values. It frequently happens that exporters are only merchants or

⁷⁶ Art 2, 3-7 reg (eec).

⁷⁷ Art 2, 1 and 4 of the Anti-dumping code.

brokers who do not produce the goods nor sell on the domestic market.⁷⁸ In such cases, many problems may occur when trying to establish the normal values. The following circumstances may be distinguished:

- (a) where the exporter produces the goods and sells them on the domestic markets, the normal value would normally be based on the exporter's domestic price;
- (b) where the exporter sells on the domestic market, though he is not a manufacturer, the normal value would also be based on his domestic price, in normal circumstances;
- (c) where the exporter produces only for export and does not sell on the domestic market then, as a general rule, the normal value would be based either on the price of his exports to a third country or on the constructed value of his product;⁷⁹
- (d) where the exporter neither produces the good nor sells it on the domestic market but exports it to other countries in addition to the Community, then, in normal circumstances, his normal value could be based on the price of his exports to a third country;⁸⁰
- (e) finally, where the exporter neither produces the good nor sells it on the domestic market, and only exports it to the Community, then there is no alternative but to base his normal value on the prices or costs of those who do sell the good on the domestic market or produce it in that country. In these circumstances, it is possible either to look beyond the exporter in question and take the prices or costs of his supplier or to take the prices of other suppliers on the domestic market.⁸¹

⁷⁸ See imposing a provisional anti-dumping duty on imports of Urea Ammonium Nitrate solution fertiliser originating in the US.

⁷⁹ See imposing a provisional anti-dumping duty on imports of certain textured polyester fabrics originating in the US. 1, Meyers fibers produced on the US market, but sold there at a loss and normal value was thus established by reference by other companies, domestic sales. A similar approach was chosen from Amoco-chemical Corporation.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

2.4.5 Injury

Injury is determined in a less complicated manner. Material injury is determined by considering whether there has been a significant depression and/or suppression in the local industry's prices. Furthermore, it must be considered whether there have been considerable changes in the domestic performance of the local industry or market, in respect of diverse potential injury factors. A *causal link*⁸² between the dumped imports and injury also needs to be established. This is ordinarily done by recommendation of developments in quantities and prices of the dumped imports and price undercutting or price suppression and depression. All relevant factors other than dumping that may have caused the injury must be considered.⁸³

Even if export products represent dumping, the authority of the importing country cannot immediately establish anti-dumping measures unless the dumping causes injury to a domestic market of the importing country.⁸⁴ The purpose of adopting antidumping measures is not to penalise the action of dumping, but it is an actual remedy for the injury to the domestic market.⁸⁵

Therefore, the extent of this injury has to be determined. In terms of Article 3 of the World Trade Organisation's Anti-dumping Agreement, the injury to the importing country's market can take on three forms:⁸⁶

- (i) dumping causes material injury to a recognised market;
- (ii) dumping threatens material injury to a recognised market; and
- (iii) dumping materially retards the recognition of a domestic market.

If the authorities can verify one of the abovementioned situations then anti-dumping measure can be legally adopted. The World Trade Organisation's

⁸² *US Lamb Investigation* (Art 4.7 of the Agreement on Safeguards) and *Argentina Footwear Investigation* (14 February 1997).

⁸³ *Ibid.*

⁸⁴ Bryan & Boursereah "International Law and Economics" (1985) 648 <www.ufh.netd.ac.za> (accessed on 14 March 2010).

⁸⁵ *Supra* note 45 at 329.

⁸⁶ The Agreement on the Implementation of Art 6 of the GATT 1994.

Anti-dumping Agreement specifies that an injury shall be determined on the base of positive evidence and objective examination of both:⁸⁷

- (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products; and
- (b) the consequent impact of these imports on domestic producers of such products.

Specifically, an injury determination involves reviewing many different factors, “no one or several of these factors can necessarily give decisive guidance”.⁸⁸

According to Bryan and Boursereau⁸⁹, these factors fall within three categories:⁹⁰

- (i) the investigating authorities has to consider whether a significant increase in the volume of dumped imports has occurred.
- (ii) the investigating authorities has to consider whether the price of the dumped imports has undercut significantly the price of a like product sold in the importing country.
- (iii) the investigating authorities has to consider the actual and potential impact the dumped products have or will have on the domestic industry, according to a variety of factors. Such factors may include:

“actual and potential decline in sales , profits , output, market share, productivity, return on investment , or utilisation of capacity ; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, employment , wages, growth, ability to raise capital or investments. ”⁹¹

Therefore the concept of injury has been defined so broadly that it could also include any negative effect found in the importing country or its market.⁹²

⁸⁷ WTO Antidumping Agreement Art 3.1.

⁸⁸ The Agreement on the Implementation of Art 3.2 of the GATT.

⁸⁹ *Supra* note 80 at 648.

⁹⁰ *Ibid.*

⁹¹ The Agreement on the Implementation of Art 3.4 of the GATT.

⁹² *Ibid.*

When evaluating the Chinese Anti-dumping Statutes and the South African Anti-dumping Regulations with the World Trade Organisation provisions in respect of determination of injury, it becomes clearer that the Chinese Antidumping Statutes are far from being consistent with the World Trade Organisation's Anti-dumping Agreement where the South African Anti-dumping Regulations are strictly consistent with the World Trade Organisation provisions.⁹³ One shortcoming in the Chinese Anti-dumping Statutes is that there are no separate criteria for the determination of the existence of material injury, a threat of material injury or a retardation of the recognition of the market.⁹⁴ The World Trade Organisation requires the determination of dumping which caused injury and according to China's Statutes they only need to prove dumping and the causal link thereof.

Article 8 of the Chinese Anti-dumping Statutes only determines a few factors that must be examined in determining whether dumping has caused injury or not. There are no provisions with regard to a threat of material injury or a retardation of the recognition of an industry or market. The South African Anti-dumping Regulations stipulate detailed provisions for three kinds of injuries to a market or industry. These provisions are determined in Section 13 (material injury), Section 14 (threat of material injury) and Section 15 (material retardation of the recognition of a market) of the GATT.⁹⁵

2.4.5.1 *Material Injury*

Material injury consists of three forms namely:⁹⁶

- actual and present material injury;
- a threat of material injury; and
- the material retardation of the establishment of an industry.

⁹³ Li Yang "Some issues in the determination of dumping and injury under China's Anti-dumping regulations" (2003) 12 <www.vi.unctad.org/resources> (accessed on 30 June 2010).

⁹⁴ Art 8 of the Chinese Antidumping Statute.

⁹⁵ Art 13 to 15 of the South African Antidumping Regulations.

⁹⁶ G Brink "A theoretical Framework for South African Antidumping Law" (2004) Unpublished Doctoral thesis, University of Pretoria. <www.ictsd.org/demonstration> (accessed on 30 June 2010).

There were only two countries that tried to define ‘material injury’, namely United States of America and Australia. There has been a long dispute about the definition of “Material” injury. The United States defines “Material” injury as “Injury that is not immaterial or inconsequential”, but it clearly seems to be the wrong definition. The Australians on the other hand, defines it as “injury that is greater than the normal ebb and flow of business”. Antidumping Regulation 13 prescribes fifteen injury factors that should be taken into account. Which ought to be the right one?⁹⁷

The Anti-dumping Regulation⁹⁸ factors are: price suppression; price depression; sales volume; profit and loss; output; market share; productivity; return on investments; capacity utilisation; cash flow; inventories; employment; wages; growth; ability to raise capital or investments; and any other relevant factors placed before the Commission. The World Trade Organisation came to the following conclusion in the *Mexico – High Fructose Corn Syrup or HFCS* Investigation. In terms of the World Trade Organisation rulings, International Trade Administration Commission⁹⁹ must consider and evaluate each and every injury factor and not only those that indicate the presence of injury.¹⁰⁰

Threat of injury: the additional factors to be considered:

- a significant rate of increase of dumped imports into the domestic market of the South African Customs Union;
- sufficiently freely available, or an imminent substantial increase in, capacity of the exporter;
- the availability of other export markets to absorb additional export volumes;

⁹⁷ *Ibid.*

⁹⁸ Hereafter referred to as ADR.

⁹⁹ Hereafter referred to as ITAC.

¹⁰⁰ *Ibid.*

- whether products are entering or will be entering the South African Customs Union¹⁰¹ market at prices that will have a significant depressing or suppressing effect on South African Customs Union prices;
- the exporter's inventories of the product under investigation.

2.4.6 Export prices

In order to evaluate whether dumping has taken place, the normal value is compared with the export price. Primarily in the GATT there were doubts about whether the normal value should be compared with the price of the like product when it left the exporting country, or the price after it entered the importing country. This was because, in the 1920's, some countries provided in their legislation that the price should be that at which the product was offered for sale in the importing country.¹⁰² Viner drew attention to this practice, though he took the view that dumping occurred only if the price differential reflected adjustments for such factors as freight and packing charges which implied, in effect, that the price should be that at which the product left the exporting country.¹⁰³

Dumping in this chapter is considered to take place "if the price of the product exported from one country to another" is *inter alia*, "less than the comparable price in the ordinary course of trade for the like product when destined for consumption in the exporting country."¹⁰⁴

The anti-dumping code determines the price of the "product exported from one country to another,"¹⁰⁵ and public legislation clarifies the position even further by providing that the export price shall be the "price actually paid or payable for the product when sold for export to the Community."¹⁰⁶

¹⁰¹ Hereafter referred to as SACU.

¹⁰² Art 8, para (d) (1968) Anti-dumping code.

¹⁰³ Jackson & Vermulst (eds) "Anti-dumping law and Practice (A comparative study)" (1989) 80 <www.jstor.org/stable> (accessed 30 June 2010).

¹⁰⁴ *Ibid.*

¹⁰⁵ Art 2 para 1 of Anti-dumping code.

¹⁰⁶ Art 1 para 8(a) of Anti-dumping code.

2.5 Anti-dumping in South Africa

South Africa is one of the first country's to promulgate legislation dealing with dumping. South Africa was one of the most creative users of anti-dumping measures during the first half of the twentieth century. During the nineteen seventies and eighties South Africa was a closed economy. Several countries imposed trade sanctions against South Africa and the South African government responded by imposing high tariffs to protect domestic industries, thus opposing the need for anti-dumping action.¹⁰⁷ The result was that several companies were founded with the purpose of replacing imports.

During the early nineteen nineties South Africa's economy opened up, customs duties were minimised and South African international trade increased drastically.¹⁰⁸ With the shift towards free international movement of goods, the government recognised that domestic companies would require protection against injurious "unfair", low-priced imports from international companies, which also enjoyed significant economy of scale advantages. The *Board Amendment Act*¹⁰⁹ and the *Customs Amendment Act*¹¹⁰ that was promulgated in 1992 changed the then-existing anti-dumping dispensation. The direct result of the legislation was the establishment of the Directorate for Dumping Investigations at the Department of Trade and Industry.¹¹¹

In 2003 the *International Trade Administration Act*¹¹² was promulgated, which revoked the *Board on Tariffs and Trade Act*¹¹³ and terminated the Board on Tariffs and Trade as an institution and created the International Trade Administration Commission of South Africa. The different laws of South Africa

¹⁰⁷ Custom and Tariffs Act 26 of 1914.

¹⁰⁸ Board on Tariffs and Trade Act 60 of 1992.

¹⁰⁹ *Ibid.*

¹¹⁰ Act 61 of 1992.

¹¹¹ *Ibid.*

¹¹² Proclamation R9 in Government Gazette – 21 February 2003.

¹¹³ 39 of 1995.

on anti-dumping are going to be discussed briefly to see the significant trade development in South Africa.¹¹⁴

2.5.1 The impact of anti-dumping on South African Trade

The imposition of duties will result in increased prices of goods from South Africa and allow world industries to increase its prices. Duties on South African goods may also allow importers from other sources such as Australia to increase their prices due to the removal of some of the down pressure on prices instigated by dumped imports. It is difficult to measure the extent of any price-increases as price competition is also affected by imports from countries such as Australia and current or potential supplies of goods from low cost sources. Prices of imports from other countries may decrease the extent to which prices could increase. The imposition of anti-dumping duties at the full margin of dumping for exports from merging; will likely result in increased prices, but prices should still be less than the non-injurious prices.¹¹⁵

The imposition of anti-dumping duties at the full margin of dumping for exports that is self-regulating is unlikely at the level of present exchange rates to result in the imposition of anti-dumping duties or increased prices. The duty levels are needed to ensure that injury caused by dumping is remedied if movements in exchange rates result in a continuation of dumping.¹¹⁶

The highest proposed anti-dumping duties are from Cape-Gate, the South African exporter. The proposed duties from Cape-Gate are set at a level that is less than the margin of dumping and no more than the required remedy and injury. The duties should result in imports from Cape-Gate being priced to meet the prices of the other countries.¹¹⁷ The extent to which goods from Cape-Gate is still able to compete in the international markets will depend on other competitive factors, such as availability, perceived quality, delivery and

¹¹⁴ ITA Act of 2002.

¹¹⁵ *Supra* note 60.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

service. Importers may also decide to source cheaper goods from other countries.¹¹⁸

Following the imposition of provincial anti-dumping duties, Euro Corporation¹¹⁹ made recommendations in its final report, that importers will limit their importers from South Africa or stop importing all together and find other sources of goods to import. While the imposition of final duties may result in consumers not having the same access to South Africa, goods that's imported from other countries will not be affected by the duties, and consumers will therefore continue to have the same access to goods from other countries.¹²⁰

2.5.2 South African anti-dumping laws

2.5.2.1 Historical amendments

Until the recognition of the Union of South Africa in 1910, South Africa had no international trade policy to speak of, also no law to control dumping.¹²¹ In 1910 the new Union immediately appointed a commission, the Cullinan Commission, to investigate the attraction of establishing local industries.

The commission established the following conditions in terms of which local industries could qualify for increased tariff protection:¹²²

1. Local natural materials had to be used;
2. Jobs for white people had to be created; and
3. The industry's chances of success should be at a high.¹²³

The recognition of the commission led to the *Customs Tariffs Act 26 of 1914*. The Union of South Africa was one of the first countries to ratify an anti-dumping law when it did so in 1914.¹²⁴ In 1922, South Africa intensified its anti-dumping legislation by the ratification of a provision that there could be a

¹¹⁸ Deputy Minister Pahad "Implications for South African Business" (2000) <www.fmpre.gov.za> (accessed on 5 March 2010).

¹¹⁹ 100% New Zealand owned distributor of steel.

¹²⁰ *Supra* note 60.

¹²¹ The Customs Tariffs Act 26 of 1914.

¹²² *Supra* note 35.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

levy added to the actual price of sale, if imported goods were sold in the union at less than the wholesale price in the country of the manufacturer, plus the cost of packing, board and freight charges to port of entry, and if such a sale jeopardised a Union industry.¹²⁵

South Africa substantially modified its anti-dumping law in 1992 with a view towards establishing more apparent definitions of dumping and a more refined procedural application.¹²⁶

Finally, the 1992 Act assigned the responsibility for investigating and enforcing anti-dumping regulations to the *Board on Tariffs and Trade*.¹²⁷ The 1992 revisions served as an appropriate reference point because the Board on Tariffs and Trade began to use anti-dumping duties on a broader scale in 1992 than in previous years.¹²⁸

On August 23, 1995, the South African parliament ratified a new anti-dumping law to amend the *Board on Tariffs and Trade Act of 1986*. This was the *Board on Tariffs and Trade Amendment Act of 1995*. The aims of the 1995 Act were, “to amend the definition of dumping; to define certain expressions; and to provide that the said Act shall also apply in the former homelands”.¹²⁹ These new guidelines set the boundaries of South Africa’s anti-dumping law by detailing the appropriate standard to evaluate normal value,¹³⁰ material injury, the threat of material injury, like products and the causal relationship.¹³¹

This was the first citation ever in South African legislative history to the “normal value” of a product. Normal value was defined in this Act as the domestic price of the product, or, in the absence of such a price, either the

¹²⁵ *Ibid.*

¹²⁶ Board of Trade and Industry Amendment Act 60 of 1992.

¹²⁷ *Ibid.*

¹²⁸ *Supra* note 113.

¹²⁹ Board on Tariffs and Trade Amendment Act of 1995.

¹³⁰ Art 32(2)(b) of *the ITA Act 2002*.

¹³¹ *Ibid.*

export price from the exporting country to a third country or the cost of production plus a reasonable addition for selling costs and for profit.¹³²

2.5.2.2 The International Trade Administration Act 2002 and the International Trade Administration Commission Anti-dumping Regulations

In 2002, in order to achieve compliance with the World Trade Organisation Agreement, South Africa ratified a new act, the *International Trade Administration Act 2002*.¹³³ The Preamble of the *International Trade Administration Act 2002*¹³⁴ states as its purpose: “To establish the International Trade Administration Commission; to provide for the functions of the Commission and for the regulation of its procedures; to provide for the implementation of certain aspects of the Southern African Customs Union Agreement in the Republic; to provide, with in the framework of the SACU Agreement, for continued control of import and export of goods and amendment of customs duties; and to provide for matters connected therewith”.¹³⁵

The *ITA Act 2002* created a new organisation on 22 January 2003, namely the International Trade Administration Commission, for the administration of trade remedies within South Africa and was followed by the promulgation of detailed anti-dumping regulation. The then South African Minister of Trade and Industry, Alec Erwin, approved the new Anti-Dumping Regulation on the 12th of November 2003. These regulations were published by ITAC. The regulations allow for investigations to be concluded within twelve months, the World Trade Organisation standard time for investigations to be finalised. In extraordinary cases the investigations can be extended by six months.¹³⁶

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Hereafter referred to as the ITA Act.

¹³⁵ Art 32(2)(b) of *the ITA Act 2002*.

¹³⁶ *Ibid.*

The regulation came after the draft regulation were sent out for public opinion in March of 2003, and are aimed at creating a balance between the rights of the Southern Africa Customs Union¹³⁷ industry and importers and exporters. The ITAC is the agency responsible for decisions on anti-dumping measures. The Commission is led by a full time Chief Commissioner, assisted by a full time Deputy Chief Commissioner, and at least two but no more than 10 other commissioners who must have appropriate qualifications in economics, accounting, law, commerce, agriculture, industry or public affairs. The ITAC is independent and by law subject only to the Constitution and the law and any Trade Policy Statement or Directive or Notice issued by the Minister of Trade and Industry in terms of the *ITA Act*.

According to the new trademark regulation promulgated by South Africa's International Trade Administration Commission, as from 23 May 2005, foreign textile products, clothing and footwear can be imported into the country and sold on the domestic market only if they comply with the following stipulations on trademarks:¹³⁸

- 1) designating the country of manufacturing, the registration number of the manufacturer and/or the import registration number of the importer, and the degree of product processing;
- 2) complying to South African Standardisation Bureau's identification and marking standards regarding Universal Product Code (UPC) of textile products and clothing (SANS011) and UPC of synthetic and natural fibers (SANS0235);¹³⁹
- 3) itemising the composition of raw materials by weight or by quantity and their respective percentages;
- 4) stating specifically as such, if the products have been reprocessed and re-treated;

¹³⁷ SACU was concluded between the Governments of South Africa, the Republic of Botswana, Kingdom of Lesotho and Kingdom of Swaziland on 11 December 1969. Namibia became a member of SACU after its independence in 1990.

¹³⁸ *Supra* note 113.

¹³⁹ *Ibid.*

- 5) specifying the names of the fibers in the order of their weight or quantity, in the case of a fiber product made through plastic spraying by two or more fibers differentiable by chemical means; and
- 6) indicating the ratio of labour cost to raw material cost of the product.

2.6 Predicaments of the South African anti-dumping laws

In February 2003 the Board published a draft on anti-dumping regulations for public opinion. Parties had 30 days to submit opinions to be taken into consideration by the Board. The anti-dumping regulations were finally promulgated on 14 November 2003.¹⁴⁰

Until November 2003 South African legislation provided only the broadest outlines regarding what constituted dumping and how it could be countered. The *Board Act 1986* and the *ITA Act*.

- (a) prescribed that the Board was the authority that could conduct anti-dumping investigations;
- (b) defined dumping, export price and normal value; and
- (c) prescribed the treatment of export prices from non-market economies and how the export price should be determined in cases where the indicated export price was unreliable for a variety of reasons.¹⁴¹

The predicament that South Africa is facing is twofold. Firstly, until November 2003, South African procedural and substantive anti-dumping laws were nearly non-existent, indicating that there may be very little relevant knowledge at the Board despite all the investigations it has conducted since 1914.¹⁴²

Secondly, the Anti-Dumping Regulations do not cover all aspects that should be covered and may not be harmonious with South Africa's international obligations regarding other provisions. The following must be taken into account:¹⁴³

¹⁴⁰ Anti-Dumping regulations of 2003.

¹⁴¹ Art 21 of the *Board Act 1986* and art 32 of the *ITA Act*.

¹⁴² *Ibid.*

¹⁴³ *Supra* note 60.

- (a) the requirements of the World Trade Organisation;
- (b) the current legislation, regulations and procedures of the European Union, the United States and South Africa itself; and
- (c) those aspects that are peculiar to South Africa.

Additionally, the South African practice is at least to a certain extent based on the European Union practice. It is submitted that South Africa could be a leader in the field of anti-dumping action, not only as regards to the number of cases investigated, but also as regards to the procedures followed.

Anti-dumping law can be divided into two broad sections, being substantive and procedural anti-dumping law. Substantive anti-dumping law deals with:

1. causality;¹⁴⁴
2. dumping (normal value, export price etc);
3. general issues such as like products;
4. material injury; and

Procedural anti-dumping law deals with the authorities and parties involved in an investigation, time frames, and the procedures and or methodology used.¹⁴⁵

2.7 South African anti-dumping investigations

2.7.1 Anti-dumping applications

Any domestic industry may approach the Commission at any stage with an anti-dumping application. The application must be made by or on behalf of the domestic industry, which means that manufacturers representing at least 25% of the total production volume of the product must supply the essential information. In addition, at least 50% of the manufacturers by production volume that state an opinion on the application must support the application.¹⁴⁶ The Commission, however, now proposes to require at least

¹⁴⁴ The Anti-Dumping Agreement and most writers do not properly distinguish between material injury and causality, but treat this as a single point of reference. (art 3 and 5 of the Anti-Dumping Agreement).

¹⁴⁵ *Ibid.*

¹⁴⁶ Antidumping Regulation 7.3 and Antidumping Agreement 5.4.

50% of the manufacturers by production volume to submit information and to request all manufacturers individually accounting for 35% or more of production volume to provide the required information.¹⁴⁷ This is apparently done to ensure that injury experienced by one manufacturer is caused by the dumped imports and not by another manufacturer.¹⁴⁸

Parties must submit an accurately documented application.¹⁴⁹ This requires the applicant to submit such information as is reasonably available to it, including information relating to normal values, export prices and injury.¹⁵⁰ Once the Commission is satisfied that all questions have been answered and all insufficiencies pointed out have been addressed it will proceed to verify the information *in situ*.¹⁵¹ The investigating officers will then write a merit submission to the Commissioners for their consideration. If the Commission finds that the application establishes a *prima facie* case of injurious dumping it will inform the trade representatives of the countries under investigation prior to initiation.¹⁵² If the Commission, however, finds that the application is without merit, it terminates the proceedings and informs the applicant accordingly. The applicant may lodge a new application at any stage thereafter.

2.7.2 Preliminary investigations

Once an investigation has been initiated through publication of an initiation notice in the *Government Gazette*, the Commission directly informs all known interested parties and supplies them with a copy of the initiation notice, the non-confidential version of the application and the relevant questionnaire to be completed. These parties will receive days from the date of the letter to complete the questionnaires and submit any comments on the application.¹⁵³

¹⁴⁷ Antidumping Regulation 15.2 and 15.3.

¹⁴⁸ *African explosives Ltd v International Trade Administration Commission Case 15027/06T*.

¹⁴⁹ Antidumping Regulation 21 and 22.

¹⁵⁰ Antidumping Regulation 24 and 24.

¹⁵¹ Antidumping Regulation 18 and 25.

¹⁵² Antidumping Regulation 26 and 27.

¹⁵³ Antidumping Regulation 29.2 and 29.3.

All parties not directly informed of the investigation will have 40 days to submit comments. Parties may request an extension,¹⁵⁴ but the Commission will rarely grant an extension of more than 14 days. Once the exporters' and importers' submissions have been received, the Commission studies the responses to determine whether there is any inefficiency in the responses. This includes failure to provide proper non-confidential versions of all submissions, the failure to answer all questions or the failure to attach the necessary supporting documents. This process normally takes between one and three weeks, depending on the workload of the specific investigating officers and the complexity of the specific investigation.

Once the deficiencies have been identified, the Commission sends a deficiency letter to the specific party setting out all deficiencies. These have to be addressed within seven days of the letter, failing which the parties' information will not be taken into consideration in the Commission's preliminary determination.¹⁵⁵ Once the Commission is satisfied that it has received all the relevant information from the parties it proceeds to verify the importers' and the exporters' information *in situ*.¹⁵⁶ The purpose of the verification is to determine the accuracy and completeness of the information submitted. Following verification, the Commission issues a verification letter to the specific party that it pertains to and places a non-confidential version thereof on the public file.¹⁵⁷

The verification letter should set out the exact information verified, the process follows during verification and should list all documents retained during verification, including a list indicating the confidentiality status of each document so retained. In practice, however, most verification reports are meaningless and only indicate that domestic sales, export sales and costs

¹⁵⁴ Antidumping Regulation 31.1.

¹⁵⁵ Antidumping Regulation 32.

¹⁵⁶ Antidumping Regulation 18.1 and 18.2.

¹⁵⁷ Antidumping Regulation 19.1 and 19.2.

were verified, without providing any indication as to how the process was conducted or which documents were scrutinised.¹⁵⁸

Once the verification visits have been completed, the investigating officers prepare another submission to the Commissioners for their consideration. This is for the preliminary determination, where the Commission decides whether provisional payments should be imposed or not. If the Commission makes an affirmative preliminary determination, that is, it finds injurious dumping; it normally requests SARS to impose a provisional payment in the amount of either the margin of dumping or the margin of injury, whichever is the lower, for a period of six months.¹⁵⁹ If the Commission makes a negative preliminary determination it publishes a notice to this effect in the *Government Gazette*. The Commission issues a preliminary report to all interested parties as soon as the preliminary determination has been published in the *Government Gazette*. This concludes the preliminary investigation phase.¹⁶⁰

2.7.3 Final investigation

All interested parties are granted 14 days to comment on the report, but may not submit any new information.¹⁶¹ Parties may request an extension for the submission of their comments, but such motivated requests must reach the Commission at least seven days before the deadline for comments.¹⁶² The Commission should¹⁶³ take all comments into consideration for its essential facts finding, which is essentially a pre-final determination. In the essential facts letter the Commission is required to set out all relevant issues of law and fact that it will take into consideration in its final determination. The letter often indicates only those facts that have changed since the preliminary determination, indicating that the other facts have remained unchanged. Parties have seven days to comment on the essential facts letter. Although the ADR specifically refers to an essential facts letter in the singular, the

¹⁵⁸ *Ibid.*

¹⁵⁹ Antidumping Regulation 33.2.

¹⁶⁰ *Ibid.*

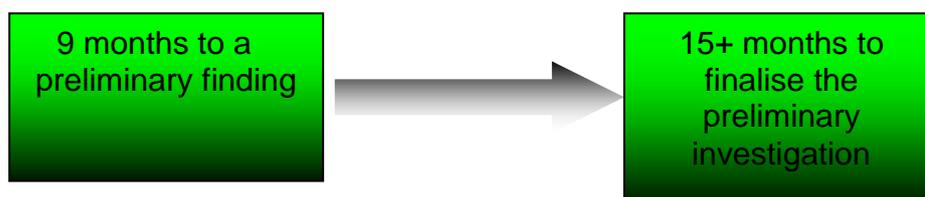
¹⁶¹ Antidumping Regulation 35.1.

¹⁶² Antidumping Regulation 35.3.

¹⁶³ *Supra* note 92.

Commission has recently started to issue multiple essential facts letters in investigations and reviews, following challenges to the facts in each case. This has created doubt, as parties do not know whether the letter sets out the facts that will actually be taken into consideration. It also causes serious delays in finalising investigations, which is of great concern to all interested parties, as uncertainty exists in the market as long as the investigation is ongoing.

As soon as parties have commented on the essential facts letter, the investigating officers prepare a final submission to the Commissioners. This is used as the basis for the final determination. Contrary to the provisions of the *ITA Act*, the final determination is in the form of a recommendation to the Minister of Trade and Industry. The recommendation is made via the offices of the Director-General and the Deputy Minister. If the Minister of Trade and Industry accepts the Commission's recommendation that definitive anti-dumping duties be imposed, he requests the Minister of Finance to impose the requisite duties. The Minister of Finance, in turn, will instruct SARS to implement the duties. The process to implement definitive duties after the Commission has made its final determination therefore takes anywhere from four to eight weeks, depending on the availability of all key persons. Once the final determination has been published in the *Government Gazette*, the Commission issues its final report to all interested parties. It also publishes the report on its website.¹⁶⁴



2.8 Conclusion

It is apparent from the different types of dumping that the World Trade Organisation's Anti-dumping Agreement does not clearly stipulate which kind

¹⁶⁴ <www.itac.org.za> (accessed on 20 September 2010).

of dumping should be illicit. Anti-dumping measures can be adopted in the domestic industry if the importing country's industry or market is being injured by the incorporation of its own anti-dumping laws as well as other international agreements.¹⁶⁵ This is used to protect both developed and developing countries' markets and industries. By not using the anti-dumping measures effectively, these measures will become new trade protective measures and prevent the improvements of international trade.¹⁶⁶

Although there have been several opportunities to properly legislate anti-dumping substance and procedure, the existing legislation (including the *ITA Act*) does not conform to the requirements of the World Trade Organisation. While the Anti-Dumping Regulations have been addressed, most of these inadequacies and several issues still need to be addressed. It is submitted that a separate Anti-Dumping Act should be drafted, and that such Act should provide for all the substantive issues, and that new regulations be drafted to complement such an Act.¹⁶⁷

In this chapter the question of the dumping predicament and its origin has been answered. The dumping predicament have made its appearance already in the early 1900's and firstly had an impact on the Northern American countries. After discussing the abovementioned and taking into account the definition of dumping, the impact and effect thereof, dumping is one of the most wide spreaded international trade practice where the most disapproval exist in the eyes of the international community.¹⁶⁸

¹⁶⁵ North American Free Trade Agreement (NAFTA).

¹⁶⁶ Gain Report: "A summary of the final Act of the Uruguay round" (2005) <www.fas.usda.gov> (accessed on 20 September 2010).

¹⁶⁷ *Supra* note 55 at

¹⁶⁸ Osode "Procedural aspects of South African Law and Practice" (2004) 19 <www.law.ufh.ac.za> (accessed on 20 September 2010).

CHAPTER 3

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3.1 Introduction

Companies all over the world faces a broad range of obstacles when conducting cross-border business and trade deals where there are a wide range of trade obstacles from anti-dumping duties to specific provisions. In this Chapter we will take a look at the European Union and China’s anti-dumping legislation and both countries regulate and restrict cross-border business and trade.¹⁶⁹

3.2 The European Union’s anti-dumping legislation

In the late 19th and early 20th century, a number of European companies came together and formulated an anti-dumping agreement. At that time the United

¹⁶⁹ <www.ec.europa.eu> (accessed on 20 September 2010).

Kingdom and Netherlands led the European countries in this matter, because of the dissatisfaction with sugar dumping from other countries, the International Treaty on anti-dumping was signed by them in the 1920's.¹⁷⁰

Ten European countries were asked to join the first open anti-dumping precedent. During the Marrakech round in 1994, the European Union played a vital role because they were seen as one of the four biggest international trade actors in the world. The European Union anti-dumping laws were laid down by the council's regulations 3283/94 of 22 December 1994 with the purpose to implement the GATT, Uruguay Round anti-dumping agreement. In regard to countries with non-market economies (NME) the new European Union anti-dumping laws did not change a lot from the older legislation. A long list of NME's were issued by the European Union's basic regulations where it was said that a separate set of anti-dumping legislation should be applied and set out in the European Communities Council. Examples of NME countries are Bulgaria, Hungary, North Korea, People's Republic of China and the USSR.¹⁷¹

This list of NME's gives an advantage in that it relieves the council by determining if these certain countries are NME's on a case by case basis, but it could still not be flexible enough to reflect the changes in the economic status in those NME's. The council's regulations provide special methods to determine dumping normal value etc.¹⁷²

3.2.1 The imposition of European Union's anti-dumping duties

The European Union anti-dumping regulation is regulated by the council regulation 1225/2009 and regulates the imposition of anti-dumping duties and the procedure how it should be applied. If the following four conditions are proved, then the European Union may impose anti-dumping duties in terms of council regulation 1225/2009:¹⁷³

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ <www.trade.ec.europa.eu> (accessed on 15 July 2010).

- (i) a result of dumping: where the export price at which the product is sold on the European Union market is seen to be lower than the price in the manufacturer's home market (normal value);
- (ii) a material injury to the Union's industry: this is where imports have caused damages to a certain part of the relevant industry or market within the European Union, for example loss of market share, reduced prices for European Union manufacturers, sales and profits etc;
- (iii) there must be a causal link between the dumped imports and the material injury;
- (iv) the interest of the European Union will be provided by the imposition of measures: the economic cost for the European Union when imposing measures must not be inconsistent with the benefits, in this instance exporters, European Union importers and European Union users and consumers will be invited to present their views when the imposition of anti-dumping duties are opposed.

When all of the above conditions are met, European Union anti-dumping duties will be imposed against exports of the products that originated in the exporting countries in that specific case. If there are normal custom duties then these duties will be added. They must not exceed "the dumping margin" or if it is smaller than "the dumping margin", then "the injury margin".¹⁷⁴

3.3 The European Union's anti-dumping procedures

3.3.1 The complaint

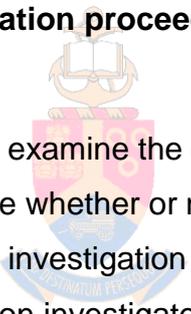
When the European Union's industry or market in a given sector considers that dumped imports from non-European Union countries are causing material injury, it can propose a complaint to the European Commission. The European Union industry refers to European Union producers or manufacturers of the particular product being dumped that are injured by the

¹⁷⁴ *Ibid.*

dumping. A complaint must be supported by a considerable amount of relevant European Union producers. Jointly, these companies must produce at least 25 per cent of the total European Union output of the product being dumped.¹⁷⁵

A complaint must contain information showing that a certain product originating in a third country is being exported to the European Union at dumped prices, and that this dumped product is causing injury to the Union industry. Evidence will be required to support the accusation made in the complaint.¹⁷⁶

3.3.2 European Union Investigation proceedings



The Commission has 45 days to examine the complaint, consult European Union Member States and decide whether or not there is enough evidence to permit a formal investigation. An investigation takes about 15 months and during this period, the Commission investigates the matter in depth and further consults with European Union Member States.

Within 9 months, the Commission generally imposes provisional duties. These duties consist in the provision of bank guarantees for the value of the duties that importers must provide when they are importing their product. The European Union Council of Ministers has the authority to decide whether to impose definitive duties and order the collection of the provisional duties.¹⁷⁷

Definitive duties are valid for a period of five years before they expire. If the European Union producers demonstrate that the removal of duties is likely to lead to further or continuous dumping and the renewed imposition of duties, the Commission may reopen its investigation and extend the protective measures for a period longer than the initial five year period.

¹⁷⁵ Werner “An introduction to Anti-dumping and other European Union trade law measures” (2010) <www.nortonrose.com.> (accessed on 15 July 2010).

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

3.3.3 Who is responsible for investigating antidumping complaints?

The European Commission is responsible for investigating complaints and assessing whether it is justified. The Commission can impose provisional measures, while it is the Council of Ministers which imposes definitive antidumping duties following a recommendation by the Commission.¹⁷⁸

3.3.4 Where can imposing duties be challenged?

European Union Regulations imposing anti-dumping duties may be challenged in the European Union General Court and the World Trade Organisation dispute settlement procedure may be used to settle disputes between World Trade Organisation Member States.¹⁷⁹

3.3.5 Confidentiality

Confidentiality is a central concern with anti-dumping complaints mainly for two reasons:¹⁸⁰

- (i) the companies involved in filing a complaint are typically competitors. Therefore, the exchange of business secrets or confidential information between these operators could constitute an infringement of competition law;
- (ii) an investigation relating to dumping practices focuses on the period immediately prior to the initiation of proceedings. If it is disclosed that a complaint is being considered, exporters will naturally increase their prices in order to decrease the risk of anti-dumping measures being imposed on them.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

The substantial majority of information is provided to the Commission on a confidential basis. The Commission will not reveal confidential information without specific permission from the supplier of the information.

3.3.6 Exporting non-market economy countries

The complainant must demonstrate that exporting countries export as an average at a price lower than the average domestic price (the normal value). Information must therefore be provided concerning average domestic prices for all countries targeted by the complaint.¹⁸¹

Where exports originate from a non-market economy, the complaining parties must provide the Commission with an “analogue country”, the average domestic prices of which will be compared to the non-market economy country average export prices in order to assess the existence of a dumping margin.¹⁸²

3.3.7 Other restrictions to access the European Union market

Aside from anti-dumping measures, the European Union from third countries may be made subject to safeguard measures in the form of quantitative restrictions or other restrictive arrangements.

Companies that operate globally may need to comply with very specific and targeted legal provisions, applicable to the sector in which they do business, if they are to market their products in the European Union. In that respect, the European Union has put in place an excess of measures, varying from one industry to another, requiring the prior authorisation of products or imposing particular labelling requirements, etc.¹⁸³

By way of particular example, the European Union recently implemented the REACH Regulation on chemicals and their safe use (Regulation No 1907/2006 of the European Parliament and of the Council). The aim of

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

REACH is to improve the protection of public health and the environment by according greater responsibility to industry for the management of risks associated with the production of chemicals.¹⁸⁴

3.4 China's anti-dumping legislation

3.4.1 China's anti-dumping legislation

In 1994 the implementation of The People's Republic of China Foreign Trade Law¹⁸⁵ came into effect. China has initially recognised a system of anti-dumping law. Article 30 of the Act provides China's anti-dumping rules, which are products to be exported below normal value, and thus have been completed under the related domestic industries, resulting in substantial damage or threat of material injury or the domestic establishment of substantive obstacles related industries or markets. The State may take necessary measures to eliminate or lessen such harm, or threat of harm. Article 32 provides that: "when the abovementioned happens, the State Council according to the provisions of the relevant departments instigates an investigation and make an arrangement." Article 6 of the General Agreement on Tariffs and Trade has the same effect as abovementioned provisions.¹⁸⁶

On 25 March 1997 the State Council promulgated 'The People's Republic of China Anti-dumping and countervailing regulations'.¹⁸⁷ The Ordinance of anti-dumping substantive law as well as procedural law became one in the same, as for the application, the filing of the final ruling when imposing anti-dumping duties on a specific part of each case, are corresponding regulations for China's dumping of foreign products against anti-dumping litigation, to provide a practical legal basis.¹⁸⁸ The Economic and Trade Commission has also developed a Commission where the rules is based on 'Foreign Trade Law of

¹⁸⁴ <www.trade.ec.europa.eu> (accessed on 15 July 2010).

¹⁸⁵ Chen Ming "Building a new Asia" (1997) 295 <www.cuhk.edu.hk> (accessed on 15 July 2010).

¹⁸⁶ *Ibid.*

¹⁸⁷ The Chinese Antidumping and Countervailing Statute 1997.

¹⁸⁸ *Ibid.*

The People's Republic of China' and 'The People's Republic of China Anti-dumping and countervailing regulations' of the relevant provisions which is applicable on The People's Republic of China Economy and Trade Committee in the anti-dumping and countervailing procedures in the organisation's ruling of industrial damages.¹⁸⁹

These and the relevant World Trade Organisation regulations still have not entirely consisted of the basic principles of the Department and therefore on 26 November 2001, China promulgated a new law, The People's Republic of China Anti-dumping Regulations.¹⁹⁰ The law compared to foreign developed countries and the World Trade Organisation, is relatively sound than those legal provisions that were previously issued. When compared with the past, China has shown great progress, but there are many factors that need further discussion and clarification in order to improve the protection of China's industry or market. In April 2004, the State Council revised China's Anti-dumping Statute 2002. The revised Anti-dumping Statute led to China's Anti-dumping Statute 2004 that closely followed the World Trade Organisation's Anti-dumping Agreement.¹⁹¹

The establishment of the World Trade Organisation, in particular the 1994 'Anti-Dumping Agreement' signing of the anti-dumping legislation around the world has played an important role. At this point in time, China is undergoing an economic transformation, but before China plays an important part in the World Trade Organisation, it must learn to use the World Trade Organisation and integrate the World Trade Organisation laws that are directly related to China by looking at the international trade's advantages and disadvantages.¹⁹² China is under severe dumping and anti-dumping *status quo*, which is directly paired with the development of China's anti-dumping legislation where new demands are being brought forward.

¹⁸⁹ *Ibid.*

¹⁹⁰ The China Anti-dumping Statute of 2002.

¹⁹¹ *Ibid.*

¹⁹² Yu "Dumping and Anti-dumping regulations with reference to China" (2002) 305 <www.etd.iovs.ac.za> (accessed on 15 July 2010).

3.5 China's investigation process

Investigations are quasi-judicial in nature and begin with the formal filing of an application by a representative of the domestic industry with the two relevant Ministry of Commerce¹⁹³ offices - the Bureau of Fair Trade for Imports & Exports ("BOFT"), which determines whether imports are being dumped, and the Investigation Bureau of Industry Injury ("IBII"), which determines whether a domestic industry is thereby injured.¹⁹⁴

Both portions of the investigation proceed simultaneously and are completed within one year to eighteen months. The investigation is conducted primarily through "questionnaires" for interested parties, along with hearings and meetings when requested. MOFCOM will issue both a preliminary and final determination in the course of the investigation.¹⁹⁵ MOFCOM is responsible for administering the Anti-dumping Regulations of the People's Republic of China.¹⁹⁶

China's Regulations which impose anti-dumping duties may be challenged in a Chinese High Court that has jurisdiction over this matter and the World Trade Organisation dispute settlement procedure may be used to settle disputes between the World Trade Organisation Member States.¹⁹⁷

3.6 Trade agreement between South Africa and China

China has become an increasingly important trading partner for South Africa. For the year ending in the third (September) quarter of 2007, China was the second main supplier of imports behind Germany and the sixth main destination of exports behind the US, Japan, 'unallocated', Germany and the

¹⁹³ Hereafter referred to as MOFCOM.

¹⁹⁴ <www.mofcom.gov.cn/> (accessed on 20 May 2010).

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

UK. General and electrical machinery dominates the imports of US\$2,356 million, while ores and slag and mineral fuels dominate exports to China.¹⁹⁸ China and South Africa have mooted entering into a free trade agreement¹⁹⁹, although there is a degree of apprehension in South Africa about such an agreement. We use version 7 of the GTAP database to assess the welfare and trade gains from the FTA, as determined by merchandise goods access only.²⁰⁰ The results show that there are comfortable welfare gains to South Africa of \$295 million, or 0.21 per cent of real GDP. Negating these are the labour market-related losses to South Africa, where employment falls by 0.13 per cent and the real wage declines by 0.37 per cent, but where at the same time the Consumer Price Index (CPI) declines by 0.86 per cent. These latter changes are a function of the unskilled labour market closures used in the model, so, although indicative, they raise distributional concerns about an FTA with China.²⁰¹

Scrutinising the results reveals that South Africa does gain modestly in the agricultural sector. Enhanced agricultural exports to China of \$136 million are concentrated in vegetables and fruit products in primary agriculture and 'other foods' in processed agriculture. These increased exports are dominantly 'new' exports or trade creation rather than 'current' exports or trade diversion away from other destinations. Increased agricultural imports are minimal.²⁰² Balancing this Chinese intrusion is the fact that manufacturing exports to China increase by US\$644 million, and even better exports here increase by US\$955 million to other destinations as the South African economy becomes more competitive.²⁰³

¹⁹⁸ Hurst & Ethel "China's now South Africa's fifth biggest export destination" (2007) <www.tralac.org> (accessed on 10 August 2010).

¹⁹⁹ Hereafter referred to as FTA.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Ibid.*

An alternative scenario is presented whereby a reduction in the non-tariff barriers²⁰⁴ facing South African imports into China is simulated by effectively assessing these barriers equivalent to tariffs of between two and five per cent. The welfare gains for South Africa more than doubled (to US\$697 million) with virtually no change to China's large welfare gains. Importantly, this NTB scenario results in large export increases to China (indeed, almost doubling them overall) with very minor changes in imports.²⁰⁵

As an extension of this section on the GTAP analysis we introduced a note on a more detailed examination of the FTA results using sector-specific South African models to answer different questions. GTAP is the appropriate model to analyse trade flow between different regions in the world, while the BFAP Sector model illustrates what an FTA means for the sugar farmers and mills in South Africa, and the PROVIDE model shows the relative shift in factor demands and wage rates due to a change in economic activity at a detailed regional and household level using grapes and apples as case studies.²⁰⁶

3.7 Trade agreement between South Africa and the European Union

In 1994, South Africa applied for full membership of Lomé²⁰⁷ (minus certain privileges--such as use of price stabilisation mechanisms and preferential access to European markets for beef and cane sugar exports--that might have damaged other ACP countries), but the European Union rejected the request.²⁰⁸ It argued that, as a relatively developed nation, South Africa was not eligible for Lomé preferences under the World Trade Organisation rules. Instead, it offered South Africa a bilateral Free Trade Agreement. South Africa

²⁰⁴ Hereafter referred to as NTB.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ Convention signed between the European Economic Community and 46 African Caribbean and Pacific countries to improve trade relations in this circle. <www.wikitavel.org> (accessed on 20 September 2010).

²⁰⁸ "The European Union: South Africa trade Agreement" (2000) Published by World House Bielefeld <http://www.sacc-ct.org.za/ppi_lome.html> (accessed on 20 September 2010).

made a counter proposal: a Trade, Development and Cooperation Agreement that would address the country's development needs while promoting regional integration.²⁰⁹ Talks began in earnest in early 1997 and continued for two years as negotiators battled over the details of roughly 8000 tariff arrangements associated with specific agricultural products. Finally, in January 1999, the two teams agreed on a common text for ratification by their respective governments. In terms of the final deal, the European Union is to give 95% of South African exports improved access to its markets over a ten year period, while South Africa pledged to relax restrictions on 86% of European Union exports over twelve years.²¹⁰

About 28% of South Africa's agricultural exports were placed on a "reserve list" of items not eligible for tariff reduction (although this list is subject to periodic review). Vulnerable commodities continue to be protected by special protocols, while agricultural production and exports are subsidised by the European Union to make them more competitive with South African commodities. The agreement provides improved access for South African fish products, though a number of details require further negotiation. Meanwhile, 76% of all European Union goods will gain greater access to South African markets.²¹¹

3.8 Conclusion

The World Trade Organisation has disapproved the way the European Union imposes extra duties on imports it considers unfairly priced in a case brought by China in a case with broad implications for European Union trade policy. Next month, the World Trade Organisation panel will say that the European Union discriminated against Chinese exporters of screws and bolts compared to exporters from other countries when it applied a single anti-dumping duty based on the national principle.²¹²

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² <www.ec.europa.eu> (accessed on 15 July 2010).

Instead of imposing a blanket duty for the whole country, the European Union will in future have to set individual duties for companies on case-by-case basis in order to comply with the World Trade Organisation's position. The European Union already uses the individual duty model in cases of countries it considers not to be market economies, such as Cuba, Albania or Vietnam. "The amount of money at stake here is not huge in this case, but it will have repercussions on other anti-dumping cases," a person acquainted with the report told the Financial Times.²¹³

"It's a big victory for China as it takes out one of the pillars of European Union's anti-dumping activity against China". The World Trade Organisation report will not back China's claim that Brussels made unfair comparisons between high-end European Union fasteners used in the car and aviation industries and low-grade Chinese screws and bolts sold in hardware shops.

China raised the case against the European Union, its first since joining the organisation in 2001, in July 2009. Chinese imports in the disputed case, worth around €575 million a year, were slapped with duties of up to 85 percent when entering the European Union market.²¹⁴

In May 2010 the World Trade Organisation set up an expert panel in another case brought by China against the European Union on Chinese-made footwear. The Chinese authorities said when filling the complaint that the European Union measures "violated various obligations under the World Trade Organisation, and consequently caused damage to the legitimate rights and interests of Chinese exporters."²¹⁵ The European Union in June has opened another anti-dumping case over below-cost Chinese imports of ceramic tiles, which saw the Chinese ministry of commerce threaten to punish European Union-made iron and steel fasteners in return.

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

CHAPTER 4

OTHER REMEDIES AVAILABLE IN A DOMESTIC INDUSTRY WHICH DEALS WITH UNFAIR TRADE

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4.1 Introduction

Trade remedies are legal instruments which companies may use to safeguard themselves against unfair foreign competition. The first and most commonly used instrument is anti-dumping as discussed in Chapter 2. The second instrument, which forms the basis of this Chapter, is Countervailing and Subsidies. Countervailing measures are used to counter the injurious effect of subsidised exports. The third instrument is known as Safeguards and furthermore Tariff amendments can be used as a remedy of trade.²¹⁶

4.2 Remedies

4.2.1 Different types of subsidies

The Board Amendment Act defines subsidised export as: “the export or proposed export of goods to the Republic from any country where the authority of that country or any other country provides any form of financial aid or other assistance in respect of those goods, including assistance in respect of the production, manufacture, transport or the export thereof.”²¹⁷

²¹⁶ The Australian Government: Department of Foreign Affairs and Trade “Trade remedies” (1998) <www.dfat.gov.au/trade/negotiations/trade-remedies.html> (accessed on the 16 March 2010).

²¹⁷ See art 1(1) of the Board Amendment Act.

No clarification is given as to who the “authority” may be the form of the subsidy or that the subsidy should be specific and countervailable.

In its countervailing reports the Board refers to the definition of a subsidy as contained in the Subsidies Agreement. Article 1 of the Subsidies Agreement defines a subsidy as follows:²¹⁸

For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this agreement as “government”), i.e. where:

- (i) a government practice involves a direct transfer of funds (e.g. grants, loans, equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);*
- (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);*
- (iii) a government provides goods or services other than general infrastructure, or purchase goods;*
- (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or*

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and

(b) a benefit is thereby conferred.

A subsidy is therefore any benefit conferred by or on behalf of government on an industry or market or any other recipient. There are three categories of subsidies namely, prohibited subsidies, actionable subsidies and non-actionable subsidies, in terms of the Safeguard and Countervailing Measures Agreement.²¹⁹

²¹⁸ *Ibid.*

²¹⁹ Hereafter referred to as the SCM Agreement.

Firstly, prohibited subsidies is also known as ‘red light subsidies’ and is based on export performance or the use of domestic goods over imported goods following Article 3.1 of SCM Agreement. These subsidies are essentially specific and interfere with international trade. Tax deduction that encourage exportation, grants to reduce freight costs, certain export credit, guarantee or insurance programs are examples of prohibited subsidies according to Annex 1 of the SCM Agreement.²²⁰

Secondly, actionable subsidies also known as “amber light subsidies” are allowed, unless they cause harmful effects to other WTO members. Forms of harmful effects in terms of Article 5 of the SCM Agreement:

- (a) injury to the domestic industry;
- (b) nullification or impairment of GATT/WTO benefits;
- (c) serious prejudice to the interest of a WTO member.

Debt forgiveness payments and certain payments to cover operating losses are the most common examples of actionable subsidies.²²¹

Thirdly, non-actionable subsidies, also known as “green light subsidies” is the assistance for research activities, conducted by firms or by higher education or research establishments on a contract basis with firms, if the assistance does not cover more than 75 per cent of the cost of industrial research or 50 per cent of the cost of the pre-competitive development activity.²²²

4.2.2 World Trade Organisation Provisions on subsidies

The Subsidy Agreement forms part of the World Trade Organisation Agreement²²³ and South Africa as a World Trade Organisation member

²²⁰ Geldenhuys “Simplifying International Trade: Trade remedies” (2009) <<http://www.tradelawchambers.co.za>> (accessed on 16 March 2010).

²²¹ *Ibid.*

²²² Art 2(a) of the SCM Agreement – subsidies that are not specific named under the meaning of art 2, and subsidies in the meaning, but not named according to art 2(a), (b) or (c).

²²³ It is one of the ‘covered agreements’ in terms of art II.2 of WTO Agreement.

therefore acquires international obligations under this agreement even though it has not been incorporated into South African municipal law.²²⁴

This agreement provides the basis on which all World Trade Organisation members must undertake countervailing investigations and to be used in determining the margin of subsidisation. Paragraph 6 of Annex IV to the Subsidy Agreement, provides that the margin of subsidy shall be determined on the basis of the sum of all subsidies granted under different programmes.²²⁵

In respect of countervailing measures, Article 21 of the Subsidy Agreement provides the following:²²⁶

1. A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidisation which is causing injury.
2. The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. If as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.
3. Any definite countervailing duty shall be terminated on a date not later than five years from the imposition, unless the authorities determine on their own initiative within a reasonable period of time, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury.

²²⁴ In terms of section 231 of the Constitution of South Africa a court must interpret South African legislation and such interpretation must be closely aligned with international law, unless South African law is clear to the contrary.

²²⁵ Paragraph 6 follows: "In determining the overall rate of subsidisation in a given year, subsidies given under different programmes and by different authorities in the territory of a member shall be aggregated."

²²⁶ Brink G "Countervailing Review: Counter subsidised exports or countering subsidised programmes?" Tralac Trade Brief No 10/2007.

4.3 What does this all mean for Africa and all developing countries?

Developed countries' subsidies undermine trade and the economic developments in Africa. Sugar, corn, wheat, milk and rice are products that are subsidised by developed nations and is harmful to African nations that exports these agricultural goods. The participation of Benin and Chad in the United States on upland cotton was a significant step for the developing countries. Given the uncertainty of the negotiations under the Doha round, African and developing countries should continue and try to maximise such involvement. The World Trade Organisation was created in pursuit of economic development for LDC's and developing nations. World Trade Organisation rights were settled to those nations towards that end.²²⁷

4.3.1 Countervailing

According to Countervailing Regulation 1,²²⁸ a 'countervailing measure' is defined as "a special measure imposed for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise".²²⁹

The subsidy mentioned in CVR 1 is considered as the provision of specific assistance, either directly or indirectly, by the government of a country. Goods or services which receives a subsidy from the government are called subsidised goods or services and provides foreign competitors with an unfair competitive advantage and often subsidised goods or services demoralises the domestic price.²³⁰

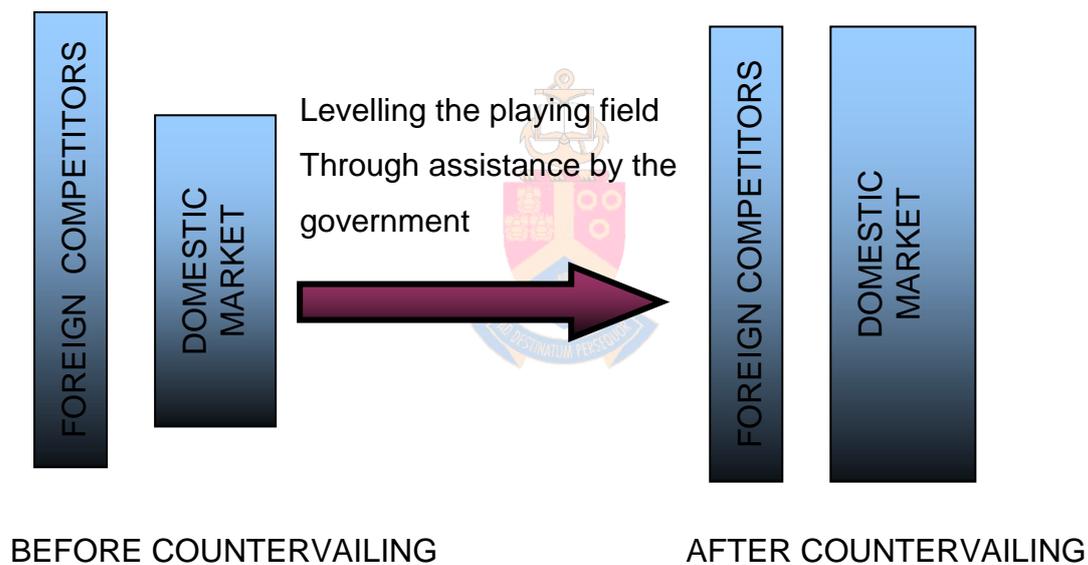
²²⁷ *Ibid.*

²²⁸ Countervailing Revision 1.

²²⁹ ITAC report 252:9.

²³⁰ Appellate Body Report, *United States-Lamb*, para 126. The court was also of the view that the standard of serious injury in the Agreement on Safeguards is a very high one when contrasted with the standard of material injury envisaged under the *Anti-Dumping Agreement*, the *Agreement on Subsidies and Countervailing Measures*. The Court opined that the word 'serious' connotes a much higher standard of injury than the word 'material'.

Therefore the purpose of this countervailing duty is to level the playing fields and to protect the South African Customs Union from unfair trade practices. If a review was limited to only those subsidies which are subject to countervailing duties, while proof have been submitted that several other subsidies are available to the exporter, it would defeat the very purpose of the countervailing duty and the purpose of the *ITA Act*, Countervailing regulations and Subsidy Agreement.²³¹



Before countervailing measures may be imposed, the Board must establish whether a subsidy meets the criteria of Article 2 of the Subsidies Agreement in respect of specificity. If the subsidy is dependent upon export performance, as defined in Article 3 of the Subsidies Agreement, it will be regarded as a specific subsidy. Countervailing measures may be imposed for a period of five years and may often be renewed for further periods through the use of a sunset review procedure.²³²

In the opinion of the Court this accords with the object and purpose of the SGA that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures.

²³¹ *Ibid.*

²³² Countervailing Revision 1.

4.3.2 Safeguard Measures

Safeguards are acting measures where a domestic industry can protect itself from a sudden rush of imports. Safeguards take the form of a quota or a quantitative restriction, but do not take the form of an increase in a tariff applicable to a product. Therefore a quota will be imposed on the amount of products that are allowed to be imported into a country. The safeguard measures will be implemented as soon as the quota has been reached and no more imports of that product will be allowed into the territory of that country.²³³ However, the investigating officials may decide to increase the customs duty applicable to the product in question, usually to the level to attain the same result as a quota.

Safeguards may only be used to preclude or remedy serious injury or to make possible the adjustment to increase competition for the domestic industry due to further trade liberalisation. In the *Hatters' Fur*²³⁴ investigation case the Court held that safeguard measures are supposed to be emergency measures and their duration must therefore be satisfactory regulated to avoid abuse. It is very important to prove that the rush of imports are responsible for the serious injuries and that no further forces in the markets are at play. Due to the ways by which safeguard measures are normally used, the application procedures are more suitable than anti-dumping duties and countervailing measures. The time period of a safeguard measure, is also shorter than the other remedies that can be used with duration of four years, but it may be increased for a further period of four years. When a safeguard measure is imposed for less than one year, the investigating officials will normally impose conditions for the liberalisation during the period for which it was imposed.²³⁵

Article 2.1(1) of the *ITA Act*²³⁶ in South Africa provides the concept and general conditions for the application of a safeguard measure. It provides: "A Member may apply a safeguard measure to a product only if that Member had

²³³ *Ibid.*

²³⁴ Of 1951.

²³⁵ Supra note 209.

²³⁶ Art 2.11 of the Safeguard legislation in South Africa.

determined pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”²³⁷ In the case, *United States-Steel Products*, the Court underlined that what was unforeseen when the contracting parties negotiated their first tariff concession in all likelihood differs from what can be considered as unforeseen developments today.²³⁸

This article also provides the following conditions for the application of a safeguard measure:²³⁹

1. an increase in imports;
2. causing or threatening to cause;
3. serious injury to domestic industry that produces products.

A competitive advantage can be given to the domestic industries or markets by the use of tariff amendments.²⁴⁰ To protect the domestic industries against foreign competition, companies may apply to either have a tariff increase, or in order to source more inexpensive foreign inputs to become more competitive, a company may apply to have tariffs decreased.²⁴¹ Because of the differences which exist between the bound tariff which is a countries international legal obligation and the applied tariff which is a countries rate of taxation which is actually applied, companies are allowed to apply for these increases or decreases.²⁴²

4.4 Conclusion

Trade actions can have a great impact on all parties, whether manufacturers, importers or exporters. Anti-dumping, subsidies, countervailing and

²³⁷ See art 2 of the ITA Act.

²³⁸ Supra note 92 at 228.

²³⁹ *Ibid.*

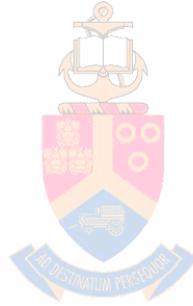
²⁴⁰ Board on Tariff and Trade Act 107 of 1986.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

safeguard legislation is vital for South Africa in the new more liberalised trading order. At the same time, it should be clear and apparent and should not be used as a non-tariff barrier in the face of the dismantling of protectionism, with the potential to acquire the rage of our trading partners and inviting GATT complaints and retribution.²⁴³

South Africa's actions in terms of customs duties and particularly anti-dumping and countervailing actions will have to be of the highest standard to be able to withstand international analysis. South Africa is a new player in the international trade arena, and must learn not only to play the game, but also to play fairly by the recognised international rules.



²⁴³ "Guide to importing into South Africa" (2000) Board on Tariffs and Trade <<http://www.mbendi.com/import/sa.html>> (accessed on 7 March 2010).

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

In this study a few limitations arose regarding dumping and Anti-dumping legislation between South Africa, the European Union and China. The relationship between South Africa and China is not on the same playing field as the relationship between South Africa and the European Union. The relationship between South Africa and China was established by the signing of the Excess and Proceed Protocol for the trade of textiles. However, this protocol is only limited to textiles. The trading policies that the European Union has uttered against China have been seen as discriminatory and limit their trade relationship. Taking abovementioned into account, it is important for South Africa to implement policies and legislation which will benefit both China and the European Union.

South Africa has had a long history of anti-dumping legislation, but its anti-dumping regulations are not as comprehensive as that of the European Union's. This study discusses anti-dumping law in South Africa by comparing them with the World Trade Organisation's Anti-dumping Agreement and the China or the European Union's anti-dumping laws.²⁴⁴

Although the South African anti-dumping laws satisfy the requirements of the applicable World Trade Organisation rules and principles, they still need to be improved as regard to issues which are discussed in this study. Even if the World Trade Organisation didn't make any effort to develop any further legislation and came to any further agreements the South African legislation has been modernised and has made provisions for dumping, e.g. *The International Trade Administration Act*²⁴⁵ and the *International Trade Administration Commission Anti-dumping Regulations* as well as the *Anti-dumping regulations*.²⁴⁶

²⁴⁴ Supra note 101 at 32.

²⁴⁵ Of 2002.

²⁴⁶ Of 2003.

China can be seen as a new member in the international anti-dumping field.²⁴⁷ The reality is that China has become one of the most significant targets, and also one of the most distinctive victims of the worldwide anti-dumping campaign. This situation will be sustained in a continuous trend, and will not be remedied in a short time. Facing such a situation, China and its industries are working closely to develop adequate and effective strategies and legislation to challenge the campaign. A positive attitude is important, while the right approaches are necessary.²⁴⁸ Though the Chinese Anti-dumping Statutes are designed to follow the World Trade Organisation's Anti-dumping Agreement, and its efforts are recognised and applauded by other World Trade Organisation members, China needs to improve its Anti-dumping Statutes and make significant changes in its current practices and legislation, such as profit margin provision, captive production provision and anti-circumvention provision, in order to follow the international norms. It is insufficient to bring the Chinese Anti-dumping Statutes into superficial compliance with the World Trade Organisation's Anti-dumping Agreement. World Trade Organisation-consistency has to be secured substantially through its actual implementation as well.²⁴⁹ Today, South Africa and China are increasingly becoming part of the global economy. Trade relations between South Africa and the international trade community, as well as with China, will continue to strengthen and develop to a new level.

South Africa's relationship regarding China, lead to a Memorandum of Understanding²⁵⁰ in December 1999 where the regional trade protocol was signed between the two countries in terms of textiles, that South Africa won't impose any duties against China until December 2013, but anti-dumping duties can be imposed on any other country.²⁵¹ South Africa and the European Union have not yet created such a relationship of that between

²⁴⁷ *Supra* note 101 at 32.

²⁴⁸ Gong "Trade Unionism in China: Sinking or Swimming?" (2002) 609. <www.ihlo.org> (accessed on 30 August 2010).

²⁴⁹ *Ibid.*

²⁵⁰ Art 3(1) of the Memorandum of Understanding between South Africa and China textiles.

²⁵¹ *Supra* note 92.

South Africa and China, but South Africa and the European Union, both signed the Trade Development and Co-operation Agreement.²⁵² This was the first bi-lateral framework agreement between South Africa and the European Union. The final ratification occurred in 2004 and was revised in March 2007. The international trade war against China and the European Union has been won by China, because the World Trade Organisation recently came to the conclusion that the European Union's trade policies against China were discriminatory. It should be mentioned that these three World Trade Organisation members will play an important role in the development and implementing of international trade relations and regulations and by their collusion, it could only improve the visions of international trade.



²⁵² Hereafter referred to as the TDCA.

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ABBREVIATIONS

- AdA = Anti-dumping Agreement.
- BOFT = the Bureau of Fair Trade of Imports and Exports.
- CPI = Consumer Price Index.
- CVR = Countervailing Regulation.
- EU = European Union.
- FTA = Free Trade Agreement.
- GATT = General Agreement on Tariffs and Trade.
- IBII = Investigation Bureau of Industry Injury.
- ITA = International Trade Administration Act.
- LDC = Least Developed Country.
- MOFCOM = Ministry of Commerce of China.
- NME = Non-market economists.
- NTB = Non-tariff Barriers.
- REACH = European Community Regulation on Chemicals and their safe use.
- SACU = South African Customs Union.
- SARS = South African Revenue Services.
- SCM = Safeguard and Countervailing Measures.
- TDCA = Trade Development Co-operation Agreement.
- URRRA = Uruguay Round Anti-dumping Agreement.
- US = United States.
- USSR = the Union of Serviette Socialist Republic.
- WTO = World Trade Organisation.

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- Board Act of 1986.
- Board Amendment Act 160 of 1997.
- Board of Trade and Industry Amendment Act 60 of 1992.
- Board on Tariffs and Trade Act 107 of 1986.

- Board on Tariffs and Trade Act 60 of 1992.
- China Anti-dumping Statute of 2002.
- Constitution of the Republic of South Africa, 108 of 1996.
- Custom and Tariffs Act 26 of 1914.
- Customs and Excise Amendment Act 61 of 1992.
- International Trade Administration Act 2002.
- The Chinese Anti-dumping and Countervailing Statute of 1997.
- The Revenue Act of 1916.

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- Anti-dumping Agreement 5.4.
- Anti-dumping Regulation 15.2 read with 15.3.
- Anti-dumping Regulation 18 read with 25.
- Anti-dumping Regulation 18.1 read with 18.2.
- Anti-dumping Regulation 19.1 read with 19.2.
- Anti-dumping Regulation 21 read with 22.
- Anti-dumping Regulation 24.
- Anti-dumping Regulation 26 read with 27.
- Anti-dumping Regulation 29.2 read with 29.3.
- Anti-dumping Regulation 31.1.
- Anti-dumping Regulation 32.
- Anti-dumping Regulation 33.2.
- Anti-dumping Regulation 34.1.
- Anti-dumping Regulation 35.2.
- Anti-dumping Regulation 7.3.
- Anti-dumping Regulation of 2003.
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- Article 1(1) of the Board Amendment Act 160 of 1997.
- Article 13, 14 and 15 of the South African Anti-dumping Regulations.
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- Article 17.6 of the World Trade Organisation Agreement.
- Article 2 of the Agreement on Countervailing and Subsidy Measures.

- Article 2 of the Anti-dumping Code of 1968.
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- Article 2.1 of the Anti-dumping Agreement.
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- Article 3.1 of the Memorandum of Understanding between South Africa and China.
- Article 3.1 of the Safeguards and Countervailing Agreement.
- Article 3.1 of the World Trade Organisation Anti-dumping Agreement.
- Article 32 of the International Trade Administration Act of 2002.
- Article 32(2) (b) of the International Trade Administration Act of 2002.
- Article 4 of the Anti-dumping Code.
- Article 4.7 of the Agreement on Safeguards.
- Article 5 of the SCM Agreement.
- Article 5 of the World Trade Organisation Agreement.
- Article 5.8 of the World Trade Organisation Agreement.
- Article 6 of the World Trade Organisation Agreement.
- Article 8 of the Anti-dumping Code of 1968.
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- High Fructose Corn Syrup – Mexico – Dispute Settlement (DS132) of 2001.
- US Lamb – Dispute Settlement (DS177) of 1999.



ANNEXURE A

