

Chapter 1

Introduction to the Study

1.1 Introduction

Dumping is variously defined in the literature on the subject. However, central to all the suggested definitions is the concept of price discrimination in different markets.¹ Thus, in 1922, the practice of dumping was defined by Viner as “price discrimination between national markets.”² Slayton on the other hand suggests that in international trade, dumping is said to occur when the sale of products for export is at a “price lower than those charged domestic buyers, taking into account the conditions of sale”.³ In the view of Hoekman and Leidy, dumping may occur if the export price of the product is less than the total average or marginal costs incurred by the producer.⁴ But according to Devault, dumping takes place when a firm sells a product abroad at a price which is beneath its fair value.⁵

It is apparent that all these definitions have one thing in common, namely the concept of price discrimination between markets. Not surprisingly, this concept of price discrimination also features in the definition of dumping adopted in the Law of the World Trade Organization (WTO).⁶ According to the latter, dumping occurs when a producer exports a product at a price that is lower than that which it normally charges

¹ Krishna “Antidumping in Law and Practice” 1997 *Policy Research Paper* 1823 2. Available at <http://www.worldbank.org/html/dec/Publications/Workpapers/WPS1800series/wps1823/wps183.pdf> (accessed 16-10-2007).

² Viner *Dumping: A Problem in International Trade* (1923) 3.

³ Slayton “The Canadian Legal Response to Steel Dumping” 1979 *Canada - US Law J* 78-94.

⁴ Hoekman and Leidy “Dumping, Antidumping and Emergency Protection” 1989 *J of World Trade* 27-44.

⁵ Devault “The Administration of US Antidumping Duties: Some Empirical Observations” 1990 *The World Economy* 75-88.

⁶ The WTO is an international organization established to supervise and liberalize international trade. It came into being on 1 January 1995 and is the successor to the General Agreement on Tariffs and Trade (GATT) which was created in 1947. The WTO deals with rules of trade between nations at a near-global level. It is responsible for negotiating and implementing new multilateral trade agreements and is in charge of policing member countries’ adherence to all the WTO agreements.

on its own home market, or if it exports its product for a sustained period at prices which are below the average cost of production.⁷ The practice of dumping is widely recognized internationally as an unfair and potentially harmful trade practice.⁸ Accordingly, many governments take action against it in order to defend their domestic industries. Not surprisingly, the General Agreement on Tariffs and Trade (GATT), which is the system of rules that governs international trade in goods, entrenches a legal position to the effect that dumping “is to be condemned if it causes or threatens to cause material injury to an established industry” or if it “retards the establishment of a domestic industry”.⁹

Article VI of the GATT and the Antidumping Agreement (ADA) permit governments to act against dumping in instances where there is material injury to the competing domestic industry. In order to take action against dumping, the importing country government has to be able to show that the dumping is indeed taking place. It also has to determine the extent of the dumping and be able to prove that the dumping is causing injury to the domestic industry or threatening to cause such injury. The WTO instruments allow countries to take trade protectionist measures that would normally breach the GATT principles of binding tariff concessions and non-discrimination between trading partners. The retaliation against dumping is achieved by charging additional import duty on the particular product that is being dumped in order to bring its price closer to the “normal value” or to remove the injury to domestic industry in the importing country.¹⁰

⁷ WTO “Understanding the WTO : The Agreements, Antidumping, Subsidies, Safeguards: Contingencies Etc.” Available at www.wto.org/english/thewto_e/whatis_e/tif_eagr8e.htm (accessed 15-10-2007).

⁸ See Osode “An Assessment of the WTO-Consistency of the Procedural Aspects of South African Antidumping Law and Practice” 2003 *Penn State International Law Review* 19-32. Osode has also asserted that dumping is one of many trade practices that the majority of the international community strongly despise and frown upon. See Osode “An Evaluation of The Legislative Framework for the Control of Dumping in South Africa Against the Backdrop of Applicable WTO Rules and Policies” (Unpublished Manuscript).

⁹ See Article VI of the GATT 1994 and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Hereinafter the ADA.

¹⁰ Howell and Balantine “Dumping: Still A Problem in International Trade.” Available at

1 2 The Big Question: Why is “dumping” a topical issue?

1 2 1 The emergence of China as a dominant player in international trade

China has for several years now occupied first place on the list of countries subject to antidumping investigations and measures. The WTO Secretariat reported on the 27 November 2006 that China at that time was the most frequent subject of antidumping inquiries, accounting for 36.7% of the antidumping investigations during January – June 2006, compared to 21.9% during the corresponding period of 2005.¹¹ According to a newspaper article, the investigations involved a combined value of 2.05 billion US dollars, included 63 cases of antidumping, 2 cases of government subsidy, and 21 cases of investigations involving protectionist measures.¹² Coming closer home, China has also been accused of dumping textiles in South Africa.¹³ It is alleged that this has had a negative impact on the South African textile industry.¹⁴

1 2 2 Africa’s dumping problem

In 1991, the European Community (EC) was said to have dumped 54 000 tons of beef into West Africa, resulting in local cattle businesses losing market share and

<http://www.dbtrade.com/publications/howell.pdf> (accessed 12-04-06).

¹¹ “WTO Secretariat reports new anti-dumping investigations continue to decline, while new final measures show increase” WTO: 2006 Press Releases, Press/458, 27 November 2006. Available at http://www.wto.org/english/news_e/pres06_e/pr458_e.htm (accessed 26-06-07). Also an article from the *People’s Daily Online* reported that in 2006, China was subject to 86 antidumping and trade protection probes, a year-on-year increase of 37 percent. See “China subject of 86 antidumping and trade protection probe last year” *People’s Daily Online*, 16/01/07. Available at http://english.peopledaily.com.cn/200701/16/eng20070116_341594.html (accessed 26-07-07). See further Chu and Prusa *The Reasons for and the Impact of Antidumping Protection: The Case of the People’s Republic of China* (2005) 411. They submit that China is the largest target economy for antidumping cases. For instance, the total number of antidumping cases targeting China reached 457 by the end of 2001 making China’s total only slightly lower than that of the EU economies combined. It is submitted that if current trends continue, China will surpass the EU in the near future.

¹² See *People’s Daily Online* *ibid*.

¹³ “Bilateral China-South Africa Talks Begin” *Business Report* 2005. Available at <http://www.tralac.org/scripts/content.php?id=2640>. Last Accessed 16/10/2007.

¹⁴ *Ibid*.

consequently going bankrupt.¹⁵ Assisted by generous governmental support provided through the Common Agricultural Policy, European Union (EU) farmers began to produce more beef than could be “swallowed up” in the EU or exported on normal commercial terms.¹⁶ The inevitable result was a beef mountain,¹⁷ which had to be sold below its cost of production in developing countries, first in West Africa and later on in South Africa.¹⁸ There is no doubt that the dumped EU beef competed on unfair terms with domestically produced beef and as a result, severely damaged farmer output and incomes and thus the economic development of an important sector for the national recipients of the dumped products.¹⁹ African consumer groups have also complained that Asian manufacturers were dumping electrical goods and textiles.²⁰

Southern African markets have also been affected by dumped products originating from different regions which tend to undermine viability of the competing domestic industry. In 1993, exporters flooded southern African markets with maize, thereby undermining Zimbabwe’s maize producers.²¹ In 1995, it was reported that Zimbabwe’s chemical industry was potentially under attack due to the devastating impact of dumped chemical exports.²² South Africa was in 1995 accused of serious price undercutting affecting the Zimbabwe Fertilizer Company.²³ The battery producing company, Chloride Central Africa, also faced potential attack from South African exporters, and this potential attack became a major concern for the Zimbabwean domestic battery

¹⁵ Madeley and Robinson “Brussels Blind Spot: The Lack of Coherence between Poverty Eradication and the European Union’s Other Policies” 4. Available at <http://www.aprodev.net/devpol/Documents/3%20Doc%20c-1-all.pdf> (accessed 11-04-07).

¹⁶ *Ibid.*

¹⁷ A large surplus of beef.

¹⁸ Madeley and Robinson see fn 15.

¹⁹ In West Africa, dumped beef shipments from the EC to the region increased 7-fold in the 1980s and reached its peak in 1991, affecting well over four million people who solely relied on cattle raising. With the advent of the dumped beef, the prices these farmers received for their cattle plunged by over 50%. See Madeley and Robinson *ibid.*

²⁰ See fn 13. See also Prusa “East Asia’s Antidumping Problem” 2006 *The World Economy* 743-761.

²¹ Meldrum “Seeds of African Doubt” *Guardian* 26-11-1993 15.

²² Maravanyika “A Difficult Year Ahead” *Sunday Mail* (Harare) 20-08-1995 12.

²³ “Fertilizer Firms Brace up for SA Competition” *Herald* (Harare) 20-03-1995 7.

producer.²⁴ Kenya recently indicated that it will impose safeguards in terms of the Common Market for Eastern and Southern Africa (COMESA) framework to limit Egyptian imports, which, according to the government, pose a threat to the local industry.²⁵ The Kenyan Trade Minister, Mukhisa Kitiyu, promised Kenyan manufacturers that the government would address their concerns to the effect that local producers were losing market share to cheap, subsidized products originating from Egypt. The dumped Egyptian products were reportedly 600% cheaper than their local equivalents.²⁶

In South Africa, an application was in 2005 submitted to the International Trade Administration Commission (ITAC) by African Explosives Limited alleging that China was dumping detonating fuses and delay detonators, in the Southern African Customs Union (SACU) market, causing material injury or threat of material injury to the domestic industry concerned.²⁷ A notice dated 8 of July 2005 in a South African Government Gazette stated that African Explosives Limited had submitted sufficient evidence of price undercutting, and that there had been a decline in the latter's sales, profits, output, market share and capacity utilization, as well as a negative effect on cash flow, return on investment and employment.²⁸ It was alleged that the decline of African Explosives Limited had been at the expense of a corresponding increase in the market share of the allegedly dumped products.²⁹ In the same year, a Namibian Newspaper reported that the dairy industry was facing closure as a result of dumped imports from South Africa.³⁰ And in a move aimed at curbing the dumping of cheap cheese in South Africa, ITAC in 2005 imposed a 60.2% tariff on imported cheese from Ireland.³¹ In 2004,

²⁴ "South Africa Accused of Dumping Products in Zimbabwe" *Herald* (Harare) 30-11-1995 21.

²⁵ Munaita "Kenya to Invoke Antidumping Rule Against Egypt" *The East African* 01-02-2006. Available at <http://www.tralac.org/scripts/content.php?id=4485> (accessed 12-04-04).

²⁶ *Ibid.*

²⁷ See "Dumping of Chinese Explosives in SACU to be investigated" *Engineering News* 13-07-2005. Available at <http://www.tralac.org/scripts/content.php?id=3829>. Last Accessed 12-04-07.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Maletsky "Namibian dairy industry facing closure" *The Namibian* 05/04/2005. Available at <http://www.tralac.org/scripts/content.php?id=3534> (accessed 12-04-07).

³¹ Njobeni and Mathe "SA blocks cheap Irish cheese imports" *Business Day* (South Africa) 18-02-2005. Available at <http://www.tralac.org/scripts/content.php?id=3424> (accessed 12-04-07).

the Australian government threatened to lodge a complaint with the WTO concerning cheap car exports from South Africa.³² Also in the same year, the Parliament of Tanzania passed a bill that sought to protect local manufacturers against goods of “suspect prices and quality.”³³ The bill was mainly aimed at protecting locally produced goods against unfair competition brought about by trade liberalisation.³⁴ In 2003, the Ugandan sugar industry appealed to the parliamentary committee in Kampala to protect local sugar producers from dumped exports.³⁵ This list is by no means exhaustive.³⁶

It is apparent that the practice of dumping has also proliferated on African markets. Seemingly, dumping is not only limited to overseas exporters offloading products at less than fair value onto African markets, but from the discussion above, it can be seen that African states dump products in each other’s territories. In all instances, there is a need for African states to be aware of their rights as WTO member states, and at the same time design domestic legislation that seeks to effectively respond to the practice of dumping. Active implementation of a domestic legislative framework designed to

³² “Australia upset about cheap car exports from South Africa” *Business Day* (South Africa) 19-05-2004. Available at <http://www.tralac.org/scripts/content.php?id=2625> (accessed 12-04-07).

³³ “Tanzania clamps down on dumping” *News 24* (Tanzania) 11-02-2004. Available at <http://www.tralac.org/scripts/content.php?id=2400> (accessed 12-04-07).

³⁴ See fn 32.

³⁵ “Uganda sugar industry hit by dumping” *New Vision* (Kampala) 10/12/2003. Available at <http://www.tralac.org/scripts/content.php?id=2291> (accessed 12-04-07).

³⁶ For instance:

- South Africa in 2003 imposed punitive antidumping duties against Thailand. The duties were imposed on cheap gypsum plasterboard imports from Thailand. The subsequent dumping by Thai producers caused material injury to BPB Gypsum, the only producer of this type of building material in Southern Africa. BPB claimed that the imports had unfairly taken away market share from the domestic company, leading to reduced revenues. See “SA to protect firms from unfair trade” *Business Day* (South Africa) 02-10-2003. Available at <http://www.tralac.org/scripts/content.php?id=1965> (accessed 12-04-07).
- The Zambian Revenue Authority in 2002 introduced measures designed to restrict the entry of cheap products from various Southern African countries. Zambia had apparently been plagued by cheap imports from member nations of the COMESA free trade area since 2000. See “Zambia restricts imports of cheap goods” *Financial Gazette* 14-06-2002. Available at <http://www.tralac.org/scripts/content.php?id=192> (accessed 12-04-07).
- A 2002 article reported that the United States (USA) had been dumping food disguised as humanitarian and Red Cross aid in third world countries to prevent these countries from competing with USA production. See “US accused of food dumping” *Die Burger* 10-07-2002. Available at <http://www.tralac.org/scripts/content.php?id=331> (accessed 12-04-07).

counter this trade practice will not only protect domestic producers in African states, but also enhance the continent's participation in global economic processes.³⁷

1 3 Purpose of study

The alarming increase in the number of antidumping actions pursued by both industrialized and developing countries has caused considerable concern among economists, lawyers and various international trade advocates.³⁸ The various claims in favour of free trade became an important issue in economic policy circles as well as in the development literature around the 1950s.³⁹ The adoption of the GATT in 1947 and the establishment of the WTO in 1995 have been major milestones in the drive towards freer trade.⁴⁰ However, despite the innovations brought about as a result of GATT 1994 and the coming into being of the WTO, antidumping actions seem to have become a fact of life and the international community as a whole recognizes them as the only legitimate tool to counter the practice of dumping.

However, WTO members seem to manipulate the interpretation and application of the pertinent provisions of the GATT and ADA in pursuit of maximum import competition protection for their domestic industries. Two key questions therefore arise: What can be done to the said provisions to ensure/maximise compliance? How can these provisions be strengthened in order to minimize and control abuses on the part of administering authorities in the importing country? This study seeks to answer these questions. It does this by pursuing a detailed exposition of selected provisions of the GATT and ADA that are prone to abuse. Through a critical and analytical approach, the study will provide an extensive exposition of the problematic issues associated with the regulation of

³⁷ Petersen "African Dumping Grounds: South Africa's Struggle Against Unfair Trade" 1996 *Boston University Int'l Law J* 375-406.

³⁸ See Krishna fn 1.

³⁹ Santos-Paulino "Trade Liberalization and Economic Performance: Theory and Evidence for Developing Countries" 2005 *The World Economy* 783-821.

⁴⁰ The simplification of import procedures, reduction or elimination of quotas and the rationalisation of tariff structures are the most widespread reforms that have come about as a result of the GATT and the WTO.

dumping as well as the interpretation and application of the pertinent provisions of the GATT and ADA. Some of the contentious issues discussed are as follows:

- Whether the increase in the number of countries using antidumping measures has led to different interpretations of various provisions of the ADA resulting in divergent practices amongst WTO members.
- Whether dumping being a mechanism which enables firms to obtain or hold export market share based on factors other than efficiency or productivity allows some firms to prevail consistently over others in international competition without necessarily being more efficient.
- Whether the rules for the determination of injury to competing domestic industry and the establishment of a causal link between dumping and the injury is not abused by administering authorities of the importing country.
- Whether administering authorities unrealistically magnify their findings of “normal value”.
- Whether the surrogate country selection in the case of Non-Market Economies is inconsistent with the economic realities existing in exporting and importing countries.⁴¹
- Whether the “zeroing” method employed by some WTO members in the calculation of dumping margins is contrary to the spirit and purport of the ADA.
- Whether Article 6.8 of the ADA, dealing with the use of “facts available” is overly discretionary and subject to abuse by administering authorities of the importing country.

1 4 Structure of study

The study is divided into seven chapters, comprising of an introduction, five discursive chapters and a conclusion. The current chapter introduces the reader to the general definition of the practice of dumping. It provides an exposition of the definitions from

⁴¹ Chaisse *et al* “Growing Misuse of Anti-Dumping Provisions – Analysing Some Pertinent Concerns” 2007 *World Trade Institute Working Paper* 26.

an international economic law perspective and in terms of the rules of the WTO. It also discusses why dumping is a topical issue in international trade and why there is need to regulate the practice. Chapter 2 traces the history of the practice of dumping and the imposition of antidumping measures. Chapter 3 gives the reader an insight into the nature and effects of dumping from the viewpoint of the economists. It discusses the economic impact of dumping on both the importing and exporting countries.

The legal aspects of antidumping measures are dealt with in chapters 4-6. Chapter 4 introduces the reader to the legal aspects and the “nitty gritty” associated with the interpretation of the GATT and ADA. It focuses on the substantive provisions of the GATT and ADA and through a critical eye, demonstrates how some of those provisions are susceptible to abuse by administering authorities of the importing country in furtherance of their trade protectionist goals. Some of the technicalities associated with the calculation of the dumping margin are dealt with in chapter 5. Through WTO case law, the chapter reveals how discretionary provisions in the WTO instruments are certain to be exploited by WTO members in order to achieve protectionist outcomes. Chapter 6 deals with a due-process provision contained in the ADA, more specifically Article 6.8. Similarly, through WTO case law analysis, the chapter demonstrates the potential abuse of the said provision. The final chapter provides a summary of the discussion in the preceding chapters. It also addresses the future prospects of fair international trade. Recommendations and possible solutions are proffered on how best to discourage the misuse of the pertinent GATT and ADA provisions.

1 5 Sources and approach

A critical analysis of the issues related to the interpretation and application of antidumping measures will be undertaken employing the historical research method. Material used in this study was obtained from relevant textbooks, journals, WTO Panel and Appellate Body (AB) decisions and internet sources. Relevant legislative instruments

such as the GATT and ADA were also used. The use of internet sources is important in keeping up to date with the recent literature on antidumping.

Various decisions of the WTO Panel and the AB will demonstrate the problems associated with the interpretation and application of the provisions of the ADA and how some WTO Members continue to carve out ways of using antidumping measures as a means of protecting their domestic markets from import competition. Although decisions rendered by the WTO Panel and the AB do not create binding precedent,⁴² they are influential in resolving disputes dealing with antidumping measures. Accordingly, the importance of those decisions cannot be ignored.

1 6 Referencing

The style of the referencing used in this study is that of *Speculum Juris*, an accredited law journal jointly published by the University of Fort Hare, Nelson R Mandela School of Law and the Faculty of Law, Rhodes University.

⁴² According to Palmetier and Mavroidis, Panel and AB reports bind only the parties to the particular dispute and do not create binding precedent. See Palmetier and Mavroidis *Dispute Settlement in the World Trade Organization: Practice and Procedure* (2004) 60. See also *Japanese-Alcoholic Beverages II* WT/DS10/AB/R 1997 para 107-108. The AB stated that “...adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. *However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute...*” (Emphasis added). See further *United States – Shrimp (Article 21.5 Malaysia)* WT/DS58/AB/RW 2001 and *United States – Final Antidumping Measures on Stainless Steel from Mexico* WT/DS344/R 2007 para 7.20 – 7.21.