

THE IMPLEMENTATION OF COUNTERVAILING MEASURES IN TANZANIA: CHALLENGES AND CONSTRAINTS

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KEYWORDS

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Material injury

Material threat

Local industry

Countervailing duty

Dispute Settlement Body (DSB)



DECLARATION

I declare that *The Implementation of Countervailing Measures in Tanzania: Challenges and Constraints* is my own work, that it has not been submitted for any degree or examination in any university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Theresia Charles Numbi

May 2013

Signed



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ABBREVIATIONS AND ACRONYMS

ACP	African Caribbean and Pacific
ACWL	Advisory Centre on the WTO Law
CAMEX	<i>Câmara de Comércio Exterior</i>
CVD	Countervailing Duty
DDA	Doha development Agenda
DECOM	Department of Trade Defence
DSB	Dispute Settlement Body
EAC	East African Community
EU	European Union
GATS	General Agreement on Trade and Service
GATT	General Agreement on Tariffs and Trade
GTDC	<i>Grupo Técnico de Defesa Comercial</i>
IMF	International Monetary Fund
ITAC	International Trade Administration Commission
ITO	International Trade Organisation
LDCs	Least Developed Countries
MDIC	Ministry of Development, Industry and Trade
MFN	Most- Favoured- Nation
NGO	Governmental Organization

SVEs	Small and Vulnerable economies
TRAPCA	Trade Policy Training Centre in Africa
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation



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CHAPTER ONE

INTRODUCTION

1.1 Introduction

This chapter provides background information on trade remedies under the World Trade Organisation (WTO) namely, anti-dumping, countervailing measures and safeguards. The chapter further explains the current situation in Tanzania with respect to subsidies imports and the implementation of countervailing measures. The research questions, objectives, scope and significance of the study are also explained. The chapter ends with an outline of the five chapters of the study.

1.2 Background

Trade remedies or trade defences are contingent measures enacted to protect domestic producers where instances of unfair trade practice occur or to prevent or remedy serious injury and to facilitate adjustment.¹ The survival of domestic producers facing pressure from foreign competition and unfair trade practices has for long been one of the greatest concerns of governments.² Under a multilateral global trading system, the WTO is the body responsible for regulating world trade.³ Member states, whether developed or developing nation, have a right to use trade remedies.⁴

The WTO members have retained their right to impose trade remedies,⁵ such as, anti-dumping and countervailing duties, to correct the competitive imbalances created by unfair trade practices, such as dumping and subsidies, when these cause injury. They have also agreed on multilateral disciplines governing the granting of subsidies. Member states are also allowed to apply safeguard measures in case of a surge of imports that causes, or threatens to cause, serious injury.⁶

¹ Illy O *Trade remedies in Africa: Experience, Challenges and prospectus* (2012) ILEG Working Paper.

² Illy O (2012).

³ Meltzer S & Nzimande M 'South Africa's trade relations and use of trade remedies: Anti dumping in South Africa' (2011) 2 SA Webber Wetzel.

⁴ Articles VI and XIX of the General Agreement on Tariffs and Trade (GATT) 1994.

⁵ Articles VI and XIX of the GATT 1994.

⁶ World Trade Organization, WTO *e learning: The WTO Multilateral Trade Agreements* (2011) 209.

Apart from the General Agreement on Tariffs and Trade (GATT) and Agreements relevant to trade remedies on a multilateral level, the WTO rules can be implemented by member states in the form of domestic legislation to attempt to mitigate the adverse impacts of various trade practices on domestic industries.⁷ Anti-dumping laws⁸, for instance, provide relief to domestic industries that have suffered material injury or are threatened with material injury as a result of competing imports being sold at prices shown to be less than their normal value. Countervailing duty laws⁹ provide a similar form of relief to domestic industries that have been or may be injured by foreign subsidies on competing imports.¹⁰

On the other hand, safeguard laws provide for temporary trade restrictions, typically tariffs or quotas, which are imposed in response to overwhelming import surges, usually as a result of trade concessions that cause serious injury or threat thereof to competing domestic producers.¹¹ However, the present study will only focus on countervailing measures, as one of the available WTO remedies and Tanzania, which is a member state of the WTO and is grouped as a developing country. The study also provides a comparative analysis of the countervailing measures law and practices of the European Union (EU) and Brazil. The rationale behind this is to provide lesson(s) which Tanzania can learn from the traditional users of countervailing measures.

It is an undisputable fact that countervailing measures are a long-term exception to the fundamental WTO principle that tariffs should be equally applied to all trading member countries as far as the Most -Favoured -Nation (MFN) principle is concerned. This practice became legitimate and was incorporated under Article VI of the GATT which subsequently became part of the Marrakesh Agreement establishing the WTO in 1994, followed by the special

⁷ Jones VC 'Trade Remedies and the WTO Negotiations' (2010) 1 *Congressional Research Services*.

⁸ Article VI of the GATT.

⁹ Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization (1994).

¹⁰ Jones VC (2010).

¹¹ Illy O (2012).

Agreement on Subsidies and Countervailing Measures (SCM Agreement)¹² in terms of which Tanzania as a signatory state¹³ is empowered to use these measures. The SCM Agreement confirms that WTO member states may apply countervailing measures in instances where a domestic industry is injured by imported products which benefit from government or public body subsidies.¹⁴

Two different methods can be used to address subsidies paid by foreign governments, namely, bilateral countervailing action and multilateral dispute resolution in the WTO.¹⁵ Furthermore, where subsidised exports cause material injury to an industry in the importing country, authorities in the importing country may take action in the form of additional customs (countervailing) duties to offset either the margin of subsidisation or the injury caused by the subsidised imports.¹⁶ Also, as an alternative member states can opt to use dispute settlement as has been provided under the GATT 1994 and the SCM Agreement.¹⁷

Tanzania's Development Vision 2025 focuses on consolidating gains on the macro-economic front and to face the economic challenges that lie ahead. In addition, trade is seen as a central and pivotal pillar in the attainment of efficiency, productivity and international competitiveness.¹⁸ As a consequence, the sound and effective use of trade remedies, such as countervailing measures, is also considered inseparable from the development of trade in Tanzania. Following from this motive, the Tanzanian Anti-dumping and Countervailing Measures Act¹⁹ was enacted in 2004 to make provision for anti-dumping and countervailing measures with the specific aim to provide for the administration and regulation of dumping and subsidies and related matters.

¹² See Australia Government Department of Foreign Affairs and Trade 'Productivity Commission Inquiry: Antidumping and Countervailing System' available at http://www.dfat.gov.au/trade/negotiations/productivity_commission_inquiry.html (accessed on 11 September 2012).

¹³ Tanzania becomes a member of the WTO in 1995.

¹⁴ Article 10 of the SCM Agreement.

¹⁵ Brink G 'A nutshell guide to countervailing action' (2008) 2 *Mercantile Law*, University of Pretoria.

¹⁶ Brink G (2008).

¹⁷ Articles XXII and XXIII of the GATT 1994 and Article 30 of the SCM Agreement.

¹⁸ Ministry of industry and trade, The United Republic of Tanzania - *Trade policy for a competitive economy and export-led growth* (2003).

¹⁹ The Tanzanian Anti-dumping and Countervailing Measures Act, 2004.

Tanzania as a member of the WTO is open to trade liberalisation policies and has consequently opened its market to imports from various global trading partners. For this reason, it is vital to protect domestic industries from material injury or threats of injury caused by subsidised imports in order to maintain fair trade within the country, and therefore making relevant the proper use, application and implementation of countervailing measures by the country.

Tanzania is affected by subsidised imports like most of developing nations. For example, Tanzania's cement manufacturers have, on several occasions, pleaded for the government to protect cement firms specifically. Stakeholders have always complained that imported cement is sold cheaply because Pakistan, India, China and Egypt heavily subsidise their producers.²⁰ Indeed the prices of imported cement are said to be lower than those for locally made cement due to the fact that in the countries of origin the manufacturers are empowered by export subsidies or lower production costs.²¹ Furthermore, agriculture is considered to be one of the key sectors which facilitate economic growth, but like many other developing countries Tanzania's agricultural commodities have been challenged by subsidised agricultural commodities, such as sugar.²² Therefore it is very important for Tanzania to protect its local agricultural industries.

As regards its domestic legislation the (2004 Anti-dumping and Countervailing Act), Tanzania does not have supporting regulations for its application. In comparison, South Africa for example, in addition to the principal enabling Act²³ on applying and enforcing countervailing measures, also has in place countervailing measures regulations,²⁴ the International Trade Administration Act²⁵, and a competent authority namely, the International Trade Administration Commission (ITAC). Therefore, apart from a comprehensive primary legislative framework, Tanzania does not have in place, regulations, administrative procedures and a competent

²⁰ See The Citizen 'Plea to protect cement firms fall on deaf ears' available at <http://www.thecitizen.co.tz/Pleatoprotectcementfirmsfallondeafears/21June2012> (accessed on 15 September 2012).

²¹ See Business Times Economic and Financial weekly 'Cement wars: Imports vs. Domestic product' available at <http://www.businesstimes.co.tz/cementwars:importsvs.domesticproduct/21May2010> (accessed on 15 September 2012).

²² Hartzernberg T et al *Cape to Cairo making the tripartite free trade area work* (2011).

²³ International Trade Administration Act 71 of 2002.

²⁴ South Africa Countervailing Regulations, 2005.

²⁵ 71 of 2002

institutional framework to apply and implement countervailing duties to counter unfair trade practices.

Practically most developing countries from Africa, Tanzania being one of them, are traditionally not the major users of the trade policy instruments referred to as countervailing measures. Key possible reasons for this are the lack of competent national legislation which enables them to utilise these trade measures, socio-political concerns in terms of the distribution of power among WTO member countries, and the threat of retaliation.²⁶ In addition, they lack adequate and experienced institutional frameworks to implement such measures.

Developing countries generally refrain from effectively utilising subsidies to support their local producers or implementing countervailing duties against developed countries because of the latter's importance as significant target markets for their exports, lack of capability and capacity to defend their exports against unfair trade practices, and the fear of retaliation from more powerful trading countries. In addition, a lack of financial and institutional resources and suitably skilled human capital are among the reasons why Tanzania fails to utilise available trade remedy measures.²⁷

Various arguments have been presented as to why developing nations fail to utilise trade remedy measures but none has tried to explore in depth the challenges and constraints facing such nation(s) in the implementation of countervailing measures.²⁸ The present study seeks to explore the experiences, challenges and constraints confronting Tanzania as a developing country in administering countervailing measures, and to provide solutions for the effective use and implementation of countervailing measures in situations of unfair trade, as little has been written on this area of trade law in Tanzania.

²⁶ World Trade Organisation Report 2009-*Trade policy commitments and contingency measures* (2009).

²⁷ Hartzernberg T 'et al'(2011)124.

²⁸ Illy O (2012).

1.3 Problem statement

Countervailing measures as an international trade tool aim to promote fair trade, create a shield of protection, and act as a tool of economic growth for WTO member states. In practice, SCM Agreement facilitates the application of redress measures in circumstances of unfair trade. The WTO's Subsidies and Countervailing Measures discipline the use of subsidies and it also regulates the actions countries can take to counter the effects of subsidies. The Agreement also explains in detail that member states can make use of the WTO's dispute settlement procedure to redress the adverse effects of the subsidies, and upon fulfilling the requirements, a country can lawfully impose countervailing duties on subsidised imports that are found to be hurting domestic producers. When implementing such duties, developing member states, such as Tanzania, may preserve the principle of non-discrimination, referred to as the Most - Favoured - Nation (MFN) principle.²⁹

Every WTO member has an equal chance of grabbing this opportunity of implementing countervailing measures against subsidised imports either by imposing countervailing duty or lesser duty where desirable, or approaching the WTO dispute mechanism. Yet reality illustrates that it is only the developed countries, such as the EU and the United States, which are active users of the countervailing measures in full. On the other hand, developing countries, such as Tanzania, fail to make use of them.³⁰

This study seeks to examine the challenges and constraints confronting Tanzania in the implementation of countervailing measures, to solve the significant question as to why Tanzania fails to utilise countervailing measures in the face of the adverse effects of unfair trade practices from subsidised imports, and to explore whether it is feasible to apply and implement countervailing measures.

²⁹ Article 1 of the GATT 1994.

³⁰ Hartzernberg T 'et al' (2011)124.

1.4 Research questions

General question:

- i) To examine the constraints and challenges faced in the implementation of countervailing measures in Tanzania.

Specific questions:

- i) To examine the prevailing WTO mechanisms for countervailing measures in addressing unfair trade practices;
- ii) To identify reasons that prevent Tanzania from the active utilisation of countervailing measures;
- iii) To examine the possible lesson(s) which Tanzania can learn from the EU and Brazilian laws and practices on the use and implementation of countervailing measures;
- iv) What are the challenges and constraints faced in the implementation of countervailing measures in Tanzania?
- v) Which approach can Tanzania opt to use in implementing countervailing measures: the lesser duty rule or the community interest test or both?
- vi) What kind of legal reform and practices should Tanzania adopt for the proper, adequate use and implementation of countervailing measures?

1.5 Significance of the study

This study aims to contribute to what has been said on the WTO trade remedies and developing nations, and, moreover, to explore the possible benefits for developing countries by using countervailing measures. The key focus is Tanzania as a developing country and the study seeks to explore the reasons why developing countries fail to utilise this unlimited opportunity to outmost.

Furthermore, this study will hopefully provide not only Tanzania but also other developing countries and Least Developed Countries (LDCs), legal scholars and non-legal practitioners, academicians and policy makers with adequate knowledge about trade remedies also known as contingency measures, and particularly on the applicability and implementation of countervailing measures by developing countries. Lastly, the proposed reforms, such as ,an institutional, regulatory framework in Tanzania, and third party participation to the WTO dispute settlement process , to mention a few ,will provide a clear path on how to deal with international trade remedies and to be informed on the current global market place.

1.6 Scope of the study

This study has as its focus the applicability and implementation of the WTO countervailing measures by developing countries and with Tanzania being the country under examination, by exploring the challenges and constraints faced in the implementation of the SCM Agreement. Further, it provides answers to the question why Tanzania does not effectively utilise countervailing measures as a trade contingency measure. Furthermore, the study incorporates a comparative analysis of Tanzania's anti-subsidy legislation with that of the EU and Brazil.

This research however, will not embark on any economic analysis, but where necessary, reference shall be made to economic authorities. The key focus of this paper is to undertake a legal analysis of the use and implementation of countervailing measures as a tool of international trade redress in unfair trade situations.

1.7 Research methodology

This study has been facilitated by desktop research. Specifically, the review of the GATT 1994 Article VI, the SCM Agreement, the Tanzania Anti-dumping and Countervailing Measures Act. Further, a comparative study on the EU and Brazilian anti-subsidy legislation, reason behind is that EU has been viewed as a role model and active user of the WTO instruments while Brazil is an example of a developing country, which has been active user of the trade remedies such as countervailing measures. Hence, there are lessons which Tanzania can opt to follow from active users of the countervailing measures against subsidised imports.

Secondary sources of information relating to this study include relevant journal articles, discussion papers, and reports on countervailing measures, trade policy, the WTO cases, books, internet information, and research on issues of relevant study.

1.8 Chapter outline

- CHAPTER ONE Provides general background information to the study, together with a statement of the problem. The chapter identifies the study's objectives, both general and specific, and both the rationale for as well as limitations of the study.
- CHAPTER TWO Provides an overview of trade remedies under the WTO, namely, anti-dumping, countervailing measures, and safeguards. The chapter also details the operation of the WTO countervailing measures as well as the substantive and procedural requirements.
- CHAPTER 3 Gives an overview of the present situation relating to subsidised imports in Tanzania. Then examines the reasons preventing Tanzania from using countervailing measures against subsidies. Then Follows a discussion of the challenges and constraints confronting the implementation of countervailing measures in Tanzania. Lastly it provides a comparative assessment of the EU and Brazilian countervailing measures law and practices.
- CHAPTER 4 Provides for an analysis of the findings on the implementation of countervailing measures in Tanzania as well as a way forward on the use of such trade remedy by the country.
- CHAPTER 5 Provides a conclusion as well as recommendations on the implementation of countervailing measures in Tanzania.

CHAPTER TWO

AN OVERVIEW OF TRADE REMEDIES AND THE APPLICATION OF COUNTERVAILING MEASURES IN TERMS OF THE WTO.

2.1 Introduction

This chapter presents a detailed account of the jurisprudential nature of countervailing measures as one of the trade remedies which the WTO Members can use in reaction to unfair trade practices. Since one can never start explaining a measure without indicating from where it originated, the chapter starts by providing the historical background to the multilateral trading system, that is, from the GATT to the WTO. Further, it identifies in nutshell the available trade remedies, namely, anti-dumping, safeguards and countervailing measures. This is followed by a discussion on the subsidies and countervailing measures.

2.2 Historical view of the multilateral trading system: from the GATT to the WTO

The Second World War had great impact, both politically and economically. For instance, countries were economically disrupted; hence the need to construct a worldwide economy was on the scheduled agenda in the 1940's. As the result, in 1944 the United Nations Monetary and Financial Conference was held at Bretton Woods, United States. Among others, government authorities reached the conclusion that in order to restore the world trade system to a better position, there must be the creation of three international organisations, namely, the International Bank for Reconstruction and Development (World Bank), the International Monetary Fund (IMF) and the International Trade Organisation (ITO).³¹

Indeed, the ITO was vested with the responsibility of promoting trade by lowering trade barriers among countries. However, the ITO never came into existence, the reason behind such a key failure being that no major country ratified the ITO Charter at the United Nations Havana Conference. Nevertheless, 23 countries adopted a related provisional arrangement of the ITO

³¹ International Trade Centre *Business guide to Trade remedies in Brazil: Anti-Dumping, Countervailing and Safeguard Legislation Practices and Procedures* (2009) 1.

Charter related to negotiations on tariffs and trade the GATT which came into effect on 1 January 1947. The GATT included an international agreement establishing a set of rules for conducting international trade and a provisional structure to administer the Agreement.³²

Throughout its virtually 50 years of incidence; GATT became a platform for periodical rounds of negotiations. For instance, from 1947 to 1994, there were almost eight rounds of negotiations under the auspices of the GATT. The impact from such negotiations hit the multilateral trade system positively whereas; the first five rounds were able to accomplish the lowering of tariffs. Thus, the Kennedy Round of 1963 to 1967 and the Tokyo Round of 1973 to 1979 not only proficient tariff reductions, but consistently introduced a series of agreements on non-tariff barriers. Although the Kennedy Round introduced an Anti-Dumping Code the negotiations under the Tokyo Round resulted on the other hand, 'in a series of codes concerning subsidies and countervailing duties, customs valuation, government procurement, import licensing procedures and technical barriers to trade' among others.³³

In addition to the above discussions, the final round of negotiations under the GATT, namely, the Uruguay Round of 1986 to 1994, focused at consolidating the prevailing disciplines and bringing new topics into discussion. As the end result, after seven years of negotiations, the Final Act incorporating the Uruguay Round an agreement was signed in Marrakesh on 15 April 1994. The Final Act also recognised the creation of an international body in the field of international trade, the WTO, which came into being on 1 January 1995. The WTO continued and improved the GATT arrangement. It incorporated the reorganised GATT regulations (GATT 1994) and expanded the framework of the separate agreements on services, investments and intellectual property rights. Further, it adopted a dispute settlement mechanism which lends efficiency to the decisions of the WTO.³⁴

³² International Trade Centre (2009)1.

³³ International Trade Centre (2009)2.

³⁴ International Trade Centre (2009)2.

2.3 The WTO and the available trade remedies: a history in a nutshell

Trade remedies have been in the multilateral trading system since 1947. The discipline regarding to such trade instruments has been enforced over the eight rounds of negotiations under the GATT. The landmark is obtained under Article VI of the GATT which sets forth general rules dominating the application of anti-dumping and countervailing duties; Article XVI covers general provisions on subsidies; and Article XIX establishes the probability for the GATT contracting party to use safeguard measures to protect its industries from increased imports.³⁵

By definition trade remedies are trade policy tools that allow governments to take remedial action against imports which are causing or threaten to cause injury to a domestic industry. Such tools are more efficient compared to domestic ones and they are legitimate actions under the WTO terms.³⁶ According to the SCM Agreement³⁷ ‘domestic industry’ has been interpreted as referring to

‘the domestic producers as a whole of the like products to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products except that when such producers are related to the exporters or importers or are themselves importers of the allegedly subsidised product or a like product from the other countries,.....’.

The definition lack some clarity, whereby it has failed to provide in detail some key terms such as defining what is like product. Under the WTO the term like product has been debatable due to the fact that the GATT and the SCM Agreement does not define what is ‘like product’. Latter the SCM Agreement also did not provide a straight forward definition of the term apart from providing general reference in the footnote.³⁸

³⁵ International Trade Centre (2009)2.

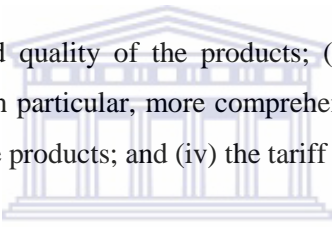
³⁶ See Australian Government Department of Foreign and Trade ‘Trade Remedies’ available at www.dfat.gov.au/trade/negotiations/trade_remedies.html (accessed on 10 December 2012).

³⁷ Article 16.1 and footnote 48 of the SCM Agreement.

³⁸ Footnote 46 of the SCM Agreement establishes that “like product” shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

According to the WTO case law, namely, *Japan-Alcohol* and *European Community –Asbestos*³⁹, it was held that there is no “one precise and absolute definition” of the term “like”. Reasonably, the scope of the term varies contingent on the context of the provision, the object and purpose of the provision, and the object and purpose of the agreement in which it appears. Additionally, in the *European Community –Asbestos* matter the Appellate Body first noted that the dictionary meaning of “like” suggests that “like products” means products “that share a number of identical or similar characteristics or qualities”.⁴⁰ However this definition did not make available, on its own, a clear meaning for the term “like”.

Referring to prior GATT/WTO precedent, the Appellate Body noted that the determination of “likeness” must be made on a “case-by-case basis”. Furthermore, it noted that four general criteria have been examined in past reports to determine “likeness”:

- 
- (i) The properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits in particular, more comprehensively termed consumers' perceptions and behaviour in respect of the products; and (iv) the tariff classification of the products.⁴¹

Lastly in the *Korea-Alcohol case*⁴², the panel stated that an assessment of what amount to a like product(s) can also have its legal basis on whether a "direct competitive" relationship between products exists. Nevertheless it requires evidence that consumers consider the products to be “alternative ways” of satisfying a particular need or taste. Specifically when the domestic and imported products at issue are directly competitive or substitutable, an examination of which requires evidence of the direct competitive relationship between the products there must be comparisons of their physical characteristics, end-uses, channels of distribution and prices.⁴³

³⁹ WT/DS135/AB/R.

⁴⁰ WT/DS135/AB/R.

⁴¹ WT/DS135/AB/R.

⁴² WT/DS75/84/R Para 10.43.

⁴³ WT/DS75/84/R.

2.3.1 Anti-dumping

The development of international anti-dumping regimes originated from national laws. The landmark legislation on domestic anti-dumping was adopted by Canada in 1904. Such specific legislation was created out of fear of dumping of goods from Europe and America at a cheap price, with the apparent intention to control the Canadian Market.⁴⁴ Similarly followed by the United States in its 1916 Anti-dumping Act, ‘as a result of fears of cartel-like systematic dumping from Europe with the intent to destroy the younger industries in the United States in order to monopolise trade and commerce after wiping out competitors’.⁴⁵

Thereafter, due to the continued existence of domestic anti-dumping laws in industrialised countries, such as, the United States and others, who were the key proponents of the ITO, anti-dumping provisions were contained in the American proposal for the still-born ITO and eventually became part of the 1947 GATT. The original rules of the GATT received extensive revisions in 1947 and 1979. Eventually, efforts by some countries to tighten anti-dumping disciplines achieved modest success by the adoption of a new agreement on anti-dumping known as the Agreement for the Implementation of Article VI of the GATT 1994.⁴⁶

At present, WTO member states can apply remedial action if a company exports a product at a place lower than the price it normally charges in its own home market. This is legally termed as “*dumping*” of the product. In a situation of unfair trade, such as dumping of a product, the WTO Agreement allows governments to act against the dumping where there is material injury to the competing domestic industry. In order to do that the government has to show that dumping is taking place, calculate the extent of the dumping (that is, how much lower the export price is compared to the exporter’s home market price), as well as show that the dumping is causing injury or threatens to do so.⁴⁷

⁴⁴ Eckes A *Opening America’s Market: US Foreign Trade policy since 1776* (1995)260.

⁴⁵ Hwang TW *Trade Remedies: Law of Dumping, Subsidies and Safeguards in China* (2003) 13.

⁴⁶ Hwang TW (2003) 13.

⁴⁷ See World Trade Organization ‘Anti-dumping, subsidies, safeguards: contingencies, etc’ available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (accessed on 10 December 2012).

Moreover Article VI of the GATT allows countries to take action against dumping while the Anti-dumping Agreement clarified and expanded this provision. Therefore, in summary, one can define anti-dumping action as imposing an extra import duty on the particular product from the exporting country in order to bring its price closer to its “normal value”.⁴⁸

Furthermore, the determination of offsetting dumping requires a price similarity between a product's “normal value” and its “export price”. ‘A product is to be regarded as being “dumped” when introduced into the commerce of another country at less than its “normal value”, likewise, if the “export price” of the product when sold in the importing country is less than its “normal value”, that is, the comparable price, in the ordinary course of trade, for the like product in the market of the exporting country’.⁴⁹

However the Agreement on Anti-dumping applies only to goods and the GATT does not include provisions on dumping of services.⁵⁰

2.3.2 Safeguards

The development of international regimes on safeguards has followed a pattern similar to the anti-dumping rules. Safeguard provisions had been in existence in the national practices of major industrial countries long before they were adopted as multilateral trade remedies.⁵¹ In 1935, the United States incorporated an escape clause in the bilateral trade agreement with Belgium under which the United States would be entitled to withdraw from the tariff concession as a result of the extension of such concession to third countries causing an excessively large increase in the importation of products.⁵²

Similar provisions were later included in trade agreements with other countries such as Sweden, The Netherlands and Mexico. Thus, this escape clause becomes the precursor of a similar provision in the American proposal to establish the ITO, that tariff concessions may be suspended or withdrawn if increased imports cause or threaten serious injury to domestic

⁴⁸See World Trade Organization ‘Anti-dumping, subsidies, safeguards: contingencies, etc’ available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (accessed on 10 December 2012).

⁴⁹ WTO E-learning (2010) 211.

⁵⁰ Wolfrum R & Kobele M *WTO: Trade Remedies* (2008)1.

⁵¹ Wolfrum R & Kobele M (2008)1.

⁵² Eckes A (1995)260.

industry.⁵³ Under the current situation in the WTO, a member may restrict imports of a product temporarily if its domestic industry is injured or threatened with injury caused by a surge in imports. The legal provision for this emergency protection from imports is provided by Article XIX of the GATT.

The same have been clarified and reinforced by the Agreement on Safeguards. Specifically, an import ‘surge’ justifying safeguard action can be a real increase in imports, whether an absolute increase or relative increase, whereby there is an increase in the imports share of a shrinking market even if the imports quantity has not increased. In practice industries or companies may request safeguard action by their government.⁵⁴

2.3.3 Countervailing measures

The third type of trade remedy is known as a countervailing measure with the aim to offset the effect brought about by a subsidy. Under the SCM Agreement, a country can use the WTO's dispute settlement procedure to pursue the withdrawal of the subsidy or the elimination of its adverse effects. Or the country can host its own investigation and eventually apply a countervailing measure on subsidised imports that cause injuring to domestic producers.⁵⁵

Despite the fact that under the WTO three types of trade remedies exist, this study will only focus on one countervailing measures and more discussion of the countervailing measures will be provided in the reminder of the study.

2.3.4 Differences between the WTO trade remedies

Although anti-dumping duties, countervailing duties and safeguard measures are mechanisms used to restrain the amount of imports into a country, there are substantive differences between them. While anti-dumping and countervailing duties are used to remedy the effects of unfair competition, safeguard measures are used to allow a domestic industry to adjust to trade liberalisation. In this sense, the investigation process for the imposition of a countervailing duty is very similar to the anti-dumping investigation process, since both investigations concern unfair

⁵³ Eckes A (1995)260

⁵⁴ See World Trade Organization ‘Anti-dumping, subsidies, safeguards: contingencies, etc’ available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (accessed on 10 December 2012).

⁵⁵ WTO E-learning *Trade remedies and the WTO* (2012)159.

trade practices. Safeguard investigations, on the other hand, are significantly different from anti-dumping and countervailing duty investigations as the fairness or unfairness of the imports is not considered.⁵⁶

A substantial difference between anti-dumping and countervailing measures concerns the nature of the agents involved in the practice of dumping and subsidisation. Dumping relates to business activities between private companies, whereas subsidization is a financial contribution made by a government or public body which confer benefit to the recipient.⁵⁷

2.4 Historical background of subsidies and countervailing measures

Prior to the internationalisation of regulations against subsidies, domestic laws against foreign subsidies were common among industrialised countries. In the United States, for example, provisions against subsidies were enacted against imports of beet sugar from Europe in as early as 1980s.⁵⁸ A broader statute was adopted against subsidies by imposing countervailing duties on all items. The Tariff Act of 1930 further adopted anti-subsidy measures by giving Treasury authority to levy countervailing duties to alleviate any bounty or grant. The idea of an anti-subsidy remedy later made its way into the original American Proposals for establishing the ITO. Although the ITO failed to materialise due largely to disinterest on the part of the United States, subsidy regulation became part of the GATT 1947.⁵⁹

Rules on the use of subsidies and countervailing measures have existed as part of the multilateral trading system since the beginning. More specifically, Article XVI of the GATT 1947 contained the original rules on subsidies, and Article VI the original rules on the use of countervailing measures.⁶⁰

These original rules were, however, relatively broad. For example, Article XVI of the GATT 1947 did not define the term "subsidy" and contained little detail as to the types of adverse effects that might be caused by subsidies or as to the actions other Contracting Parties could take

⁵⁶ International Trade Centre (2009)4.

⁵⁷ International Trade Centre (2009)4.

⁵⁸ Eckes A (1995) 261.

⁵⁹ Eckes A (1995) 261.

⁶⁰ World Trade Organisation E-learning (2012)161.

in response. Article VI provide only three paragraphs regarding the use of countervailing measures.⁶¹

In response to the need to elucidate the GATT rules on subsidies and countervailing measures. The Tokyo Round of multilateral negotiations, which took place between 1973 and 1979, saw the establishment of the Agreement on Implementation and Application of Articles VI, XVI and XXIII of the General Agreement, mostly acknowledged as the “Tokyo Round Subsidies Code”, or “Subsidies Code”.⁶² Unfortunately the Subsidies Code, which was a plurilateral agreement, did not fully achieve its objectives. It was ratified by only 25 Contracting Parties, and there were a number of disputes plus over fundamental concepts that were not defined in the Code.⁶³

Thus, in the Uruguay Round, the rules on subsidies and countervailing measures were once again put on the negotiating agenda. The Punta del Este Ministerial Declaration, which launched the Round, called for a fundamental review of all the rules on subsidies and countervailing measures: Articles VI and XVI of the GATT 1947 and the Subsidies Code. Thereafter the Subsidies Countervailing Measures (SCM) Agreement was born.⁶⁴

2.5 The WTO jurisprudence on subsidies and countervailing measure

The WTO regulates the use of subsidies, and regardless of whether they are intended only to correct market failures or to address policy priorities of the government involved, they can distort international markets. More precisely, a subsidy can introduce a structural competitive imbalance into the market for a good which is unrelated to the natural comparative advantages of the different countries producing that good. Where this occurs, an unsubsidised good can find it impossible to compete with the subsidised good even where the unsubsidised good has the intrinsic comparative advantage.⁶⁵

In the WTO legal framework Article VI of the GATT provides a foundation of where and how Members can use countervailing measures against subsidized imports .The Article acknowledged the right of any Contracting Party to impose countervailing duties .It has been described as

⁶¹ World Trade Organisation E-learning (2012)161.

⁶² World Trade Organisation E-learning (2012)161.

⁶³ World Trade Organisation E-learning (2012)161.

⁶⁴ World Trade Organisation E-learning (2012)161.

⁶⁵ World Trade Organisation E-learning (2012)159.

‘extra duties levied to offset any bounty or subsidy bestowed directly or indirectly. subject to two basic constraints: countervailing duties must not exceed the estimated direct or indirect subsidy on the manufacture, production or export of a commodity and they may not be levied until the importing country has determined that the subsidisation causes or threatens to cause material injury to a domestic industry, or materially retards the establishment of a domestic industry’’.⁶⁶

The Article provided no definition of what a ‘subsidy’ or ‘bounty’ is nor did it give any clue as to how to measure it. It was also silent on the nature of material injury. On the other hand, Article XVI only provides for notification of subsidies that could affect either exports or imports and provided for discussions on the possibility of limiting the subsidisation whenever the subsidy in question could cause or threaten serious prejudice, a factor whose characters were not defined in detail.⁶⁷

Later the article was expanded by the implementation of the SCM Agreement. The purpose of the SCM Agreement is to impose multilateral disciplines on subsidies that distort international trade. The SCM Agreement also permits WTO Members' responses against subsidised imports. Subsidies result from the decisions of governments. The provisions of the SCM Agreement not only authorise unilateral action by means of countervailing duties that may be taken against subsidised imports, but also establish multilateral disciplines to control the use of subsidies themselves.⁶⁸

Furthermore, the SCM Agreement goes far beyond its predecessors in terms of the level of detail and specificity of the rules in respect of subsidies. It establishes detailed disciplines for both prohibited and non-prohibited subsidies, together with the definitional provisions on prohibited subsidies, lengthy provisions concerning adverse effects of subsidies, and details as to the applicable multilateral dispute settlement procedures.⁶⁹

⁶⁶ Article VI of the GATT 1994 also see Barca L Subsidies *and countervailing measures under the GATT and the WTO and in the US law and practice: parallel developments and interactions* (unpublished PHD thesis, University of Warwick 2007).

⁶⁷ Barca L (2007).

⁶⁸ World Trade Organisation E-learning (2012)161; also see Barca L (2007).

⁶⁹ World Trade Organisation E-learning (2012)161.

It is essential to also recognise that the SCM Agreement was meant for subsidies on goods and that as regards agriculture product(s), the WTO provides special legislation which is known as the Agreement on Agriculture.

However there is a relationship between the SCM Agreement and Agreement on Agriculture. For instance Article 21 of the Agreement on Agriculture establishes that the provisions of the GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement including the SCM Agreement shall apply subject to the provisions of the Agreement on Agriculture. While, Article 3.1 of the SCM Agreement prohibits export and import substitution subsidies "except as provided in the Agreement on Agriculture". Also Article 10 of the SCM Agreement provides that 'countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture'.

In *US - Upland Cotton*, the Appellate Body stated that agricultural subsidies are subject to the SCM Agreement 'except to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter'. Therefore, for example, agricultural export subsidies that are fully consistent with the provisions of the Agreement on Agriculture are not prohibited under Article 3 of the SCM Agreement. They can be countervailed.⁷⁰

2.5.1 Categories of subsidies covered by the SCM Agreement.

The SCM Agreement defines three categories of subsidies, namely, prohibited, actionable and non-actionable subsidies. However the last category, that is, non-actionable, subsidies existed for only five years (ended on 31 December 1999).⁷¹ Therefore in this study the focus shall be on the available two subsidies which do exist up-to-date.

⁷⁰ WTO E-learning (2010)232.

⁷¹ WTO E-learning (2011).

2.5.1.1 Prohibited subsidies

Also known as red light subsidies, prohibited subsidies are viewed as among the most disruptive impediments to the operation of the international trade market.⁷² Article 3 of the SCM Agreement singles out the two kinds of such subsidies which are prohibited; export subsidies and import substitution subsidies.

2.5.1.1.1 Export subsidies

These are subsidies contingent, in law or in fact, ‘whether solely or as one of several other conditions, upon export performance, including the programmes enumerated in the Illustrative List of export subsidies in Annex I of the SCM Agreement’. The *Canada-Autos* Panel has held that, while all practices identified in the Illustrative List are subsidies contingent upon export performance, there may be other practices not identified in the Illustrative List that are also subsidies contingent upon export performance.⁷³ Export subsidies can either be direct or indirect.

Direct subsidies are considered to provide an explicit price subsidy to either the exporting or importing agent, lowering the price of the traded good. Also, such subsidies provide an explicit price discount that effectively lowers an importer’s traded price for the product in question. These discounts not only include bonuses paid by the government agencies to increase export but also transportation, handling and inspection services that are provided on more favourable terms for exports than for goods for sale within the country. Indirect subsidies provide non-price benefits that ultimately lower the final cost to importers. The use of indirect subsidies includes the use of food aid programs, actions of state trading enterprises, publicly underwritten export credits, export promotion activities, and possibly even the combination of domestic policy instrument that act like an export subsidy.⁷⁴

Footnote 4 to the SCM Agreement provides that *de facto* export subsidies exist when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings; on the other hand, the fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy. For instance, In the case of *Brazil-Aircraft*, it was

⁷² Kerr AW & Gaisford JD *Handbook on International Trade Policy* (2000) 282.

⁷³ WT/DS139/R.

⁷⁴ Kerr AW & Gaisford JD (2000) 282.

held that there is no hint that a tax advantage would not constitute an export subsidy because it reduced the exporter's tax burden to the level comparable to that of foreign competitors.⁷⁵

Moreover, the Illustrative List in Annex I lists 11 types of export subsidies ranging from direct export subsidies to currency retention schemes, exemptions, remissions or deferrals of direct taxes on exports (*US-FSC*),⁷⁶ excessive duty drawback, and provision of export credit guarantees or insurance programmes at premium rates, or export credits below commercial rates (*Brazil-Aircraft*; *Canada-Aircraft*).⁷⁷

2.5.1.1.2 Import substitution subsidies

This second category of prohibited subsidies is defined as subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods. Often, these take the form of local content requirements. However, Article 3.1(b) talks about 'goods', and local content requirements often comprise not only goods, but also other cost items.⁷⁸

Any subsidy falling under the provisions of Article 3 shall be deemed to be specific. These two categories are prohibited because they are presumed to distort international trade, and are therefore most likely to have adverse effects on the interest of other Members. They may be challenged through the WTO dispute settlement mechanism (multilateral track) on the basis of special accelerated procedures, and, if the subsidy is found to be prohibited, it must be withdrawn without delay. Prohibited subsidies may also be subject to countervailing measures (unilateral or domestic track) if subsidised imports are causing injury to the domestic industry.⁷⁹

2.5.1.2 Actionable subsidies

Actionable subsidies are not prohibited. However, they are subject to challenge, either through multilateral dispute settlement or through countervailing action, in the event that they cause adverse effects to the interests of another Member. Thus, in addition to the existence of a specific subsidy, the complaining Member has to show that this specific subsidy causes adverse effects.⁸⁰

⁷⁵ *WT/DS46/R*.

⁷⁶ *WT/DS108/AB/R*.

⁷⁷ Vermulst E (2003)15.

⁷⁸ Vermulst E (2003) 16.

⁷⁹ WTO E-learning (2011).

⁸⁰ WTO E-Learning manual (2011).

2.6 The application of countervailing measures to address unfair trade practices

Subsidies have long been recognised as damaging to international trade as well as the economy. Subsidised industries are able to sell their products in foreign markets at prices lower than would otherwise be possible, which distorts trade patterns based on the comparative advantage to subsidised industries.⁸¹ In economics, the law of comparative advantage is defined as the situation where a country is able to produce goods or services at lower cost than anyone else⁸².

The SCM Agreement provides multilateral disciplines also known as "multilateral track" by invocation of the WTO Dispute Settlement mechanism. That is, 'if the decision is given to the complainant the alleged subsidies has to be withdrawn in case of prohibited subsidies or eliminate the adverse effects of the subsidies or withdrawn in case of actionable subsidies'. The applicable rules are enforced through the WTO dispute settlement mechanism, in accordance with the Dispute Settlement Understanding (DSU).⁸³

The SCM Agreement also recognises a unilateral or domestic track whereby Members may apply countervailing measures after conducting a domestic investigation according to the criteria set forth in the SCM Agreement. Specifically, countervailing duties can only be applied when subsidised imports are causing injury or threatening to cause injury to the domestic industry producing the like product. The SCM Agreement also provides procedural requirements that regulate the conduct of countervailing investigations.⁸⁴

2.6.1 Substantive requirements for the application of countervailing measures

Part V of the SCM Agreement provides that a Member cannot impose a countervailing measure unless it determines that three elements are present: *subsidised imports*, and *material injury to a domestic industry*, and *a causal link between the subsidised imports and the injury*.

⁸¹ Schaffer R (et al) *International business law and its environment* (2008) 374

⁸² See Library Economics Liberty 'Comparative advantage' available at <http://www.econlib.org/library/Topics/Details/comparativeadvantage.html> (accessed on 14 May 2013).

⁸³ WTO E-learning (2010) 227.

⁸⁴ WTO E-learning (2010) 227.

2.6.1.1 Determination of subsidies

The GATT did not define what a subsidy is so there was a need to clarify this key term in the WTO system. The SCM Agreement defines a subsidy as having to comply with four key elements to establish its existence. There must be

- I. a financial contribution;
- II. made by a government or any public body within the territory of a Member;
- III. which confers a benefit; and
- IV. specificity.

2.6.1.1.1 Financial contribution

Article 1 of the SCM Agreement contains a list of measures that are deemed to provide a financial contribution. These include direct transfers of funds, for example, grants, loans, and equity infusion, and potential direct transfers of funds or liabilities, such as, loan guarantees. For instance, in the *European Communities-Countervailing Measures on Dynamic Random Access Memory Chips from Korea case*⁸⁵ the Panel held that "the provision of a guarantee involves a potential direct transfer of funds", and thus a "Guarantee constituted a financial contribution in the sense of Article 1.1(a)(1)(i) of the *SCM Agreement*".

A financial contribution also exists where government revenue that is otherwise due is foregone or not collected: for example, fiscal incentives, such as tax credits; where a government provides goods or services other than general infrastructure, or purchases goods; as well as where a government entrusts or directs a private body to carry out these functions.⁸⁶

Specifically, the recipient of the financial contribution can be someone other than the recipient of the benefit in situation where that entity is sold to someone else as well as where an initial government financial contribution has been made not directly. This reasoning was held by the panel in *US-Softwood Lumber IV*, *US –Countervailing Measures on Certain EC Products* and *Mexico-Olive Oil*.⁸⁷

⁸⁵ WT/DS299/R.

⁸⁶ WTO E-learning (2010) 228, Article 1.1 of the SCM Agreement Also see Vermulst E Subsidies and Countervailing Measures(2003)11 UNCTAD.

⁸⁷ Shadikhodjaev S "Indirect Subsidisation under WTO Disciplines: Financial Contribution to One Entry, Benefit to Another" (2011)23 Korea Institute for International Economic Policy working paper 11-04.

However, if a measure confers regulatory but not financial advantages, it would not constitute a subsidy. For instance, ‘presuppose that a government temporarily exempts a manufacturing facility in financial difficulties from the obligation to observe anti-pollution laws. To the extent that there is no element of financial contribution, this would not constitute a subsidy’.⁸⁸

2.6.1.1.2 By a government or any public body

In order for a financial contribution to be a subsidy, it must be made by the government or under the assignment or direction of a government or any public body within the territory of a Member. The SCM Agreement applies not only to measures of national governments, but also to measures of sub-national governments and of such public bodies as state owned companies.⁸⁹ According to case law, as observed in *United States-Definitive Anti-dumping and Countervailing Duties on Certain Products from China*, a public body is defined as an entity that possesses, exercises or is vested with governmental authority. Further, the Appellate Body held that evidence of government ownership, in itself is not evidence of meaningful control of an entity by government and cannot, without more, serve as a basis for establishing that entity is vested with authority to perform a government function.⁹⁰

A financial contribution made by a private body may still fall under the definition provided above, if a government or public body entrusts or directs a private body, that is, if the contribution is made pursuant to the government's instructions. For example, if a private non-governmental organization (NGO) gives technical and financial assistance to coffee growers in certain WTO Members in Africa, it would be a case of private, not governmental, assistance, most likely unless the financial contribution was made at the direction of a government or public body within the territory of the WTO Member.⁹¹

⁸⁸ WTO E-learning (2010) 228.

⁸⁹ WTO E-learning (2010) 229 also in *European Communities-Countervailing Measures on Dynamic Random Access Memory Chips from Korea* case provide that it is a general rule that *SCM Agreement* will not apply if there is no financial contribution *by the government*, unless it can be demonstrated that the private body was entrusted or directed by the government to provide such a financial contribution".

⁹⁰ Zheng W ‘Trade Remedies and Non-Market Economies: The WTO Appellate Board Report United states-Definitive Anti-Dumping and Countervailing Duties on certain products from china’ (2011) *American Society of International Law*.

⁹¹ WTO E-learning (2010) 229.

2.6.1.1.3 Benefit

A financial contribution by a government is not a subsidy unless it confers a "benefit". The word "benefit", as used in Article 1.1 of the SCM Agreement, is concerned with the "benefit to the recipient" and not with the "cost to government" (*Canada – Aircraft*)⁹². Although the SCM Agreement does not provide comprehensive guidance on these issues, the Appellate Body has stated in *Canada – Aircraft* that the existence of a benefit is to be determined by comparison with the market place, that is, whether the recipient has received a financial contribution on terms more favourable than those available to the recipient in the marketplace.⁹³ Thus, for example, if a government makes a loan to a manufacturer on conditions equivalent to those that the manufacturer could obtain from private banks, there is a financial contribution but no benefit; under these conditions the loan would not constitute a subsidy.⁹⁴

2.6.1.1.4 Specificity

A subsidy fund is characterised as specific if access to that fund is formal or in fact limited to certain specific enterprises, industries, groups of enterprises and industries, or to enterprises in a specific geographic region.⁹⁵ Although a measure is a subsidy within the meaning of the SCM Agreement, it nevertheless is not subject to the SCM Agreement unless it has been "*specifically*" provided to an enterprise or industry or group of enterprises or industries. The basic principle is that only a subsidy that distorts the allocation of resources within an economy should be subject to disciplines. Where a subsidy is widely available within an economy, such a distortion in the allocation of resources is presumed not to occur.⁹⁶

⁹² WT/DS70/AB/R paras. 154-155.

⁹³ WT/DS70/AB/R paras 157.

⁹⁴ WTO E-learning (2010) 229.

⁹⁵ Jurgen S (1996) 6.

⁹⁶ WTO E-learning (2010) 229 Also see Vermulst E (2003)13.

There are four types of “specificity” in terms of the SCM Agreement: (i) enterprise-specificity, when a government targets a particular enterprise or enterprises for subsidisation; (ii) industry-specificity, when a government targets a particular enterprise or enterprises for subsidisation; (iii) regional-specificity, when a government targets producer in specified parts of its territory for subsidisation; (iv) prohibited subsidies, when a government targets export goods or goods using domestic inputs for subsidisation.⁹⁷

The SCM Agreement covers not only subsidies which are *de jure* specific (their specific nature is derived from an explicit limitation by the granting authority or the legislation pursuant to which the granting authority operates), but also those that are *de facto* specific (the specific nature of the subsidy is derived from the facts and circumstances surrounding its application; in other words, the subsidy is "in fact" specific).⁹⁸ The same reasoning was adopted by the Panel in *European Communities-Countervailing Measures on Dynamic Random Access Memory Chips from Korea*⁹⁹.

In this regard, Article 2.1(c) of the SCM Agreement provides that if there are reasons to believe that the subsidy may, in fact, be specific, other factors listed in the Agreement, such as, the use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy, may be considered. Information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions are also to be considered. The extent of diversification of economic activities within the jurisdiction of the granting authority, as well as the length of time during which the subsidy programme has been in operation are to be taken into account.¹⁰⁰

Therefore it can be clearly stated that non-specific subsidies are those that are in effect generally available to and broadly distributed among all enterprises or industries in a country.¹⁰¹

⁹⁷ WTO E-learning (2010) 230.

⁹⁸ WTO E-learning (2010) 230.

⁹⁹ WT/DS299/2.

¹⁰⁰ WTO E-learning (2010) 230.

¹⁰¹ Jurgen S (1996) 6.

2.6.2 Determination of injury

Article 15(1) of the SCM Agreement requires that a determination of injury must be based on *positive evidence* and *involve an objective examination* of both (a) the volume of the subsidised imports and the effect of the subsidised imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products

In *US Hot-Rolled Steel*,¹⁰² the Appellate Body stated that the term "positive evidence" relates to the quality of the evidence that authorities may rely upon in order to justify an injury determination. It further explained that the word "positive" means that the evidence must be of an affirmative, objective and verifiable character and that it must be credible.¹⁰³ Further in *Mexico- Definitive Countervailing Measures on Olive Oil from the European Communities*¹⁰⁴ the panel held that "the definition of the term 'injury' for purposes of the *SCM Agreement* encompasses the concept of material retardation". Therefore, the Panel did "not find that the first clause of subparagraph (i) prohibits the imposition of duties on the basis of a determination of material retardation as opposed to determinations of material injury or threat of material injury".

2.6.3 Threat of injury

The SCM Agreement provides that a determination of threat of material injury *shall be based on facts, and not merely on allegation, conjecture, or remote possibility*. Furthermore, the change in circumstances which would create a situation where subsidised imports would cause material injury must be clearly foreseen and imminent.¹⁰⁵

In making a threat determination, the importing country authorities *should* consider, *inter alia*, the nature of the subsidy or subsidies in question, a significant rate of increase of subsidised imports into the domestic market indicating the likelihood of substantially increased importation, as well as whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices and would likely increase demand for further imports.¹⁰⁶

¹⁰² WT/DS184/AB/R.

¹⁰³ WTO E-learning (2010)218.

¹⁰⁴ WT/DS341/R.

¹⁰⁵ Article 15(7) of the SCM Agreement.

¹⁰⁶ Vermulst E (2003) 23.

2.6.4 Causal link between subsidised imports and injury

Article 15(5) requires a demonstration that ‘there is a causal relationship between the subsidised imports and the injury to the domestic industry producing the like product’. It must be demonstrated that the subsidised imports, through the effects of subsidies, are causing injury. This demonstration must be based on an examination of all relevant evidence before the investigating authority. The same jurisprudential reasoning was also adopted in *Mexico-Definitive Countervailing Measures on Olive Oil from the European Communities*¹⁰⁷.

Moreover the above mentioned provision requires investigating authorities to examine any known factors other than subsidised imports which may be causing injury to the domestic industry at the same time. The SCM Agreement provides examples of such:

“the volumes and prices of non-subsidised imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry”.¹⁰⁸

2.7 Procedural requirements for the application of countervailing measures.

Apart from indicating the substantive factors for a Member to apply the countervailing measures, the law also provide for procedural requirements for such measures to be applied as follows;

2.7.1 Initiation of investigation at the request of the domestic industry

The SCM Agreement specifies that an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of a domestic industry.¹⁰⁹ Such application will only be valid where there is sufficient evidence of existence of subsidy and, if possible, its amount, injury within the meaning of article VI of the GATT 1994 and a causal link between the subsidised imports and the alleged injury.¹¹⁰ Further, it is the obligation of the importing country authorities to review the accuracy of such allegation before

¹⁰⁷ WT/DS341/R.

¹⁰⁸ Article 15(5) of the SCM Agreement.

¹⁰⁹ Article 11(1) of the SCM Agreement.

¹¹⁰ Article 11(2) of the SCM Agreement.

the grant of the application and implementation of countervailing measures. The GATT Panels have held several times that the failure to properly determine standing before initiation is a fatal error, which cannot be rectified retroactively in the course of proceeding.¹¹¹

2.7.2 Evidentiary requirements for initiation of an investigation

The SCM Agreement provides for an opportunity to present evidence in writing in respect of the proceedings. It states that interested Members and all interested parties in Countervailing Duty (CVD) investigation shall be given notice of information which the authorities require and ample opportunity to present all evidence in writing.¹¹² The same Article provides for different rights such as the right to access the file,¹¹³ the right to a hearing¹¹⁴, and the right to be timely informed of the essential facts under consideration which form the basis for the decision whether to apply definitive measures.¹¹⁵

The authorities must also provide an opportunity for industrial users of the product under investigation and for representative consumer organisation in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization injury and causality.¹¹⁶

However, where the information submitted might be very confidential and the parties unwilling to share it or extremely reluctant to provide to their competitors, the law provides for the confidentiality principle to be adhered to by the parties.¹¹⁷

2.7.3 Consultations

The law provides that upon the acceptance of application for investigation, or in any event, before the initiation of any investigation, the interested party to the claims and subjected to investigation shall be invited for consultation.¹¹⁸ The rationale for this is to clarify the matter at hand concerning the subsidy allegations, namely, the existence of a subsidy, injury caused to

¹¹¹ Vermulst E (2003) 28.

¹¹² Article 12(1) of the SCM Agreement.

¹¹³ Article 12(1)(2) of the SCM Agreement.

¹¹⁴ Article 12(2) of the SCM Agreement.

¹¹⁵ Article 12(8) of the SCM Agreement.

¹¹⁶ Article 12(4) of the SCM Agreement.

¹¹⁷ Article 12(10) of the SCM Agreement.

¹¹⁸ Article 13(1) of the SCM Agreement.

domestic industry, as well as the causal link between the subsidised import and the alleged injury.

2.7.4 Undertakings

The SCM Agreement contains rules on the offering and acceptance of price undertakings, in lieu of the imposition of anti-dumping duties. It establishes the principle that any exporter may enter into an undertaking with the authorities of the importing Member, but not the domestic industry in the importing member, to revise its prices, or to cease exports at prices, as a way to settle an investigation.¹¹⁹ In practice, an undertaking takes place when the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects or where the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated.¹²⁰

2.7.5 Application of Countervailing Duties

Countervailing measures take the form of customs duties, which may be in excess of the bound tariff provided in the Schedule of concessions of the Member applying the measure.¹²¹ Only once totally satisfied that the subsidized imports are causing injury to the domestic industry, a Member may impose a CVD.¹²² Therefore when a CVD is imposed in respect of any product, such duty shall be levied in appropriate amounts and on a non discriminatory basis. Specifically, no CVD shall be levied on any imported product in excess of the amount of the subsidy found to exist. By calculating subsidisation per unit of the subsidised and exported product.¹²³ The SCM Agreement also provides that it is desirable that the imposition of the duty is permissive and that the duty is less than the margin of subsidisation if such "*lesser duty*" would be adequate to remove the injury to the domestic industry.¹²⁴

In order to offset or prevent the effect of subsidised goods a contracting party to WTO may impose a CVD on such goods. A CVD is a special tariff, in addition to the normal import tariff, imposed on imports of subsidised goods in an amount equal to the amount of the countervailable

¹¹⁹ WTO E-learning (2012) 144.

¹²⁰ Article 18(1) (a) and (b) b of the SCM Agreement.

¹²¹ WTO E-learning (2011) 222.

¹²² Article 19(1) of the SCM Agreement.

¹²³ Article 19(3) of the SCM Agreement.

¹²⁴ Article 19(2) of the SCM Agreement.

subsidy. Moreover, the international instruments under the international trade provide that “countervailing duty “shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise”.¹²⁵

In the WTO CVDs against subsidies can be of the following kinds:

i) *Provisional CVDs*

Under the SCM Agreement, provisional CVDs may be applied before the conclusion of an investigation, only if there has been a preliminary affirmative finding of subsidisation, injury and causation. In no circumstance can such provisional duties be applied until at least 60 days have passed from the date of launching the investigation. Additionally, provisional CVDs must be limited to as short a period as possible, and under no circumstances can they be applied for longer than four months.¹²⁶

ii) *Definitive CVDs*

The definitive duties can only be applied on the basis of a final determination in an investigation. In precise, before it can enforce a definitive duty, the importing Member must have initiated and conducted an investigation in a whole conformity with the relevant provisions of the SCM Agreement, and in the investigation it must have arrived at affirmative final determinations of subsidisation, injury and causation.¹²⁷

iii) *Voluntary undertakings*

Voluntary undertakings signify an alternative to definitive duties. A countervailing duty investigation can be suspended without the imposition of CVDs if the Member and/or exporter being investigated gives the investigating Member a satisfactory voluntary undertaking that the government of the exporting Member agrees to eliminate or limit the subsidy or to take other measures concerning its effects and/or the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated.¹²⁸

¹²⁵ Article VI of the GATT 1994; also see article 10 of the SCM Agreement as well as footnote 36 of the SCM Agreement.

¹²⁶ Article 17 of the SCM Agreement; also see WTO E-Learning manual (2012)178.

¹²⁷ WTO E-Learning manual (2012)178.

¹²⁸ WTO E-Learning manual (2012)178 Also see article 18 of the SCM Agreement.

2.7.6 Duration and review of CVDs

Article 21(1) provides that a CVD shall remain in force only as long as necessary to counteract subsidisation which is causing injury, and not otherwise. Moreover, the law provides that a definitive CVD shall be determined on a date not later than five years from its imposition.¹²⁹ It is also crucial to understand that the evidence and procedure shall apply to any review, and that such review shall normally be concluded within 12 months of the date of initiation.¹³⁰

2.7.7 Special and differential treatment

Article 27 of the SCM Agreement recognizes that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of countervailing measures under the SCM Agreement. Possibilities of constructive remedies provided for by the SCM Agreement shall be explored before applying CVDs where they would affect the essential interests of developing country Members.¹³¹

2.8 Summary

In the multilateral trading system Members may use trade remedies as redress against fair trade practices by using safeguard measures or unfair trade practices such as, dumping and subsidies. This chapter sought to provide in a detailed account of the WTO and trade remedies with the focus being the available redress against subsidies.

Despite there being in place the legal basis and relevant provisions for the WTO remedy of countervailing measures, most developing countries, including Tanzania, fail to fully utilise countervailing measures against unfair trade practices in relation to subsidies .

The following chapter focuses on the contemporary situation relating to subsidised imports in Tanzania as a case study, followed by the challenges and constraints facing Tanzania in implementing countervailing measures. Although implementing such measures has been a challenge to Tanzania, Brazil, which is also grouped as a developing country and the EU have been active users of countervailing, measures. Thus, there will be a comparative study of Brazil

¹²⁹ Article 21(3) of the SCM Agreement.

¹³⁰ Article 21(4) of the SCM Agreement.

¹³¹ WTO E-learning manual (2010) 223.

and the EU since despite the available challenges to implementing such measures these two countries have been active and successful users of countervailing measures.



CHAPTER THREE

TANZANIA AND COUNTERVAILING MEASURES: CHALLENGES AND CONSTRAINTS ON THEIR IMPLEMENTATION.

3.1 Introduction

The United Republic of Tanzania (Tanzania) has been part of the WTO as a member since the 1990s. Indeed, Tanzania is entitled to all the available benefits that the multi -trading organisation has to offer, including the right is to defend her trade interests. Yet despite the fact that subsidised imports still continue to be a challenge to domestic industries, Tanzania has not been capable of addressing this problem either by implementing CVDs or using the WTO dispute body for a complaint against subsidies. This chapter focuses on Tanzania in the multilateral trading system and also examines the present situation there with regard to subsidised imports. This is followed by a discussion on the challenges and constraints facing Tanzania implementing countervailing measures .Finally, there will be a comparative assessment of the active users of countervailing measures, namely, the EU and Brazil.

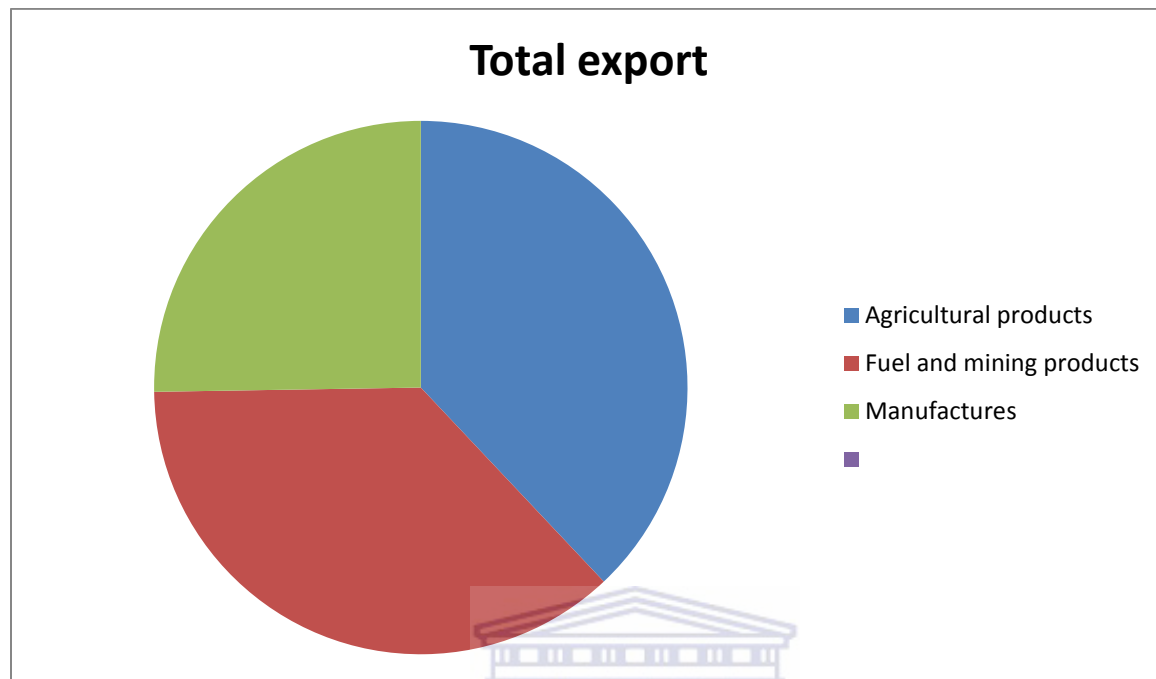
3.2 Tanzania in the multilateral trade system

Tanzania became an official member of the WTO on 1 January 1995 by successfully concluding its accession process to the Organisation.¹³² It terms of its share of the world's total exports Tanzania contributes 0.03% since it is a small scale economy country and also grouped as a least developing country. It is also crucial to understand that according to WTO data of September 2012,¹³³ the United Republic of Tanzania's breakdown of its economy's total export range is as shown in figure 1.

¹³² See World Trade Organization 'Tanzania' available at www.stat.wto.org/countryprofile/WSDBCountryPFView.aspx?language=E&Country=Tz (accessed on 23/01/2013.

¹³³ WTO/G/ADP/N/193/22 June 2010.

Figure 1



By main destination

1. Switzerland 19.4%
2. South Africa 18.1%
3. China 14.3%
4. European Union 12.1%
5. Japan 7.5%



As regard, import tariffs, Tanzania is a member of the East African Community (EAC) customs union along with Kenya, Burundi, Rwanda, and Uganda.¹³⁴ Customs tariffs, rules of origin, import prohibitions, and trade remedy regulations have been harmonized through the EAC. Tanzania imposes the EAC common external tariff on goods imported from non-EAC countries. These import tariffs are levied at an ad-valorem rate on the cost, insurance and freight (c.i.f.) value of goods at the point of entry to the EAC customs union.¹³⁵

As regarding the use of trade remedy instruments, Tanzania is not an active user of such tools. As for anti-dumping measures, ‘Tanzania delegation notified the WTO that it had not yet established an authority competent to initiate and conduct such investigation. The delegation added that Tanzania has not to date taken any anti-dumping action for the foreseeable future (per communication dated 11th June 2011)’.¹³⁶

On the other hand, there is not much information concerning countervailing measures or safeguards. However, the WTO Agreement on Subsidies and Countervailing Measures has been implemented by the Tanzania Anti-dumping and Countervailing Measures Act of 2004. It is the core legislation that governs the operation of Tanzania anti-dumping and countervailing measures. The Act, expressly, lays down the administrative procedures for the application of the two trade remedies.

In terms of using the WTO Dispute Settlement Body, the United Republic of Tanzania is not an active user either. Up to date it has not filed any case as a complainant or as respondent. However, it has appeared before such body as a third party in three cases against the European Community for its export subsidies on sugar.¹³⁷

¹³⁴ Articles 1 and 2 of the Protocol on the establishment of the East Africa Customs Union of 2004.

¹³⁵ See Office of Textiles and Apparel (OTEXA) ‘Market Reports/Tariffs Textiles, Apparel, Footwear and Travel Goods Tanzania’ available at <http://web.ita.doc.gov/tacgi/overseasnew.nsf/alldata/Tanzania#Tariffs> (accessed on 31 January 2013).

¹³⁶ See World Trade Organization ‘Committee on Anti-Dumping Practices - Notification under Articles 16.4 and 16.5 of the Agreement – Tanzania’ available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=%28%20@Symbol=%20g/adp/n/*%20and%20za%29&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true# (accessed on 23 January 2013).

¹³⁷ See WTO/DS/265, WTO/DS/266 and WTO/DS283.

Finally, according to a WTO press release:

“Members commended Tanzania for its strong support of the multilateral trading system. They were unanimous in commending Tanzania for its process of economic reform and liberalization. These steps have included the dismantling of import and export license procedures, the simplification of the tariff structure, the elimination of foreign exchange controls, and the broad efforts by the Government to create an environment more conducive to both foreign and domestic investment.”¹³⁸

3.3 The current situation on subsidised imports in Tanzania

A recent study¹³⁹ shows that the like other developing countries subsidised imports still act as a challenge to domestic industry. For instance the war pitting cement manufacturers in Tanzania against importers of the same commodity in the country is yet to be resolved. Local manufacturers are still being adversely impacted by increased subsidized cement imports from China, Pakistan, Egypt and India.¹⁴⁰ Specifically the prices for imported cement are said to be lower than those for locally made cement. This is usually due to a number of reason(s) including export subsidies and /or lower cost in the country of origin.¹⁴¹

In May 2012, the Ministers of Finance from the EAC of which Tanzania is a member, agreed to continue to apply the common tariff rate of 25 per cent instead of the 35 per cent on cement under the Harmonized Systems Code for the period of one year. Cement producers have been asking for an increase in the cement import tariff since at least 2008 when the EAC Ministers removed cement from the list of sensitive products classified under the East Africa Community Customs Union Protocol in 2005.¹⁴² For example, in 2010, the cement manufacturing sector in

¹³⁸ See World Trade Organization ‘Tanzania: March 2000’ available at http://www.wto.org/english/tratop_e/tpr_e/tp129_e.htm (accessed on 31 January 2013).

¹³⁹ Illy O (2012) IGEG Working Paper.

¹⁴⁰ See Business Times Economic and financial weekly ‘Cement wars: Imports vs. Domestic product’ available at http://www.businesstimes.co.tz/index.php?option=com_content&view=article&id=116:cement-wars-imports-vs-domestic-product&catid=1:latest-news&Itemid=57 (accessed on 9 January 2013); also see allAfrica ‘Tanzania: Higher Taxes Cannot Be Imposed On Cement’ available at <http://allafrica.com/stories/201212110156.html> (accessed on 9 January 2013).

¹⁴¹ See Business Times Economic and financial weekly ‘Cement wars: Imports vs. Domestic product’ available at http://www.businesstimes.co.tz/index.php?option=com_content&view=article&id=116:cement-wars-imports-vs-domestic-product&catid=1:latest-news&Itemid=57 (accessed on 9 January 2013).

¹⁴² See allAfrica ‘Tanzania: Higher Taxes Cannot Be Imposed on Cement’ available at <http://allafrica.com/stories/201212110156.html> (accessed on 9 January 2013).

the EAC was asking the East Africa Member states to reinstate the 35 per cent common external tariff or add a further charge which is higher than 35% to save the industry from imminent collapse because of escalating imports of subsidised and dumped cement from Asia and the Far East.¹⁴³ However, after such plea ‘Tanzania scrapped the duty entirely, plugging its domestic cement industry into an abyss of uncertainties and a shaky future’.¹⁴⁴

In December 2012, the Minister for Trade and Industry, Dr Abdallah Kigoda, said in Dar-es-Salaam that the government is not planning to remove the suspended duties on imported cement, but would instead put in place conditions simulate smooth operation.¹⁴⁵ It is submitted that the government should also think of using other option such as applying an administrative proceeding such as countervailing duty, so as to offset the effect brought by subsidized cement in the country.

With regards to agriculture, the share of traditional agricultural exports from Tanzania in global markets has been shrinking, mainly due to increasing competition from other suppliers and subsidized exports.¹⁴⁶ Walking around supermarkets in Dar-es-Salaam which is the commercial city of Tanzania, it is easier to find boxes of orange juice from Dubai, tins of canned beef from the UK and butter and cheese from as far away as New Zealand, than it is to find local produce.¹⁴⁷

¹⁴³ See LAFARGE ‘Local cement manufacturers seek protection from subsidised imports’ available at http://www.lafarge.co.ug/wps/portal/ug/7_2Latest_news_Press_releases/Detail?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/lib_ug/Site_ug/AllPR/PressRelease_1308560998898/PR_Header (accessed on 9 January 2013)

¹⁴⁴ ¹⁴⁴ See Business Times Economic and financial weekly ‘Cement wars: Imports vs. Domestic product’ available at http://www.businesstimes.co.tz/index.php?option=com_content&view=article&id=116:cement-wars-imports-vs-domestic-product&catid=1:latest-news&Itemid=57 (accessed on 9 January 2013).

¹⁴⁵ See Kenya Daily Eyes ‘Tanzania: Request to protect cement firms’ rejected available at <http://kenyadailyeye.jibostudios.com/2012/12/tanzania-request-to-protect-cement-firms-rejected/> (accessed on 9 January 2013)

¹⁴⁶ Ministry of Industry, Trade and Marketing of Tanzania Agriculture *Marketing Policy* (2008) 2.

¹⁴⁷ See SARPAN ‘Tanzania: Focus on impact of agricultural subsidies’ available at http://www.sarpan.org/documents/d0000026/Tanzania_agricultural_subsidies.pdf (accessed on 28 February 2013)

Expressively, Shoprite or Uchumi supermarkets will find it easier to import something than to buy it locally. This is so because Tanzanian farmers find it very difficult to compete with western farmers due to the fact that their production costs are much lower. These facts were given by Professor Pius Mbawala, Tanzania's Deputy Minister for Agriculture and Food Security.¹⁴⁸

According to UN figures, approximately 5 million people are involved in cotton production in Tanzania, but for the last few years, the industry has remained idle. In practical terms Tanzanian cotton farmer can never equally compete with United States cotton farmer due to the fact that there are larger cotton subsidies in the United States, as well as greater productivity and lower production costs. It is not just cotton. In Tanzania, one sees the effects of subsidies in traditional industries, such as beef, wheat and dairy products, but also in non-traditional markets, like spices.¹⁴⁹

3.4 The Tanzanian approach to subsidized imports

In order to implement the WTO SCM Agreement, in 2004 the United Republic of Tanzania enacted the Anti-dumping and Countervailing Measures Act. This Act applied only to the Tanzanian mainland.¹⁵⁰ The Tanzanian Act against dumping and subsidies provides the main legal framework governing countervailing measures in Tanzania. As article 24 of SCM Agreement provide for institutional requirements, section 4 of Act¹⁵¹ establishes the advisory committee on subsidies and dumping. Such committee is vested with several responsibilities, such as, to advise the Ministry of Industry and Trade of urgent measures necessary for the protection of domestic industries from injury or threat caused by subsidy. The committee also Advices the Minister on policy issues related to subsidies and countervailing measures and recommends to the Minister the imposition of countervailing measures or any other convenient action to offset the effect of subsidies.¹⁵²

¹⁴⁸See SARPN 'Tanzania: Focus on impact of agricultural subsidies' available at http://www.sarpn.org/documents/d0000026/Tanzania_agricultural_subsidies.pdf (accessed on 28 February 2013)

¹⁴⁹See SARPN 'Tanzania: Focus on impact of agricultural subsidies' available at http://www.sarpn.org/documents/d0000026/Tanzania_agricultural_subsidies.pdf (accessed on 28 February 2013)

¹⁵⁰ Section 2 of the Tanzanian Anti-dumping and Countervailing Measures of 2004.

¹⁵¹ Tanzanian Anti-dumping and Countervailing Measures of 2004.

¹⁵² Section 6(1) of the Tanzanian Anti-dumping and Countervailing Measures of 2004.

In Tanzania investigation proceedings can be initiated by an application in writing to the Minister.¹⁵³ The Act against subsidies also establishes that the proceedings can be initiated by a domestic industry or any person on behalf of the domestic industry or by a member of the Committee.¹⁵⁴ The allegations will only succeed if there is sufficient evidence that the alleged products benefited from a subsidy (in such a case the alleged subsidy was specific). In addition, due to the presence of subsidisation the local industries are likely to face a threat of, or material, injury.¹⁵⁵

The proceedings may be suspended or terminated without imposing provisional measures or any countervailing duty. Specifically, when there is a voluntary undertaking by the exporter to take reasonable measures to offset the effect of subsidies and only if the committee is satisfied that the danger or effect of subsidy has been eliminated.¹⁵⁶ The terms of the imposition of countervailing duties on products in Tanzania is made by the Minister after receiving advice from the committee.¹⁵⁷

3.5 Challenges and constraints facing Tanzania on implementing countervailing measures

Despite having national legislation to address the issue of subsidies, Tanzania has never been able to use such piece of legislation to protect her local industries against threat of, or material injury caused by subsidies. The following are the key factors which act as challenges and constraints on implementation of countervailing measures in Tanzania.

3.5.1 Absence of comprehensive national legislation and institutional framework

National legal and institutional frameworks are the basic requirements for a Member country to be competent enough for trade remedy action(s). The rationale behind this is that when the domestic producers want to file for protection there must be national regulations which prescribes the conditions and proper process to follow, as well as a competent authority that can handle the case.¹⁵⁸

¹⁵³ Section 27(1) of the Tanzanian Anti-dumping and Countervailing Measures of 2004.

¹⁵⁴ Section 27(2) of the Tanzanian Anti-dumping and Countervailing Measures of 2004.

¹⁵⁵ Section 22 of the Tanzanian Anti-dumping and Countervailing Measures of 2004.

¹⁵⁶ Section 41(1) of the Tanzanian Anti-dumping and Countervailing Measures of 2004.

¹⁵⁷ Section 55(1) of the Tanzanian Anti-dumping and Countervailing Measures of 2004.

¹⁵⁸ Illy O (2012) 20 and; also see Hartzernberg T 'et al' (2011).

The situation in Tanzania is very promising since it has a legal basis on countervailing measures after having enacted special legislation charged with administering and regulating anti-dumping and countervailing measures.¹⁵⁹ But it has never applied them due to complexity of the rules, lack of financial capacity, and insufficient experts on such matters. However, legislation alone is not sufficient; for a Member to be compatible with WTO trade remedies rules and procedure, Tanzania is also required to have comprehensive national legislation, including the principal Act and supportive regulations. So far the country only has the one principal Act which deals with two trade remedies countervailing measures being one of them.

As regards an, institutional framework, Tanzania still is facing obstacles since there is not any competent authority to deal with countervailing measures, apart from the committee established under section 4 of the principal Act¹⁶⁰ which created the Anti-dumping and Countervailing Measures Advisory Committee. This means there must be reasonable steps towards creating a competent authority or ad hoc body in charge with investigating and monitoring, and providing technical support for countervailing measures to be implemented.

3.5.2 Financial instability

Setting in place national trade remedy legal frameworks and institutions can prove very costly to a developing nation like Tanzania as well as time consuming. For instance, according to *Illy Oussenit*¹⁶¹ it has taken six years and more than USD 10 million for Egypt to build up its trade remedy framework. Mauritius has taken more than ten years to have in place its regulatory framework for anti-dumping and countervailing measures, and technical assistance was sought from the WTO. Thereafter, since the setting up of a fully fledged permanent investigating authority was prohibitively expensive in Mauritius, the government decided to simply establish an ad hoc team of investigators only called in whenever a case is filed.¹⁶² Trade remedy proceedings involve hearings, field investigation and sometimes sending a team abroad, which can prove very expensive and require sacrifice since sufficient funds, is required.¹⁶³ Therefore

¹⁵⁹ Tanzanian Ant-dumping and Countervailing Measures Act of 2004.

¹⁶⁰ Tanzanian Ant-dumping and Countervailing Measures Act of 2004.

¹⁶¹ Illy O (2012) 21.

¹⁶² Illy O (2012) 21 and Hartzernberg T 'et al' (2011) 115.

¹⁶³ Agro export project 'Solutions for dealing with import surges and dumping (2008)'8 hereafter Agro export project (2008).

having in place a competent investigation authority and running the whole procedural and technical issues regarding subsidies is reasonable costly for Tanzania.

3.5.3 Lack of experts

Determinations of subsidised import(s) investigations require more a high level of expertise and a good team of well trained specialised lawyers, custom officers and economists, among others. Putting this team in place is fundamental once the regulatory framework is actively running. However, training these experts may gain prove very expensive and keeping them is another challenge, particularly in the context of the low salaries Tanzania government can afford. Indeed ,and this has already been experienced with training programs, such as, the WTO technical assistance for developing countries, many of the government officials who receive the training leave soon after they return home, either to join the private sector or an international institution.¹⁶⁴ Therefore, due to a lack of human resources Tanzania has not been able to utilise the available countervailing measures effectively.

3.5.4 Local producer competence

The local producer have hardly any knowledge even of the possibility of filing a countervailing measure case, despite the fact that Tanzania enacted the Anti-dumping and Countervailing Measures Act in 2004. The private sector, which is essentially made up of individual and small companies, is overwhelmed by many technical and organizational constraints, which prevent it in particular from taking full advantage of international trade agreements signed by the government. Therefore in the end Tanzania will hardly derive any benefit from the multilateral trading system.¹⁶⁵

In Tanzania, research shows that there is no one strong association which can stand as a shield of protection for local producers against unfair trade practices such as subsidised imports. But there are of different associations for groups of producers with the aim of protecting only the interests of each group separately.¹⁶⁶ For example, Tanzania Coffee Association established in 1997 as the successor to the Tanzania Coffee Traders Association is entitled to assist and advice statutory

¹⁶⁴ Illy O (2012) 21 and Hartzernberg T 'et al' (2011) 115.

¹⁶⁵ Illy O (2012) 22.

¹⁶⁶ Uliwa P & Fischer D 'Assessment of Tanzania's Producer Organisations Experience and environment' (2004) USAID Tanzania Economic Growth Office.

bodies in Tanzania on all matters affecting the coffee industry,¹⁶⁷ the Tanzania Pharmaceutical Manufacturers Association, and the Tanzania Exporter Association to mention but in a few. The fact that these associations exist apart and that there is no unification of the associations to create one voice has proved to be a challenge, and local producer's interests at a time of unfair trade practices are rarely well represented and protected.

3.5.5 National economic interest

Like other developing nations the United Republic of Tanzania is also facing the pressure of its national economic interest, especially when dealing with subsidised import(s) that come from powerful economy countries¹⁶⁸. In practice economists generally find that an import restriction will reduce the national economic interest of the country that imposes it. The protected domestic interest will be better off, but the costs to the other domestic interests will be larger. The reason for this is that certain interests have more influence politically than they have value in economically; the domestic political process will sometimes choose import protection even when it does not serve the national economic interest.¹⁶⁹

On several occasions developing nations have not been able to take steps to fight fairly against unfair trade practices.¹⁷⁰ In their defence it can be said that it is hard to take measures against developed countries of the international relations they have with them or because of the fear that their actions will have a negative effect on their exports. As in one of the press release reported:

” It should be noted that any decision to impose more duties on imported subsidized cement in the free market will have long term negative effects on the struggling economy. This is because countries which will be affected by the tax increase will also impose high duties on imports from Tanzania.”¹⁷¹

¹⁶⁷ See Tanzania Coffee Association ‘Profile of the Tanzania Coffee Association (TCA)’ available at www.tca.or.tz/aboutus.htm (accessed on 7 February 2013)

¹⁶⁸ Finger MJ & Zlate A ‘WTO Rules that allow New Trade Restrictions: The public Interest is a bastard child (2003)2 UN Millennium Project Force on Trade.

¹⁶⁹ Finger MJ & Zlate A (2003).

¹⁷⁰ Finger MJ & Zlate A (2003).

¹⁷¹ See allAfrica ‘Tanzania: Higher Taxes Cannot Be Imposed on Cement’ available at <http://allafrica.com/stories/201212110156.html> (accessed on 9 January 2013).

3.5.6 Technical nature and complexity of the WTO rules on countervailing measures

The WTO rules on countervailing measures are too complex and involve a lot of technical aspects for Member to understand them so as to be able to use the SCM Agreement provisions to their advantage. In addition, that the legal language used is also very complex for it to be interpreted by a person with no trade law background.¹⁷² For example, when presenting an African Caribbean, and Pacific (ACP) Group proposal, Ghana trade officials said that the present WTO Agreements on Anti-dumping and Subsidies have become too complex for many developing countries, especially LDCs and small and vulnerable economies (SVEs), to implement. Ghana added that, in developing countries without any effective institutional framework, local industries are wiped out by unfair competition from abroad.¹⁷³

It has been shown that, a countervailing duty investigation is more complicated than an anti-dumping investigation, because calculation and estimation are involved in linking a subsidy received by an enterprise to a particular unit of the exported good in question.¹⁷⁴ Furthermore, much information has to be obtained from the government of the exporting country, which may choose not to co-operate fulfilling the investigation requirement and which might be a challenge.

3.6 A comparative assessment of European Union and Brazil countervailing measures law and practice

In the WTO, the EU and Brazil, among others, have been recognised as active users of the trade remedies instruments including countervailing measures. Different practices and specific rules have enabled them to be successful in using such tool despite the fact that most developing countries, like Tanzania, have failed to use such measures.

¹⁷² See Third World Network 'Highlights of the LDC Conference Programme of Action Published in SUNS# 7150 dated 16 May 2011' available at <http://www.twinside.org.sg/title2/wto.info/2011/twininfo110315.htm> (accessed 06 February 2013).

¹⁷³ See Third World Network 'Highlights of the LDC Conference Programme of Action Published in SUNS# 7150 dated 16 May 2011' available at <http://www.twinside.org.sg/title2/wto.info/2011/twininfo110315.htm> (accessed 06 February 2013)

¹⁷⁴ WTO E-learning (2012)177.

3.6.1 The EU and the WTO

The EU has been a WTO member officially since 1995. The EU presently consists of 27 member States which also are WTO members in their own right. Specifically, the EU is a single customs union with a single trade policy and tariff. The European Commission, as the EU's executive arm, speaks for all EU member States at almost all WTO meetings.¹⁷⁵

The EU's share of the world's total exports is 14.86%, that is, agricultural products being 7.4%, fuels and mining products 9.4%, and manufactures 80.0%. The EU exports' main destinations are the United States, China, Switzerland, the Russian Federation and Turkey. Its share of the world's total imports is 16.17%, mainly from China, the Russian Federation, the United States, Norway and Switzerland.¹⁷⁶

The EU has been recognised as an active user of WTO instruments, especially the Dispute Body where as the records show the EU has participated as a third party in 130 cases, as respondent in 73 cases, and in 87 cases as the complainant.¹⁷⁷

3.6.1.1 The EU approach to subsidised imports

In order to implement the WTO SCM Agreement, the EU Council adopted Regulation 2026/97 on subsidies, which has most recently been replaced by Regulation 597/2009.¹⁷⁸ The EU Regulation on protection against subsidised imports, as amended, provides the main legal framework governing the EU's countervailing measures. 'Apart from provisions on the definitions and calculation of subsidies, this Regulation is similar to that on anti-dumping, particularly with regard to the determination of injury, the definition of an EU industry, initiation procedures, and imposition of provisional and definitive measures, as well as, termination of proceedings'.¹⁷⁹

¹⁷⁵See World Trade Organization 'The European Union and the WTO' available at http://www.wto.org/english/thewto_e/european_communities_e.htm (accessed on 21 February 2013).

¹⁷⁶See World Trade Organization 'European Union' available at <http://www.stat.wto.org/Countryprofile/WSDBCountryPFView.aspx?language=E27> (accessed on 21 February 2013).

¹⁷⁷See World Trade Organization 'The European Union and the WTO' available at http://www.wto.org/english/thewto_e/european_communities_e.htm (accessed on 21 February 2013).

¹⁷⁸Hatcher L 'et al' *EU State Aids* (2012)229.

¹⁷⁹See HKTDTC 'Guide to Doing Business with EU-Germany, UK, France & Italy' available at <http://info.hktdc.com/euguide/2-10.htm> (accessed on 12 February 2013).

The Regulation provides for the imposition of countervailing duties for the purpose of offsetting any subsidy granted, directly or indirectly, for the manufacture, production, export or transport of any product originating in a non-EU country whose release for free circulation in the EU causes injury.¹⁸⁰

When an EU industry considers that imports of a product from a non –EU country are subsidised and injuring the EU industry producing the same product, it can lodge a complaint with the EU Commission.¹⁸¹ The proceedings are initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry.¹⁸² Where, in the absence of any complaint, an EU country is in possession of sufficient evidence of subsidisation and of resultant injury to the EU industry, it shall immediately communicate such evidence to the Commission. The complaint must include evidence of the existence of countervailable subsidies (including, if possible, of their amount), injury and a causal link between these two elements.¹⁸³ In addition such evidence must also be well supported with information from government/public sources, and publications in the international press supporting the allegation the firm makes.¹⁸⁴

The complaint is considered to have been made by or on behalf of the Community industry if it is supported by those EU producers whose collective output constitutes more than 50 % of the total EU production of the like product produced by that portion of the EU industry expressing either support for or opposition to the complaint. However no investigation is initiated where the portion of the EU industry supporting the complaint account for less than 25 % of total production.¹⁸⁵

¹⁸⁰ Article 1(1) of the European Union Council regulation no 597/2009; also see Europa ‘Anti-subsidy measures’ available at http://europa.eu/legislation_summaries/external_trade/r11006_en.htm (accessed on 12 February 2012).

¹⁸¹ See European Commission ‘The EU’s anti-subsidy policy’ available at <http://ec.europa.eu/trade/taking-unfair-trade-defence/anti-subsidy/complaints/> (accessed on 07 February 2013).

¹⁸² Article 10(1) of the European Union Council regulation no 597/2009.

¹⁸³ See Europa ‘Anti-subsidy measures’ available at http://europa.eu/legislation_summaries/external_trade/r11006_en.htm (accessed on 12 February 2012); also Article 10(1),(2) of the European Union Council regulation no 597/2009.

¹⁸⁴ See European Commission ‘Trade defence’ available at <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy> (accessed on 7 February 2013).

¹⁸⁵ See Europa ‘Anti-subsidy measures’ available at http://europa.eu/legislation_summaries/external_trade/r11006_en.htm (accessed on 12 February 2012); also the same have been provided in the European Union Council regulation no 597/2009.

Further, any product can be the subject of a complaint, but the anti-subsidy rules do not apply to services.¹⁸⁶

As regards an institutional framework, the EU Commission is in control. For instance, if the complaint contains prima facie evidence of subsidy and injury, the EU Commission will open an anti-subsidy investigation. When such investigation shows that; the imports benefit from a countervailable subsidy, there is injury suffered by the EU industry, there is a casual link between the injury suffered by the EU local industry and the subsidised imports, as well as that the imposition of countervailing measures is not against the community interest, the EU Commission may impose provisional countervailing measures. Such measures include a temporary security or bond on the imports in question, provided it acts within nine months of launching the investigation. If the definitive measures are warranted, they must be imposed by the Council of the EU within 13 months.¹⁸⁷

According to EU practice, definitive measures are normally applicable for five years. Measures are usually imposed for 5 years.¹⁸⁸ However, during that time, EU countries may request an interim review if they have prima facie evidence that measures are no longer needed.¹⁸⁹ In terms of monitoring measures in force, countervailing duties are collected by Customs authorities of EU countries. It does so close in cooperation with different bodies namely the Tax Commission and customs departments and the European Fraud Prevention Agency (OLAF)¹⁹⁰

¹⁸⁶ See European Commission 'Trade defence' available at <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy> (accessed on 7 February 2013).

¹⁸⁷ See European Commission 'Trade defence' available at <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy> (accessed on 7 February 2013).

¹⁸⁸ Article 18(1) of the European Union Council regulation no 597/2009

¹⁸⁹ See European Commission 'Trade defence' available at <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy> (accessed on 7 February 2013).

¹⁹⁰ See European Commission 'Monitoring' available at <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy/Monitoring> (accessed on 7 February 2013).

3.6.1.2 Conditions for imposition of countervailing measures

Before any measures can be adopted to counteract a subsidy in the EU, the following condition must be met:

1) Specificity

The EU law requires that in order for any claim on subsidised import to succeed in EU countervailing measures to take place, there must be specific in terms of the WTO jurisprudence on subsidy. The EU Regulation incorporates the same WTO jurisprudential ideas on the term “specificity” as it has been stipulated under Article 3¹⁹¹ which provides that only subsidies which are specific can be subjected to countervailing measures.

2) Injury

There must be material injury to the Community industry producing the like product. The determination of injury requires an examination of the volume and prices of subsidised imports and their consequent impact on the Community industry. In this regard the EU Commission verifies whether there has been a significant increase in subsidised imports, either in absolute quantities or in terms of market share.¹⁹²

In determining the effect on price, an important consideration is the extent to which the import price undercuts the Community producer’s price. On the other hand, determining the impact on the Community producers requires analysis of various typical economic factors, such as, market share, output, profits, productivity, return

¹⁹¹ Of the European Union Council regulation no 597/2009 and article 3 of the SCM Agreement.

¹⁹² See European Commission ‘Conditions’ available at <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy/conditions> (accessed on 7 February 2013) and Article 8(3) of the Of the European Union Council regulation no 597/2009.

on investment, ability to raise capital growth, and the size of countervailable subsidies, among others.¹⁹³

3) Casual link

The alleged injury to the Community industry must be caused by the subsidised import. Although the EU regulation does not clearly indicate this requirement, causality is of among key element for countervailing measures to be imposed.¹⁹⁴

4) Community interest

Countervailing measures must not be against the community interest. Although this is not required by WTO rules, it ensures that account is taken of the overall economic interests in the EU, including the domestic industry producing like product concerned, importers, community industries that use the imported product and will ultimately pay a higher price, and, where relevant, the end consumer of the product.¹⁹⁵ Specifically, the Regulation provides that the community interest including the interest of the domestic industry and users and consumers.¹⁹⁶

Furthermore, measures, as determined on the basis of subsidization and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.¹⁹⁷

¹⁹³ See European Commission 'Conditions' available at <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy/conditions> (accessed on 7 February 2013) and Article 8(5) of the Of the European Union Council regulation no 597/2009.

¹⁹⁴ See European Commission 'Conditions' available at <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy/conditions> (accessed on 7 February 2013).

¹⁹⁵ See European Commission 'Conditions' available at <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy/conditions> (accessed on 7 February 2013).

¹⁹⁶ Article 31 of the European Union Council Regulation no 597/2009.

¹⁹⁷ Article 31(1) of the European Union Council Regulation no 597/2009.

3.6.2 Brazil and the WTO

Brazil acceded to the WTO on 1 January 1995,¹⁹⁸ which is the same year as Tanzania's accession thereto. As a WTO member Brazil has actively and positively participated in the Organisation. For instance, despite being grouped as a developing country, Brazil has participated actively as a member of the Cairns Group which is a coalition of developed and developing countries exporting agricultural products, both during and after the Uruguay Round. As the launching of a new multilateral round of trade negotiations was being discussed, Brazil pushed for including in the agenda ambitious goals related to market access and the reduction or elimination of export and domestic support schemes,¹⁹⁹ which subsidies fall under the so called “domestic support schemes”.

Brazil has been a vocal leader of the G-20 that represents developing countries, interests in the WTO. Even prior to forming the G-20 group Brazil stood up for including matters critical to the developing countries at the WTO, including the most pressing issue of barriers to trade, as well as the treatment of rules covering trade remedies.²⁰⁰ Regarding the use of the WTO dispute mechanism Brazil also has a very promising record: it has appeared as a third party in 74 cases, as a respondent in 14 cases and as a complainant in 26 cases.²⁰¹

According to WTO statistics, Brazil's share of the world's total export is 1.40%, of which agricultural products constitute 33.8%, fuels and mining products 30.4%, and manufactures 32.8%, mainly to the European Union, China, the United States, Argentina and Japan. On another hand, Brazil's share of world's total imports is 1.28%, mainly from the European Union, United States, China, Argentina and the Republic of Korea.²⁰²

¹⁹⁸See World Trade Organization 'Brazil' available at <http://www.wto.org/CountryProfile/WSDBCPFVView.aspx?Language=E&Country=BR> (accessed on 21 February 2013).

¹⁹⁹ See World Trade Organization 'Brazil and the G-20 Group of Developing Countries' available at http://www.wto.org/english/res_e/bookp_e/casestudies_e/case_e.htm (accessed on 21 February 2013).

²⁰⁰ Hornbeck JF 'Brazil Trade Policy and the United States' (2006) 17-18 CRC Report for Congress

²⁰¹ See World Trade Organization 'Brazil and the WTO' available at http://www.wto.org/english/thewto_e/countries_e/brazil_e.htm (accessed on 21/02/2013).

²⁰² See World Trade Organization 'Brazil' available at <http://www.wto.org/CountryProfile/WSDBCPFVView.aspx?Language=E&Country=BR> (accessed on 21 February 2013).

3.6.2.1 The Brazil approach to subsidised import(s)

In Brazil the legislation dealing with regulation and administration procedures regarding the imposition of countervailing measures is Decree no 1.751 of 19 December 1995. The decree provides that in Brazil countervailing measures may be applied with the objective of compensation for subsidies that are granted, directly or indirectly, in the exporting country for goods, and which as a consequence cause injury to the domestic industry.²⁰³

The decree further provides that the Minister of State in charge of industry, Trade and Tourism, and the Minister of finance have the competence to apply, through a joint act, provisional countervailing measures or definitive measures and ratify undertakings, based on findings of the Secretariat of External Trade (SECEX) of the Ministry of Industry, Trade and Tourism, which confirm the existence of subsidies and injury arising there from.²⁰⁴ SECEX is the responsible body for conducting the administrative proceedings as per the Decree provisions.²⁰⁵

The Decree provides that a subsidy shall be deemed to exist when a benefit is conferred in terms of two scenarios as follows: if there is in the exporting country any form of income or price support that contributes, directly or indirectly, to the increase or decrease of exports of any product, or if there is a financial contribution by the government or by a public organ within the territory of the exporting country. Brazil incorporated the WTO Agreement on Subsidies and Countervailing Measures in defining what constitutes a financial contribution.²⁰⁶

Furthermore, in Brazil the actionable subsidy which has to be subjected to countervailing measures must be specific²⁰⁷, and there must be a causal link between the import of subsidised products and the injury alleged to domestic industry.²⁰⁸

²⁰³ Article 1 of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²⁰⁴ Article 2 of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²⁰⁵ Article 3 of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²⁰⁶ Article 4 of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²⁰⁷ Article 7 of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²⁰⁸ Article 21(1) and 25(1) of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

The Brazil law on countervailing measures defines the term “injury” to mean material injury or threat of material injury to a domestic industry already established or material retardation of the establishment of such industry.²⁰⁹ Regarding the volume of imports to be subjected to countervailing measures, the Decree stipulates that there must be evidence of a significant increase in subsidised imports, either in absolute terms or relative to the production or consumption in Brazil.²¹⁰

The investigation to determine the existence, the degree and the effect of any alleged subsidy can be requested by the domestic industry or on its behalf. This can be done by means of a petition, in written form and in accordance with the procedures established by SECEX.²¹¹ However in exceptional circumstances, the federal government, *ex officio* may initiate an investigation, as long as there is sufficient evidence of the existence of a subsidy, of injury and of a causal relationship between them.²¹²

Upon filing the petition SECEX will proceed with the examination of the degree of support or opposition to the petition expressed by the other domestic producers of the like product. The rationale behind this being to determine if the petition was presented by or on behalf of the domestic industry.²¹³

A petition will be considered to have been presented by or on behalf of the domestic industry if presented by producers responsible for more than 50% of the domestic production of the like products made by the relevant sector of domestic industry. However, if the domestic producers, who support the petition, account for less than 25% of the total production of the like product produced by domestic industry, SECEX may reject and close the case concerning the subsidy allegation because it is not a watertight case since it fall under insufficient evidence.²¹⁴

²⁰⁹ Article 21 of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²¹⁰ Article 21(2) of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²¹¹ Article 25 of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²¹² Article 33 of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²¹³ Article 28(2) of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²¹⁴ Article 30(1)c of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

One of the unique features which differentiate Brazil's countervailing measures law from the other Members is on the subject of defence. The law establishes that during the investigation, the parties and the interested governments shall have ample opportunity to defend their interests before the measures are adopted.²¹⁵ Further, the law establishes that the proceedings may be suspended without the application of countervailing measures if the government of the exporting country agrees to eliminate or reduce the subsidy or adopt other measures concerning the effects of subsidisation.²¹⁶ This practice encourages the interested parties to the matter in dispute to solve their matter amicably rather than go further and implement the duties. This can be an alternative for most developing nations who fear that implementing the duties directly might destroy international co-operation with the powerful countries.

3.7 Specific rules of the EU and Brazil countervailing measures law which Tanzania may adopt.

3.7.1 Lesser duty rule

A Member should impose duties only to the level necessary to eliminate the injury caused by the effects of the subsidy.²¹⁷ Under the trade remedy agreements, the decision whether the amount of the subsidy duty to be imposed shall be the full margin of the subsidy or less is to be made by the authorities of the importing Member. The lesser duty rule implies that countervailing duties should be less than the subsidy and only high enough to remove injury. The lesser duty concept appears to be a worthwhile change in SCM Agreement rules that will at least alleviate some of the harm caused to consumers by the imposition of the countervailing duties.²¹⁸

The use of the lesser duty rule is not mandatory, and the decision of whether to impose a duty less than the level of subsidisation found is a decision to be made by the importing Member country alone. Nonetheless, the use of the lesser duty is desirable.²¹⁹ In the WTO there are relatively few countries that implement the lesser duty rule. The European Union has the practice

²¹⁵ Article 41 of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²¹⁶ Article 45 of the Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²¹⁷ Macrory FP *et al* *The world Trade Organisation: Legal Economic and Political Analysis* (2005)721

²¹⁸ Centre for Trade and development New Delhi *South Asian Yearbook of trade and Development* (2009)99.

²¹⁹ Macrory FP *et al* (2005)721.

of routinely calculating two separate duties, an injury margin and subsidy margin. The lower of the two then is used as a punitive duty.²²⁰ Presently the lesser duty rule is only applied in the EU, South Asia, Brazil, South Africa and India. Controversially, the United States, Pakistan and Canada do not follow this system.²²¹

3.7.2 Community interest test

The application of the community interest test can be explained as a balancing of competing interests with the interests of the community industry being given special weight. In practical terms, community interests are normally equated with the community industry's interest and so there is a presumption in favour of the introduction of the measures.²²²

The EU has chosen to reinforce the concept of the community interest by introducing explicit rules in Article 31 of Regulation No 2026/97.²²³ The nature of the community interest as an essential requirement is expressly acknowledged in the relevant community regulations, in the sense that any countervailing duties as determined on the basis of subsidy and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the community interest to apply such measures.²²⁴

The community interest test provides that measures can only be taken if they are not contrary to the overall interest of the community, meaning the domestic industry, users, consumers and intermediaries.²²⁵

It has been argued that the relevant provisions of the EU Regulation have to be interpreted in a sense that only if there are convincing arguments not to take any measures, no anti-subsidy relief should be granted.²²⁶

The Commission enjoys the discretion of imposing countervailing duties even in cases where it is concluded that the community interest does not call for such intervention and the application

²²⁰ Debroy B & Charkraborty D *Anti-Dumping: Global Abuse of a Trade Policy Instrument* (2007)76.

²²¹ Debroy B & Charkraborty D (2007)76 and also Centre for Trade and development New Delhi (2009)99.

²²² Stanbrook C & Bentley P *Dumping and Subsidies: Law and Procedures Governing the imposition of Anti-dumping and Countervailing Duties in the European Community* (1996)142.

²²³ Santa Maria A *European Economic Law* (2009) 317.

²²⁴ Santa Maria A (2009) 317.

²²⁵ Hancher L et al *EU State Aids* (2012) 229.

²²⁶ Giannakopoulos KT *Safeguarding Companies Rights in Competition and Anti dumping/Anti subsidies Proceedings* (2004) 435.

of any measures. Such discretion is vested to the Commission. Moreover, it must be understood that most of the signatories of the GATT adhere to the position that, once subsidisation and consequent injury are proved, corrective measures shall be imposed without the potentially mitigating factor of a public interest clause.²²⁷

3.7.3 Best information available rule

The EU Regulation also establishes the existence of the best information available rule which allows the Commission to make its findings regarding subsidisation, injury and causal link on the basis of the information available. This opportunity can be used without having to request information or to embark on an investigation in order to collect or verify information, in cases where the undertakings accused of subsidized export in the community are not willing to cooperate.²²⁸

This practice also provides a platform where the EU Commission does not have to spend time and human resources in order to collect information and documents or to verify the accuracy of those provided by the parties, as is the case in the antitrust field. Recourse to the community interest permits the concentration of the Commission on the most serious infringements.²²⁹

3.8 Summary

This chapter has shown that subsidies on imports distort trade and accelerate the threat of material injury to local industries in the United Republic of Tanzania. Responding to this challenge Tanzania enacted legislation on countervailing measures so as to offset the effect of subsidisation. Yet till the present subsidised imports still act as a threat to local industries, and nothing has been done so far because implementing the countervailing measures Act is so demanding, in terms of financial and institutional capacity, sufficient and reliable experts, political pressure, technicalities of the WTO rules on countervailing measures, and the competence of local producers.

²²⁷ *Giannakopoulos KT (2004)435.*

²²⁸ *Giannakopoulos KT (2004)435.*

²²⁹ *Giannakopoulos KT (2004)435.*

The chapter has also conducted a comparative assessment of two active users of countervailing measures, namely, the EU and Brazil .It also indicated the specific features which enable these two to excel in the implementation of countervailing measures in dealing with subsidisation.

After exploring the available challenges and constraints on the implementation of countervailing measures in Tanzania and the results of the comparative assessment, the next chapter will deal with a way forward for Tanzania to excel in using trade remedy tools to its advantage especially when dealing with the issue of subsidised imports.



CHAPTER FOUR

A WAY FORWARD FOR THE IMPLEMENTATION OF COUNTERVAILING MEASURES IN TANZANIA

4.1 Introduction

The study has presented several challenges and constraints which made Tanzania unable to utilise effectively of countervailing measures when dealing with subsidization. It has also looked at the EU and Brazil, which according to WTO records have been among the active users of countervailing measures. The present chapter examines some specific concerns about Tanzania's countervailing measures law and practice which are impediments. Specifically, the chapter makes a compares the countervailing measures law and practice of the EU, Brazil and Tanzania. Further, the chapter provides available options which may act as be used by the United Republic of Tanzania in order to implement and use countervailing measures against unlawful subsidies.

4.2 Some specific concerns about the implementation of countervailing measures in Tanzania

4.2.1 Legal framework

In Tanzania the Agreement on the Implementation of Article IV of the GATT and the SCM Agreement have been made part of the municipal law through the enactment of the Anti - dumping and Countervailing Measures Act of 2004. It is crucial to understand that the existing legal regime in Tanzania deals with two trade remedies at once, namely, anti-dumping and countervailing measures. Apart from the principal Act, presently there are no regulations to deal with either anti-dumping or countervailing measures.

Looking at the national legislation available for countervailing measures in the EU and Brazil, it is evident that both have enacted specific legislation dealing with subsidies and countervailing measures. Whereas the EU Regulation on countervailing measures²³⁰ has 35 Articles and VI Annexure dealing with the regulation and administration of countervailing measures, The Brazil decree²³¹ has 88 Articles and VI Annexure dealing with subsidies and application of countervailing measures.

Nevertheless, Brazil has several pieces of legislation dealing with trade remedies. For example, when it comes to subsidisation imports the country has a special Decree dealing with the regulation of and administrative responsibility to deal with, subsidies and countervailing measures.²³² Examples of relevant measures include: Circular 20/96 for April 1996 which establishes the requirements of the complaint regarding the initiation of countervailing measures; Resolution 9 which establishes the technical Group on Commercial Defence; and Law 9019/95 which provides for the imposition of anti-dumping duties and countervailing measures.²³³ Having in place several pieces of legislations dealing with the same issue, is desirable because it adds some clarity and detailed information. On the other hand, it might create conflicts of interest and in terms of enacting other legislation might cause additional financial costs and be time consuming.

In addition, having focused legislation can be traced even under the multilateral system. Whereas in the WTO the SCM Agreement deal only with subsidies and countervailing measures, and anti-dumping is implemented by the Agreement on implementation of Article VI of the GATT 1994. The experience in Tanzania is different: there is a single piece legislation dealing with two trade remedies at once. That means that Tanzania lacks comprehensive legislation on countervailing measures.

A great deal has been done in catapulting market forces to drive economic activities. Indeed, Tanzania's success stories in economic reform have centred largely in this area. In the past few years, serious efforts have been directed to stabilising the macro-economic fundamentals,

²³⁰ The European Union Council Regulation no 597/2009.

²³¹ The Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²³² The Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No 1.751 of 1995.

²³³ International Trade Centre (2008)28.

including fiscal and legal stabilise. The Legal Sector Reform Programme has seen that major trade related laws are reviewed and new ones are put in place.²³⁴ To date, however, there is only a single law on countervailing measures that was enacted on 2004, a move that is not commendable.

Therefore, since Tanzania already has existing principal legislation on countervailing measures, it is a high time for the country to enact specific regulations to guide the principal Act, which would be referred to as Regulations on Countervailing Measures. This might be the better solution and a step forward to the effective implementation of countervailing measures. The same can be seen in the EU's countervailing measures laws which are focused and comprehensive piece of legislation. This is better than having a single legislation which deals with both anti-dumping and countervailing measures.

4.2.2 Institutional framework

The SCM Agreement calls for the establishment of a Committee on Subsidies and Countervailing Measures and a Permanent Group of Experts. The permanent group of Experts is an institution that reviews the nature of subsidies in line with the discipline of the SCM Agreement. It may also issue advisory opinions on the existence and nature of a subsidy if requested by a panel or by any member.²³⁵

Looking at the EU countervailing measures institutional framework, it operates in a unitary fashion, whereby all substantive elements of countervailing proceedings, such as, subsidy, injury, causation and public interest, are considered by the same institution. In the EU this function is entrusted to the Commission.²³⁶ It is occasionally discussed whether the competition authorities should be involved in a public interest investigation.

The practice of the EU suggests that the competition authorities do not participate on a permanent basis in anti-dumping or countervailing investigations, but they can contribute, if needs be. For example, in cases where the proposed measures may considerably affect the

²³⁴ A good example of a repealed law is the Regulation of Trade Act that had confined both import and domestic trade to a state owned parastatal, namely, the Board of External Trade.

²³⁵ See METI 'Chapter 6 Subsidies and Countervailing Measures' available at <http://www.meti.go.jp/english/report/downloadfiles/gCT00006e.pdf> (accessed on 16 March 2013) Also see Lal Das B The world Trade Organization :A guide to New Frame works for International Trade(199) 196.

²³⁶ Kotsiubka V *Public Interest Consideration in Domestic and International Anti-dumping Disciplines* (Unpublished LLM thesis, World Trade Institute, 2011)23.

conditions of competition or where an ongoing or completed investigation conducted by the competition authorities has any relevance to the present trade remedy investigation. This approach to the participation of competition authorities in the trade remedy investigation is fair enough.

While an investigation is not complicated by adding the separate considerations of the competition authorities, the latter have a right to inform the trade authorities of their opinion. Such opinion may be of value, especially in terms of the public interest analysis, which often involves certain competition concerns.²³⁷

In Brazil the institutional framework for trade remedies is under the Ministry of Development, Industry and Trade (MDIC) which is the principle institution. However, the Ministry does not operate alone but co-operates with two other bodies. The Minister of MDIC chairs the Chamber of Trade known as *Câmara de Comércio Exterior* (CAMEX) one of the subsidiary institutions, the collegiate body that also has representatives of other Ministries. CAMEX rules on the main aspects of the trade remedies system, such as the imposition of measures. The Secretariat of Foreign Trade (*Secretaria de Comércio Exterior*, SECEX) is the body in charge of carrying out investigations and of submitting reports to CAMEX with decisions and recommendations on dumping and subsidies and safeguards cases. SECEX executes this task through the department of Trade Defence (DECOM), its technical branch. DECOM deals with carrying out trade remedy investigations and supports Brazilian exporters in investigations abroad. Additionally, because of its technical expertise in trade remedies, the third role of DECOM is to follow discussions and participate in negotiations on trade remedies in international forums, supporting Brazilian diplomats who represent Brazil internationally.²³⁸

Brazil also has a special technical unit, known as the Technical Group on Commercial Defence (*Grupo Técnico de Defesa Comercial*, GTDC), in charge of the technical examination of SECEX proposals on: the imposition of anti-dumping duties and countervailing measures, provisional or definitive; the approval of price undertakings in anti-dumping and countervailing investigations;

²³⁷ Kotsiubka V (2011) 24.

²³⁸ International Trade Centre (2008) 32-41.

and the imposition of provisional or definitive safeguard measures. It is up to GTDC to inform CAMEX about the initiation of anti-dumping, countervailing and safeguard investigations.²³⁹

Having both principal institution, which is MDIC as well as subsidiary institutions, CAMEX and SACEX dealing with trade remedies including countervailing measures, has enabled Brazil to excel in the implementation and effective use of trade remedies tools. Tanzania could also adopt some of the effective elements found under Brazil practices on trade remedies and incorporate some of the ideas. Specifically, not to have the Ministry of Industry and Trade deal with everything but creating some subsidiary institutions, such as, a trade unit department which will only focus on trade remedies in Tanzania countervailing measures.

Regarding the institutional capacity of countervailing measures, Tanzania lacks any competent authority. As has been observed in relation to anti-dumping matters²⁴⁰, the country has not been able to establish a competent authority to deal with either anti-dumping or countervailing measures. It must be understood that in order for a country to effectively implement trade remedy tools requires having a competent authority in place. The reason behind this is: such authority will be entitled to conduct an effective investigation in accordance with all procedural requirements of the WTO. As regards institutional capacity in Tanzania, more has to be done so as to enable the country to effectively utilise of countervailing measures and other trade remedy instruments.

4.2.3 Should the public interest play any role in countervailing measures investigations?

In practice, the trade remedy investigation is a quasi-judicial administrative proceeding. Thus, the investigating authorities are expected to follow the rules of natural justice. Specifically, the investigation authority has to comply with the principle of 'due process', which 'generally requires administrative and judicial proceedings to be fair implemented'.²⁴¹ A public interest clause in the national legislation serves as a means of access to social economic justice for the

²³⁹ International Trade Centre (2008) 35.

²⁴⁰ See World Trade Organization 'Committee on Anti-Dumping Practices - Notification under Articles 16.4 and 16.5 of the Agreement – Tanzania' available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=%28%20@Symbol=%20g/adp/n/*%20and%20tza%29&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true# (accessed on 23 January 2013).

²⁴¹ Kotsiubka V (2011).

adversely affected parties.²⁴² It is thought to be a way of balancing producer interests with consumer (consumers of the product) interest. Adding a public interest clause would also impose due restraint in the application of these measures, as well as make the countervailing measures mechanism competition friendly.²⁴³

However, neither the SCM nor the Anti-Dumping Agreement includes industrial users and consumers in an obligatory list of interested parties; this issue is left to the discretion of individual Members. In practice, the domestic laws of WTO Members rarely specify the possibility for industrial users and consumers to become an interested party.²⁴⁴

The EU countervailing legislation's most prominent feature consists in its provision for a so-called community interest or public interest test.²⁴⁵ The analysis under the EU public interest test consists of various factors, inter alia, an evaluation of likely consequences of applying the envisaged measure on the community industry and other interested parties, as well as the weighting and balancing of the different interests at stake.²⁴⁶ In practice the EU Commission normally consider the chain of economic machinist to access the likely effect of taking or not talking measures against those operators. Further, under the purview of EU public interest, the interests of the upstream industry users (downstream industries) and sometimes consumers are taken into account in the Community interest test.²⁴⁷

In practice, the community interest was in several situations either the main reason or one of the reasons for the termination of proceedings without imposition of measures. In other cases, while Community interest was an important issue, the Community institutions finally decided to impose measures. Further, in some situations, measures have not been imposed because of what could be termed Member States' own conception of Community interest or simply because a necessary majority for the Commission's proposals was not obtain.²⁴⁸

The inclusion of a public interest clause in the Tanzania legislation might add to the uncertainty of the proceedings and its administrative complexity. Further, it might also facilitate an increased

²⁴² Debroy B and Chakraborty D (2007) 97.

²⁴³ Centre for Trade and Development New Delhi (2009) 98.

²⁴⁴ Kotsiubska V (2011) 10.

²⁴⁵ Article 31 of the European Union Council Regulation no 597/2009.

²⁴⁶ Luo Y *Antidumping in the World trade Organization, the European Union and China* (2010) 137.

²⁴⁷ Luo Y (2010) 137.

²⁴⁸ Jacob T 'Lesser Duty Rule and Community interest in Anti-dumping Proceedings' *The Community System in Perspective* (2001) 193 *Intereconomics*.

cost of investigation to the parties and the government.²⁴⁹ One of the main arguments of opponents is that a public interest clause would “impinge on Members’ sovereignty” and should remain in “the self-interest of every Member”. They argue that public interest is quite complex to define and this discretion should be left to individual Member states’ discretion.²⁵⁰

4.2.4 Should lesser duty rule play any role in countervailing measures in Tanzania?

The application of the lesser duty rule is not mandatory upon, but rather desirable to, the WTO Members.²⁵¹ The legal basis for this desirable application originated under Article 19(2) of the SCM Agreement. If it is recognised that subsidised imports are causing injury to the domestic industry, then the decision whether the amount of duty should be the margin of dumping or the full amount of the subsidy or less should be made by the relevant governmental authorities and, if a lesser duty is adequate to remove the injury to the domestic industry, the lesser duty should be levied.²⁵²

The WTO Members who apply the lesser duty rule have to calculate injury margins. The SCM Agreement does not give any guidance on such calculation and arguably gives the Members substantial discretion. The lesser duty rule is likely to be ineffective unless there is an unambiguous methodology of calculating the injury elimination level. It is therefore important to develop a sound methodology of calculating injury margins.²⁵³

For example, the EU has the practice of routinely calculating two separate duties namely an injury margin and a countervailing duty.²⁵⁴ The plain meaning of “lesser duty” is that a country may opt to impose only a certain duty adequate to remove injury caused by subsidisation. Such duty however is not the exactly amount of subsidisation margin.²⁵⁵ In practices, some jurisdictions, including Brazil and the EC provide for the application of a “lesser duty” than the

²⁴⁹ Centre for trade and development New Delhi (2009) 98.

²⁵⁰ Kotsiubka V (2011).

²⁵¹ Kotsiubka V (2011).

²⁵² See Jurist ‘Response to unfair trade practices: rules on the use of countervailing and anti-dumping duties’ available at <http://www.jurisint.org/pub/06/en/doc/C11.pdf> (accessed on 16 March 2013)

²⁵³ Centre for trade and development New Delhi (2009) 99.

²⁵⁴ Debroy B & Chakraborty D (2007) 76.

²⁵⁵ Mavroidis CP ‘et al’ The law and Economics Contingent Protection in the WTO (2010)213; also see Ivo Van Bael et al *EU Anti-dumping and other Trade Defence Instruments* (2011) 402.

full countervailing duty calculated if such lesser duty would be sufficient to offset the injury caused to the domestic industry.²⁵⁶

The lesser duty rule implies that a duty will be imposed which sufficiently raises the price to provide the protection the domestic industry needs to stop suffering injury brought about by subsidies, but without providing additional protection.²⁵⁷ The WTO rules and jurisprudences establish that the application of the lesser duty rule is entirely in the discretion of an investigating authority, and the SCM Agreement imposes no obligation on any Member to actually apply such rule. Instead, the obligation is to actively “consider” the possibility of offering a remedy, which can be the application of the lesser duty rule, prior to the imposition of a definitive duty.²⁵⁸

In Tanzania, the anti-dumping and countervailing law recognise the use of lesser duty. It establishes that;

“.....the decision whether the amount of the countervailing duty to be imposed shall be the full margin of subsidisation or less. Further where a decision to impose countervailing duty is made, the duty imposed shall be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.”²⁵⁹

Having the provision dealing with the lesser duty rule can be considered as a platform for the applicability of such duty but since the current legislation does not goes further on how and when should lesser duty rule be applied is still a challenge for its applicability. Also, since there is no regulation which explains its application in detailed, it is high time for the country to enact a regulation that fill’s the gap which the principal Act. It has also been observed that the methodology used by the users of lesser duty, such as the EU is complex and complicated. Therefore Tanzania might opt not to following the footsteps of EU and rather adopt the practice of the United States and Canada of not calculating injury margins. These two countries use only the subsidization margin to determine the countervailing duty.²⁶⁰

²⁵⁶ Brightbill CT et al *Trade Remedies for Global Companies* (2007)130.

²⁵⁷ Mavroidis CP et all (2010)213.

²⁵⁸ Luo Y (2010) 129.

²⁵⁹ Section 55(1)(2) of the Tanzania Anti-dumping and Countervailing Measures of 2004

²⁶⁰ Debroy B & Chakraborty D (2007) 76.

4.3 Available options for Tanzania

It is an undisputable fact that when it comes to the implementation of WTO Agreements, such as, the SCM Agreement, developing countries such Tanzania, faced several challenges and difficulties.²⁶¹ These were foreseen and several efforts have been made under the multilateral system to overcome them. There are various options which Tanzania can use so as to at least become competent in using WTO benefits to its advantage and to protect its local industries against unfair trade practices, such as subsidisation. Such available potential options include;

4.3.1 Creating a regulation on countervailing measures

Having in place specific legislation has proved to be of significance: it would provide detailed procedural and substantive requirements for countervailing measures to operate. The same has been experienced at the WTO level which has a special agreement dealing with subsidies and countervailing measures, adopted by Members including Brazil and the EU. At present there is legislation in Tanzania but it lacks comprehensiveness. Therefore it is high time for the country to enact a regulation dealing with the regulation and administration of countervailing measures. This would also create an opportunity for Tanzania to incorporate some new ideas which are still lacking in the present time in the Act, such as, lesser duty rule and public interest. This will make the regulation more effective and easy to implement and use.

4.3.2 Establishing trade remedy unit under the Ministry of Industry and Trade

It is important to note, however, that having a law in place is one thing, enforcing it is yet another. Indeed, it would appear that a central problem that features prominently in Tanzania is the institutional capacities of regulatory bodies charged with the task of trade remedies.

The present trade remedy institutional framework is vested in the Tanzania Ministry of Industry and Trade and a special Committee on Anti-dumping and Countervailing Measures. The examination of the EU and Brazil laws and practices on countervailing measures has shown that having an independent institution dealing only with trade remedies is of great importance since it provides room for experts to deal with the matter effectively. So in terms of monitoring, supervising and accountability it is more desirable to have an independent institution. In

²⁶¹See World Trade Organization 'Tanzania :March 2000' available at http://www.wto.org/english/tratop_e/tpr_e/tp129_e.htm (accessed on 28/03/2013)

Tanzania the creation of trade remedy unit under the Ministry of Industry and Trade would enable the country to be more accountable, and monitor and utilize effectively the implementation of trade remedies including countervailing measures, for the advantage of the nation.

4.3.3 Participating actively as a third party in the WTO dispute settlement process

The WTO dispute settlement process provides for equal opportunity for Members to participate as third parties to any dispute. The law states: “Any Member having a substantial interest in a matter before a panel and having notified its interest to the Dispute Settlement Body (DSB) shall have an opportunity to be heard by the panel and to make written submissions to the panel.”²⁶² This is not an absolute right; it can be limited where parties to a dispute deny the addition of a third party to the dispute but this is very rare. The WTO law creates room for a Member state to choose whether to include other parties to the dispute or not. Under GATT Article XXII the law makes it clear that party to a dispute can consult with any contracting party or parties in respect to any matter for which it has not been able to find a satisfactory solution.²⁶³ GATT Article XXIII provide that parties to a dispute under the WTO can decide to have their dispute between them solve and to exclude others.²⁶⁴

Rationale behind for the participation as a third party includes: acquiring skills, knowledge and a proper understanding of the Dispute Settlement Understanding procedure. Such skills and knowledge can also be used in the future when the country is ready to file a complaint. Not only that, the DSB provided a platform for clarity of the WTO rules.²⁶⁵ The most active participant as a third party to the DSB such as Brazil who participated in 74 cases²⁶⁶ and the EU in 131 cases²⁶⁷, have become the active users of the WTO trade remedy tools as well as dispute mechanism.

²⁶² Article 10(2) of the WTO Understanding on the rules and procedures governing the settlement of dispute

²⁶³ Article XXII of the GATT 1994, See also Busch M & Reinhardt E with a little help from our friends? Developing Country Complainant and Third Party Participation (2007)1.

²⁶⁴ Article XXIII of the GATT 1994 and Busch M& Reinhardt (2007).

²⁶⁵ Mosoti V Africa in the first decade of WTO dispute settlement (2005) 11 available at <http://www.worldtradelaw.net/articles/mosotiafrica.pdf>.

²⁶⁶ See World Trade Organization ‘Brazil and the WTO’ available at http://www.wto.org/english/thewto_e/countries_e/brazil_e.htm (accessed on 21 March 2013).

²⁶⁷ See World Trade Organization ‘EU and the WTO’ available at http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (accessed on 21 March 2013).

Participating as a third party can be viewed as an unlimited opportunity for Tanzania as a developing country to experience the WTO dispute mechanism since stepping in as a complainant is considered to be difficult due to several reasons. Hence Tanzania has to utilise this opportunity effectively because by participation it has nothing to lose but much to gain.

4.3.4 Building capacity on trade

It is an undisputable fact that in the United States of America and Europe there are over 100 law professors teaching aspects of WTO law to many students of trade law.²⁶⁸ In Tanzania there are not enough private lawyers and trade experts to advise local firms and trade associations or companies on WTO rights, as well as to work with the government to defend those rights in WTO litigation and settlement negotiation.²⁶⁹ Even in the Ministry of Industry and Trade there are not enough experts on trade and related matters to handle trade remedy instruments, such as countervailing measures.

There has been a range of commitments made to developing countries after the (Doha Round dubbed the Doha Development Agenda (DDA)), particularly in terms of improving market access for developing countries' agricultural and non-agricultural products; resolving implementation arrangements for various agreements relating to trade and investments; and providing additional assistance for capacity building to developing countries, to mention in a few.²⁷⁰

For example developing countries have different approaches to running WTO cases since its quite expensive and complex to do so. Some countries, such as Brazil, use a combination of internal resources and international law firms. Brazil has made an internal commitment to building its in-house capacity to run disputes.²⁷¹ Therefore, since Brazil has outstanding strategy in terms of capacity building in relation to trade the country has managed to be an active participant in and user of the WTO process.

²⁶⁸ Illy O (2012).

²⁶⁹ Shaffer G 'How to make WTO dispute settlement to work for the developing Countries'(2003) International Centre for Trade and Sustainable Development.

²⁷⁰ Sako S & Kararach G 'Capacity building for the promotion of Trade and investment in Africa: Challenges and Strategies' (2007)2 The African Capacity Building Foundation.

²⁷¹ Deere C 'International Trade Technical Assistance and Capacity '(2005) Human Development Report Office.

4.3.5 Technical assistance

Assistance to developing countries has always been on the WTO's agenda,²⁷² Technical assistance for trade policy, negotiations and rules implementation of the WTO law and practices usually consists of activities, such as, seminars, workshops, training programs on trade rules and procedures, courses on negotiating skills, legal advice and assistance with preparing draft laws, technical missions, the provision of manuals, guides, and documents, and/or support for research and data collection.²⁷³

Technical assistance involves partnerships among a great number of agencies in both donor and recipient countries, each of which usually has its own distinct priorities, operating arrangements, timeframes and financial resources.

‘Donors include multilateral and bilateral development agencies, NGOs, industry groups, academic centres, think tanks and philanthropic foundations. Key multilateral agencies involved in implementing trade related technical assistance include the International Trade Centre, UNCTAD, UNDP, the World Bank, WTO and AITIC. Also engaged are regional organizations and development banks, such as, UNECLAC and the Inter-American Development Bank as well as UN specialized and voluntary agencies, such as WIPO’.²⁷⁴

Additionally, in recent years, the establishment of several pro-bono services in international law firms for developing countries has provided another option for some countries.²⁷⁵

On the other hand, Tanzania must also be aware that technical assistance comes with its own unexpected challenges as well as problems, such as, inadequate funding, biased content, donor-driven priorities, inadequate assessment and articulation of needs and weak support for local capacity.²⁷⁶ Therefore technical assistance should not make the country rely solely on it, in whole but the country should have other strategies for deal with its trade issues and challenges.

²⁷² See World Trade Organization ‘Building capacity’ available at http://www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm (accessed on 21 March 2013)

²⁷³ Deere C (2005) 3.

²⁷⁴ Deere C (2005)3.

²⁷⁵ Deere C (2005) 20.

²⁷⁶ Deere C (2005).

4.4 Summary

As noted above, the implementation of countervailing measures in Tanzania is possible, since it has taken the step of enacting national legislation which provide for a legal basis of the use for countervailing measures. Yet there are several concerns about the existing countervailing measures regime in the country: the present legal and regulatory framework, the institutional framework, and current practices when compare to the EU and Brazil that are active users of this trade remedy tool. The present chapter has sought to compare the countervailing measures law and practice of Tanzania, the EU and Brazil. It further provide for the available potential adopt which Tanzania might opt in order to make effective use of countervailing measures. The next chapter will provide a conclusion and recommendations.



CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

It is an undisputable fact that subsidise imports and domestic products are not an equal terms especially when such products are from developing countries like Tanzania. Therefore WTO rules on subsidisation provide a shield of protection which developing countries may use when desirable or appropriate against subsidised imports. Yet records show that developing countries like Tanzania have never grabbed such potential opportunity against subsidised imports while their goods and agricultural products are badly affected by such unfair trade practices. The SCM Agreement has substantive and procedural provisions against subsidisation, namely, the national track, where a Member may impose countervailing duties or the lesser duty rule to offset the effect of subsidies, and the multilateral track, where a Member uses the WTO dispute settlement body.

Several reasons have explained the challenges and constraints on the implementation of countervailing measures upon proof that there has been a financial contribution made by a government or any public body or if there is any form of income or price support and a benefit to a local industry in the country where the imports originated. Such reasons include: lack of comprehensive national legislation on countervailing measures, financial instability, lack of institutional capacity, absence of skilled and competent experts on trade, inadequate private sector capacity, complexity of the WTO rules on implementation of countervailing measures and national economic interest, to mention in a few.

Experience shows that some other countries, such as Brazil, which is also grouped as a developing country per WTO standards and the EU have excelled in the use of countervailing measures despite the challenges mentioned above. To explain the success story of the use of such trade remedy tool, this study has shown that the two countries, unlike Tanzania, have their own strategies and practices which empower them to be active users. For instance, they both have

specific legislation dealing only with subsidies and countervailing measures, and Brazil and the EU have competent authorities which deal with monitoring and administering countervailing measures, both have been using the lesser duty rule in their legislation to counteract subsidisation. Also the EU law on countervailing measures contained a public interest clause which plays a great role in securing the interests of the EU community and industries before the implementation of countervailing measures. Last but not least both Brazil and the EU have been active users of the WTO dispute body as third parties, which have also contributed to their success in utilising countervailing measures and other trade remedies to their benefit.

Looking at the current situation as regards subsidised imports in Tanzania, this study has shown that subsidised imports threaten and cause material injury to domestic industries. Therefore there is a need for a country to think about how to effectively protect its local industries either in a unilateral way, by the imposition of countervailing duties, or by choosing the multilateral track, to use the WTO dispute body not necessarily as a complainant but as a third party, so as to become familiar with the WTO dispute settlement mechanism and practices as well as to build confidence in the use of such trade policy tool. In terms of a legal regime, the Tanzania government must also be aware that having legislation alone is not enough. There must be further efforts to make such legislation work for the better. In order to back up the existing legislation on the implementation of countervailing measures, the country needs to have comprehensive regulatory and competent institutional frameworks so as to be able to utilise the WTO trade remedies such as countervailing measures.

Further, the Tanzania government must also be aware that in order to implement countervailing measures especially on the unilateral track is very demanding and costly. Furthermore, to participate as a third party to WTO disputes in which Tanzania has an economic interest is optional, but might create a platform for it to acquire skills and experience to handle cases and to be more familiar with the WTO jurisprudence. Nevertheless both ways, namely, the unilateral track and the multilateral track, are desirable and the country can utilise them. It was possible for Brazil which is also grouped as developing country like Tanzania, so even Tanzania can do it if there are more efforts and strategies, some of which the present study has attempted to explicate.

This study supports that further research be carried out on other trade remedies namely anti-dumping and safeguard measures. Thus, if Tanzania fails to utilise countervailing measures, it should explore the possibilities of using anti-dumping measures whereby dumping products exists or use safeguard measures where appropriate.

5.2 Recommendations

In the light of the preceding study on the challenges and constraints facing the implementation of countervailing measures in Tanzania the following recommendations are made.

5.2.1 General recommendation

The current legal and regulatory framework on the implementation of countervailing measures has to be reworked: either through some amendment thereof or by the enactment of a specific regulation for countervailing measures. Further, the inclusion of the public interest concept in the legislation is also recommended; the previous chapter has shown that the public interest test has played a great role in the effective use of countervailing measures. The current legislation also includes the use of the lesser duty rule, but little has been provided for it, by the present legislation; therefore the new regime on countervailing measures should indicate the applicability of the lesser duty rule more clearly. It is submitted that, if Tanzania manages to have comprehensive national legislation on countervailing measures it will be of great assistance and enable the country to utilise such trade policy tool effectively, since any act against unfair trade practices, such as, subsidies, will be supported by a strong legal basis and justification.

5.2.2 Specific recommendations

Apart from the general recommendation, there are specific recommendations which work hand in hand with the general recommendation.

5.2.2.1 Tanzania government

The government of Tanzania is the key institution when dealing with international economic relations and related matter. Therefore this study recommend the following for the government so as to facilitate the implementation of countervailing measures against unfair trade practices or when it has to deal with the use of trade remedies ,such as dumping;

i) Third party participation in the WTO disputes.

Tanzania has a good foundation for using the WTO dispute mechanism as a third party: it has appeared before the dispute body three times on sugar cases. However, this study recommends that Tanzania has to continue to participate more as a third party so as to continue to build confidence and experience and to become familiar with the WTO jurisprudence. The EU and Brazil can be seen as a point of reference since they are active users of the WTO disputes process as third parties, and therefore it is no wonder that their law and practice on trade remedies is more advanced and competitive. This participation will also help the Tanzania government to have in place comprehensive legislation on trade remedies. Also, when the need arises to implement trade policy tools such as countervailing measures, the country will establish their legal claims on a strong basis derived from what it has experienced and what the WTO legal instruments and dispute body provide for the applicability of such redress.

ii) Utilising available technical assistance.

The Tanzania government still needs technical and legal advice as well as skills in respect of WTO law and practice. Such assistance should not only focus on the technical assistance but also on the implementation of various WTO Agreement measures, including countervailing measures. Such assistance should start from within Tanzania which is blessed to have the Trade Policy Training Centre in Africa (TRAPCA) located in Arusha. Furthermore, it can seek technical assistance from TRALAC, situated in South Africa, the WTO itself, and other organisations such as, the World Bank and the Advisory Centre on Trade Law (ACWL) both located in Geneva. As explained in the previously chapter, seeking technical assistance is highly recommended for the government, to acquire enough support and assistance when dealing with trade and related matters.

When the government obtains such technical assistance, efforts must also be made to reinforce its capacity building efforts. This can be done by the establishment of WTO law and practice schemes or projects for government officials, civil servants, the public at large, and the private sector. The establishment of awareness programmes about the WTO is of great significance and the government has to initiate and monitor such projects as well as evaluate them regularly.

iii) Enhancing the alliance between government and the private sector.

The government must provide a platform which facilitates co-operation between it and the private sector. The rationale therefore is that it is the interests of private sector which the government represents in international trade meetings, but it is the private sector that conducts trade and which is badly affected by unfair trade practices, although consequently the government is get affected by such unfair trade practices. The government also needs to get information from local industries and companies to justify redress, such as the implementation of countervailing measures .If there is no room for co-operation between the two, the problem of unfair trade practices will never be resolved effectively.

iv) Building up strong co-operation with institutions dealing with trade, inter alia, academic institutions, non-governmental organisations, trade associations as well as trade law chambers. One of the challenge and constraints which faces Tanzania is the lack of enough skilled and competent experts in the trade arena. However, Tanzania has potential academic institutions TRAPCA being one of them, which is the centre for trade law in African. Therefore more efforts must be made to make sure that the government promote and support the existence of such institutions, and where necessary the government should train more government officials and senior and junior trade officials to increase the human capital which will be effectively used to advance the interests of the government and other stakeholders from the private sector, when dealing with international trade matters, such as addressing the issue of unfair trade practices.

5.2.2.2 Ministry of Industry and Trade in Tanzania

A trade remedy unit needs to be created within the Ministry of Industry and Trade. Having an independent unit composed of lawyers and economists will enable Tanzania not only to smooth the operation of WTO law and practice by advising its delegation during meetings and negotiations, will also help Tanzania to monitor trade practices within the country, and when needed to work on claims regarding unfair practices, such as dumping and subsidisation. This unit can also be constituted as an ad hoc group of trade experts that will be used only when there is an immediate need. Regarding the human resources for such unit the Ministry has to co-operate with academic institutions and associations dealing with trade related matters within and outside the country so as to get competent and reliable human capital.

5.2.2.3 Tanzania private sector

The available trade associations and private enterprises should establish a single agency that deals with the investigation and filing of complaints regarding unfair trade practices such as subsidisation. This agency should be linked directly to the Ministry of Industry and Trade. Thus when any local industry discovers that there is an unfair trade practice, the agency should act as its representative with regard to the claims and before pursuing further action must satisfy itself that there is a need to ask for measures, such as countervailing measures, to be taken by the government. Further, the private sector must also strengthen co-operation and communication with the government, since as a sector its interests can only be protected by the government which will enter into negotiations and conclude international economic relations and contracts on behalf of local firms, business associations and private enterprises. The international trade system deals with the interest the States and not of private sectors, such as, companies, industries or trade associations.

5.2.2.4 The WTO

Many efforts have been made to see that the developing nations benefit from the WTO, such as, technical assistance and capacity building efforts. But in my opinion more effort is needed to monitor and evaluate to these projects made for developing nations. Great emphasis must be placed on seeing that the schemes for technical and capacity building provide real benefits provide fruits for such nations, by evaluating physical evidence rather than relying on documentary evidence only.

Therefore, the study has managed to show three things namely; first is that this study has shown various challenges and constraints on the implementation of the countervailing measures in Tanzania presently. Secondly, the study provides for potential opportunities enabling Tanzania to implement countervailing measures. Thirdly, this comparative study has revealed various lessons which Tanzania might opt to use from the EU and Brazilian law and practice. The two countries have been active users of countervailing measures and other WTO instruments.

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