THE IMPLEMENTATION OF COUNTERVAILING MEASURES IN TANZANIA: CHALLENGES AND CONSTRAINTS

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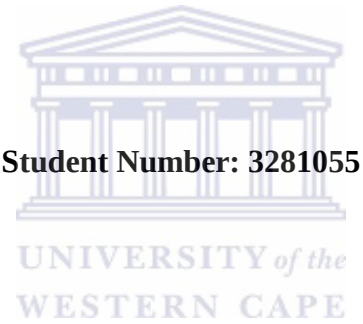

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Material threat
Local industry
Countervailing duty
Dispute Settlement Body (DSB)

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	*Câmara de Comércio Exterior*
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	*Grupo Técnico de Defesa Comercial*
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

Contents

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)1GEG 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 laws[8], 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 laws[9] 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 state[13] 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 Act [19]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 Act[23] on applying and enforcing countervailing measures, also has in place countervailing measures regulations,[24] the International Trade Administration Act[25], 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/Pleatoprotectcementfirmsfallsondeafears/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 is 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 it's 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 Agreement [37] '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]

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[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-Alcoho*l 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 it 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

[48]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).

[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]

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[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).