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**APPRAISING THE CURRENT LEGAL FRAMEWORK FOR REGULATING  
DUMPING INTO NIGERIA: NEED FOR LEGISLATIVE REFORMS AND  
INTERVENTION**

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**ABSTRACT:** *Nigeria as a member of the WTO is open to trade liberalization 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 subsidized imports to maintain fair trade within the country. The only legislation dealing with anti-dumping measures in Nigeria is the Customs Duties (Dumped and Subsidized Goods) Act 1958, which was enacted for the protection of indigenous industries from unfair foreign competition. This paper seeks to examine the existing regulatory framework for combating dumping trade practices as well as the anti-dumping measures set out in Nigeria. The paper would also examine the proposed legislative interventions by the National Assembly as to whether they reflect the provisions of the Anti-Dumping Agreement (ADA) under the GATT and proposed few legal solutions to the present dilemma.*

**KEYWORDS:** Dumping, Anti-dumping measures, trade liberalization, international trade

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## **INTRODUCTION**

Dumping is evident in an economic atmosphere that promotes a product (similar to those produced locally) to be sold below its nominal market value by an exporting country into another country, albeit, higher selling price is what dictates demand and supply in the said exporting country<sup>1</sup>. Consequently, this trade practice causes injury<sup>2</sup> to the domestic industry of the importing country.<sup>3</sup> However, a bargain sale cannot be classified as dumping under a mutual sense of ordinary trade. An importing World Trade Organisation (WTO) Member State has the power to restrict dumping. Where an application is made by the interested party for an investigation to be initiated, a final determination of dumping that shows a material injury to the domestic industry can make anti-dumping measures implementable. Emphatically, Member States must apply anti-dumping provisions within the framework of the WTO

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<sup>1</sup> Article 2.1 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 <http://www.worldtradelaw.net/uragreements/adagreement.pdf> (accessed 30 November 2020); also commonly called the Anti-Dumping Agreement (ADA). Following the Uruguay Round of negotiations, the ADA was signed in 1994 and entered into force in 1995.

<sup>2</sup> Injury' can occur in three phases: 1. Material retardation of an established industry, 2. Material injury to a domestic industry, 3. Threat of material injury to a domestic industry; Pam, A., 'Anti-dumping and Countervailing Measures and Developing Countries: Recent Development'. (2007-2010) *Nigeria Current Law Review*. 50

<sup>3</sup> Chacko, K. T. *Agreement on Anti-Dumping*. (Centre for WTO Studies, Indian Institute, 2011) 1.

Agreement on Implementation of **Article VI** of the **General Agreement on Tariffs and Trade (GATT) 1994** (hereinafter referred to as **AD Agreement**).<sup>4</sup>

Most scholars agree that where predatory dumping remains unchecked, it has a devastating effect not only on the economy of the targeted importing countries but also an obstacle to flourishing international trade as such practices scheme out a competitor from fair trade in a particular market.<sup>5</sup>The anti-dumping measures<sup>6</sup> which seek to remedy injury afflicted on domestic industries through unfair trades have intuitively substitute traditional trade barriers.<sup>7</sup>These barriers have faced gradual elimination from the international scene due to regional and multilateral trade liberalisation.<sup>8</sup> Thus, the practice removes the benefits of tariff reduction and blocks avenue for economic integration.<sup>9</sup>

The WTO agreements on anti-dumping measures, subsidies and countervailing measures and safeguards all form part of a single package that automatically binds all members. Whilst WTO members are not obliged to adopt national legislation on anti-dumping, members that decide to adopt and apply anti-dumping rules, must do so in accordance with the provisions of the **Anti-Dumping Agreement (ADA)**<sup>10</sup> and in a manner consistent with commitments to which they have subscribed.<sup>11</sup>

No member of WTO is under obligations to adopt and enforce anti-dumping and countervailing measures in their national legislation; however, any member that domesticates WTO Anti-dumping Agreement must adhere to the provisions set out therein.<sup>12</sup> Furthermore, any inconsistencies with the member's commitment as subscribed may make the national legislation on anti-dumping void to the extent of its inconsistencies.<sup>13</sup> Note further that the WTO agreement on anti-dumping and countervailing measures are automatically binding on all members.

<sup>4</sup> A conclusion was reached on GATT between January and February 1947 and became effective in 1948, see *GATT 1947*; Article 2 Anti-Dumping Agreement 1994 (determination of Injury) stipulates that based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

<sup>5</sup> Willig, R. D. 'Economic Effects of Anti-dumping Policy' in Lawrence, Robert Z. (ed.): *Brookings Trade Forum*. (Brookings Institution Press, 1998) 59; Obalade, T. A. F. 'Analysis of Dumping as a Major Cause of Import and Export Crises', (2014) (4) (5) *International Journal of Humanities and Social Science* 235.

<sup>6</sup> Cho, S. 'Beyond Doha's Promises: Administrative Barriers as an Obstruction to Development', (2007) (25) *Berkeley Journal International Law* 395, 400.

<sup>7</sup> Aggarwal, A. 'Macro-Economic Determinants of Antidumping: A Comparative Analysis of Developed and Developing Countries', (2004) (32) (6) *World Development* 1043-1057 at 1046; World Trade Organisation. *The WTO Agreements Series: Technical Barriers to Trade* (World Trade Organisation, 2013) 41.

<sup>8</sup> Hoekman, B. and Mavroidis, P. 'Dumping, Anti-Dumping and Antitrust', (1996) 30(1) *Journal of World Trade*, 27

<sup>9</sup> Pam, A. *op. cit.* p. 42

<sup>10</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

<sup>11</sup> Vermulst, E. *The WTO anti-dumping Agreement: A commentary* (Oxford University Press, 2005) 4

<sup>12</sup> Sequel to the Uruguay Round of negotiations, the Anti-Dumping Agreement 1994 became endorsed in 1994, thereby became enforceable in 1995.

<sup>13</sup> Vermulst, E. *op. cit.*, p. 4; Part I Art 1 Anti-Dumping Agreement 1994

Nigeria embraces global trade liberalisation. The traditional barriers usually employed by the country such as import bans<sup>14</sup> are now inconsistent with the spirit or trading rules of WTO.<sup>15</sup> For this reason, to protect the domestic industries from dumped products and subsidised goods, Nigeria ought to provide legal protection<sup>16</sup>, poised to affect national legislation on anti-dumping (trade remedies or mechanisms) and same shall not conflict with its WTO objectives.<sup>17</sup>

The only legislation dealing with anti-dumping measures in Nigeria is the Customs Duties (Dumped and Subsidized Goods) Act 1958<sup>18</sup>, which was enacted for the protection of indigenous industries from unfair foreign competition. However, Nigeria acknowledged in its notification<sup>19</sup> to the WTO Committees on Anti-Dumping Practices and; Subsidies and Countervailing Measures<sup>20</sup> that it has not taken any anti-dumping measures to date. Due to the globally non-acceptable practice of import prohibition by countries, anti-dumping legislation is thus very critical for Nigeria. Thus, this paper examines the regulatory framework for dumping trade practices and anti-dumping measures in Nigeria. We would also examine the proposed legislation in the National Assembly as to whether it reflects the provisions of the AD Agreement under the GATT as well as the appropriate principles guiding the sanctioning of exporters or an exporting country.

### **THE NATURE OF DUMPING UNDER INTERNATIONAL TRADE**

Dumping is regarded as unfair commercial competitive behaviour in international trade. Jacob Viner first introduced and defined the idea of 'dumping' as 'price discrimination between national markets'.<sup>21</sup> Some legal scholars characterize dumping as price discrimination between national markets;<sup>22</sup> therefore, they consider it to be a form of unfair competition in international markets. However, this characterization does not uniformly express a precise definition of dumping. According to them, there must similarities between products also injury to those similar products or threat to the industry producing them before dumping can be said to have occurred. In such cases, the action is a type or category of price discrimination.

Other researchers define dumping as the practice of selling a product for export at a price below its normal "Dumping arises from the pricing practices of exporters as both normal value and

<sup>14</sup>Ogunkola, E. O. & Agah, Y. F. 'Nigeria and The World Trading System' in Oyejide, A. & Njinkeu, D. (eds) *Africa and the world trading system* (African Economic Research Consortium, 2007)p. 249

<sup>15</sup>Beverly Mahabir-Charles, 'The Effectiveness of Anti-Dumping in Trinidad and Tobago' (2011) 6(5) *Global Trade and Customs Journal* 245

<sup>16</sup>Wolfrum, R., Stoll, P. T. and Koebele, M. (eds.), *WTO - Trade Remedies*. (Martinus Nijhoff Publishers, 2008) p .8.

<sup>17</sup> Article 1, 18.1 & 18.3 *Anti-Dumping Agreement* 1994

<sup>18</sup> Now Cap. C48, Laws of the Federation of Nigeria 2004

<sup>19</sup> WTO member countries are required to give notices under arts 18.5 &32.6 of the Agreement on Implementation of Article VI of the GATT 1994 and the Subsidy and Countervailing Measures Agreement (SCM Agreement).

<sup>20</sup> Established under Article 24 of the SCM Agreement.

<sup>21</sup> Viner. J. *Dumping: A problem in International Trade* (University of Chicago Press, 1923) 4.

<sup>22</sup>Aggarwal, A. *The Anti-dumping Agreement and Developing Countries, an Introduction* (1st ed.). (Oxford University Press, 2007)

export prices reflect their strategies in the home and foreign markets”.<sup>23</sup> Yet, this definition focused on prices in general and the selling operation itself, which is not insufficient to define dumping.

Dumping action refers to unfair competition in international markets, which may injure or threaten similar domestic products. Dumping itself is not unlawful, except where it causes injury to a similar domestic industry or threatens it.<sup>24</sup> Yet, in some cases, dumping or anti-dumping duty can as a kind of circumvention, in which one country imposes a duty on another country; this then might bring to bear on other countries. This may then lead to one country then obtaining a concession, whether political or economic, based on an international decision. According to the Anti-Dumping Agreement, dumping occurs when a producer in one country sells a product at a lower price to a specific export market than the normal value.<sup>25</sup> Normal value can be determined in different ways, but generally, it is concerning the price in the exporter’s domestic market.

Art VI of the GATT 1994 and the ADA does not prohibit dumping but condemn that which causes material injury.<sup>26</sup> It provides:

*The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.*<sup>27</sup>

For instance, a two kg packet of chicken wings from country W is exported to country X (which also locally sells chicken wings) for US \$5, while the price of the same wings in country W is US \$10. The main aspect is that the company charges a different price in different markets for the same product, which amounts to price discrimination. It should be noted that for dumping to occur, unlike price discrimination, the market has to be international, between countries.<sup>28</sup>

Based on the above statements, it can be seen that seven important elements must be met as pre-conditions for dumping to be said to exist, and all seven conditions need to be present before anti-dumping can be alleged. They are as follows:

1. The product has to be exported “Introduced”;
2. The product has to be from another country;
3. There has to be a market for competition between goods;
4. The product has to have a normal price and a lower price;
5. There have to be similarities between the products;
6. Differences in pricing must lead to injury or threat to similar products; and
7. There must be a causal link between low price and injury.

<sup>23</sup>Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, 43.

<sup>24</sup>Bossche, P. V. B. *The Law and Policy of the World Trade Organization*, (2nd ed.). (Cambridge University Press, 2009) 24

<sup>25</sup> Article VI, General Agreement on Tariffs and Trade 1994

<sup>26</sup> United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003) 3.

<sup>27</sup> Art VI:1, General Agreement on Tariffs and Trade 1994

<sup>28</sup> Li, W. *Anti-dumping Law of the WTO/GATT and the EC: Gradual Evolution of Anti-dumping Law in Global Econ Integration* (2003) 53-54.

The ADA clarifies and expands Art VI, and the two operate together.<sup>29</sup> If dumping injures the local producers of the importing country, its authorities are allowed to take measures to either offset or prevent injurious dumping.<sup>30</sup> Countries are therefore permitted with a clear-cut guideline and rule-based mechanism to act in a way that would normally breach the GATT principles of a binding tariff and non-discrimination between trade partners. The GATT only addresses the behaviour of governments, dumping by private companies or non-government organisations cannot be forbidden. Thus private firms have freedom of choice in business.<sup>31</sup>

### **INTERNATIONAL LEGAL FRAMEWORK ON ANTI-DUMPING**

Adoption of excessive trade protectionism, maximization of exports and minimization of imports were some of the significant factors responsible for the great depression of the 1930s.<sup>32</sup> The Second World War also brought key changes in the structure of world economic management, following the establishment of the “Bretton Woods Institutions”: the World Bank and the International Monetary Fund.<sup>33</sup> These institutions were responsible for world finance, and therefore the need for a third institution to deal with international trade became obvious.<sup>34</sup> This need was met in the establishment of the International Trade Organization (ITO) under the ambit of the United Nations.<sup>35</sup> The rules on employment, commodity agreements, economic development, international investment and restrictive business practices were captured in the draft ITO Charter for negotiations.<sup>36</sup> Over 50 countries took part in the negotiations and in 1946, 23 participants commenced negotiations for the reduction and binding of customs tariffs.<sup>37</sup> These negotiations on customs tariffs led to a collection of trade rules and tariff concessions which together became known as the General Agreement on Tariffs and Trade (GATT) 1947.<sup>38</sup>

Between January and February 1947, negotiations were concluded by state representatives leading to what became the GATT.<sup>39</sup> Notably, members of the Preparatory Committee conducted a round of tariff negotiations between April and October 1947 in the course of the ITO negotiations at the European office of the United Nations, in Geneva.<sup>40</sup> This became the first round of multilateral trade negotiations.<sup>41</sup> Further developments of the GATT’s basic legal

<sup>29</sup> World Trade Organization, *WTO e-learning: The WTO Multilateral Trade Agreements* (World Trade Organisation, 2011) 16

<sup>30</sup> Denner, W. *Supporting Regional Integration in East and Southern Africa-Review of Select Issues: Protectionism, Trade Remedies and Safeguards* (Tralac, 2010) 11; Art VI of the GATT 1994.

<sup>31</sup> Jackson, H. *The Jurisprudence of GATT and the WTO* (Cambridge University Press, 2000) 73.

<sup>32</sup> United Nations Economic and Social Commission for Asia and the Pacific ‘Introduction to the WTO’ [http://www.unescap.org/tid/projects/accesswto\\_bhul\\_wto.pdf](http://www.unescap.org/tid/projects/accesswto_bhul_wto.pdf) (accessed 28 November 2020).

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Mavroidis, P. C. *The General Agreement on Tariffs and Trade - A commentary* (Oxford University Press, 2005) 2-3.

<sup>37</sup> United Nations Economic and Social Commission for Asia and the Pacific, *op. cit.* p. 2

<sup>38</sup> Ibid.

<sup>39</sup> Mavroidis, P.C. *op. cit.* p. 4

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

rules were achieved through a series of multilateral trade negotiations referred to as “trade rounds.”<sup>42</sup> Trade rounds focused on further tariffs reduction and the eighth was the Uruguay Round of 1986-1994, which led to the establishment of the WTO on 1 January 1995 with a new set of agreements.<sup>43</sup> The WTO Agreements relating to anti-dumping measures, subsidies and countervailing measures and safeguards are part of the multilateral agreements on trade in goods.<sup>44</sup>

The purpose of GATT and the WTO is to ensure that parties to the Agreement<sup>45</sup> conduct their relations in the field of trade and economic endeavour to raise standards of living, ensure full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources per the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.<sup>46</sup>

The GATT and WTO are heavily documented in their operations and processes. The original agreements that established the GATT together with annexes and schedules are attached to the Final Act of the United Nations Conference on Trade and Employment.<sup>47</sup> The results of the Uruguay Round of multinational trade agreements is also contained in the Final Act consisting of the Final Act itself, the Agreement establishing the WTO and agreements annexed to it, as well as additional GATT declarations, decisions and agreements.<sup>48</sup>

### **GATT AND ANTI-DUMPING REGULATIONS**

The preamble to the General Agreement on Tariffs and Trade which was signed in 1947 states that the purpose of the Agreement is to bring about “the substantial reduction of tariffs and other trade barriers and the elimination of discriminatory treatment in international commerce, on a reciprocal and mutually advantageous basis.”<sup>49</sup> As has been shown in the preceding paragraphs, the preparation of the GATT and the draft Charter for the ITO have an intertwined history. Notably, the United States and its economic policy played significant roles in the ITO draft Charter and the GATT 1947.<sup>50</sup> The U.S economic policy on “reciprocal trade agreements” finds its legal force in the Reciprocal Trade Agreements Act of 1934. The Executive was authorized by Congress to conclude trade agreements under the provisions of the Act. The GATT and its clauses therefore, drew largely from the provisions of the Reciprocal Trade

<sup>42</sup> World Trade Organization “Understanding the WTO” (2011) p. 16 [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf) (accessed 28 November 2020)

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> The Agreement Establishing the World Trade Organization [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf) (accessed 30 November 2020).

<sup>46</sup> The Preamble to the Agreement Establishing the World Trade Organization [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf) (accessed 30 November 2020).

<sup>47</sup> Mavroidis, P.C. *op. cit.* p. 11

<sup>48</sup> Ibid.

<sup>49</sup> The Preamble to GATT 1947 [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf) (accessed 30 November 2020).

<sup>50</sup> Wolfrum, R. et al *WTO – Trade in Goods* (Martinus Nijhoff, 2010) pp. 5-6.

Agreements Act of 1934.<sup>51</sup> It is important to mention that, following Canada's enactment of the first anti-dumping legislation in 1904 other countries had become ever more interested in dumping and began enacting their own anti-dumping legislations.<sup>52</sup> A comprehensive body of rules on the subject of dumping had therefore become imperative leading to the GATT negotiations of the mid-1940s which resulted in the rules contained in Article VI of the GATT 1947, dealing with both anti-dumping and countervailing duties.<sup>53</sup> Article VI of the GATT does not prohibit dumping but rather condemns dumping where it causes or threatens to cause material injury.<sup>54</sup> The draft text of GATT 1947 was an agreement of tariff negotiations which was supervised by Tariff Negotiations Working Party drawing significantly from the ITO Charter provisions on general commercial policy (Part II of GATT).<sup>55</sup>

### **THE WTO AGREEMENT AND ANTI-DUMPING**

A landmark conclusion of the Uruguay trade round, launched at *Punta del Este* under GATT 1947 was the establishment of the World Trade Organization upon the legal instrument called the WTO Agreement.<sup>56</sup> The Agreement provides for the common institutional framework for the conduct of trade among its Members.<sup>57</sup> More significantly, the negotiators at the Uruguay round desired a treaty-based on a "single undertaking" or "single package".<sup>58</sup> In effect, at the end of the Uruguay round of negotiations, all the negotiators who wish to be members of the WTO would be bound, without reservations, to accept all the obligations of the Agreement.<sup>59</sup> The GATT 1994, the Agreement on Implementation of Article VI of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures (SCMA) all form part of Annex IA to the WTO Agreement regarding multilateral trade in goods and are binding on all members.<sup>60</sup> Article VI of the GATT 1994 provides two trade remedies (anti-dumping measures and; countervailing measures, including countervailing duties (CVDs) and regulates WTO Members' defence against dumping and subsidization.<sup>61</sup> The ADA and the SCMA provide detailed substantive and procedural rules as to how dumping or countervailable duties, injury and causality are determined.<sup>62</sup> Anti-dumping and countervailing measures would generally, constitute a breach of WTO Members' substantive obligations, for instance, the most-favoured-nation, the national treatment and the GATT tariff commitments but are now regarded as permissible and exceptions under Article VI of the GATT 1994, the ADA and the SCMA.<sup>63</sup>

### **THE ANTI-DUMPING AGREEMENT AND CODES**

The 1967 Kennedy Round featured negotiations for the Anti-Dumping Code which was signed by 17 parties and became the first agreement on the implementation of Article VI of GATT

<sup>51</sup> Ibid.

<sup>52</sup> Lester, S. et al *World Trade Law: Text, materials and commentary* (Hart Publishing, 2008) 468.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Wolfrum et al *op. cit.* pp. 11-12.

<sup>56</sup> Art I Agreement Establishing the World Trade Organization

<sup>57</sup> Art II.1, Ibid.

<sup>58</sup> Wolfrum et al *op. cit.* pp. 22-23

<sup>59</sup> Ibid.

<sup>60</sup> Art II.2, Agreement Establishing the World Trade Organization; Wolfrum et al *op. cit.* p. 199

<sup>61</sup> Wolfrum et al *op. cit.* p. 198

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

1947.<sup>64</sup> The 1967 Code was also referred to as the 1967 Agreement on implementation of Article VI of the GATT 1947.<sup>65</sup> The 1967 Code provided parties with the procedural framework for conducting anti-dumping investigations.<sup>66</sup> At the Tokyo Round negotiations in 1979, 25 parties were signatories to the Tokyo Code, counting the European Economic Communities (now the European Union) as representing one party.<sup>67</sup> Also at the Tokyo Round negotiations, the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement, which is the 1979 Subsidies Code was concluded.<sup>68</sup> Consequently, the 1967 Anti-Dumping Code was revised and brought into conformity with the 1979 Subsidies Code. Much later, at the Uruguay Round of negotiations, the ADA and the SCMA were established.<sup>69</sup>

Following the Uruguay Round of negotiations, a new agreement on anti-dumping was reached. It is referred to as - the Agreement on Implementation of Article VI of GATT 1994. Article VI of the GATT 1947 was carried forward into GATT 1994.<sup>70</sup> The ADA provides clear details and expands Article VI provision regarding dumping.<sup>71</sup> Both Article VI of the GATT 1994 and the ADA are applied together.<sup>72</sup> The ADA has provided some major changes to the Anti-Dumping Code 1979, including setting out provisions for consultations by all interested parties, application of price undertakings in anti-dumping situations, duration of measures, measures providing for expiration of anti-dumping measures after five years after the date of imposition, except in the event of a determination showing that termination of the imposed measure, will not stop the continuing or reoccurrence of the dumping and injury complained of.<sup>73</sup>

The ADA contains 18 Articles dealing with substantive and procedural aspects of anti-dumping, and providing for various other issues as anti-dumping action on behalf of a third country and dispute settlement among parties. To balance the conflicting interests of an importing country with those of the exporters with regards to imposing anti-dumping measures, the ADA provides clarity as to the definition of applicable concepts and procedures used in the agreement.<sup>74</sup> The relevance of discussing these concepts and their definitions is underscored by the fact that the national anti-dumping laws of most countries find their basis in Article VI of GATT 1994 and the ADA.<sup>75</sup>

<sup>64</sup>United Nations Conference on Trade and Development “Training module on the WTO agreement on antidumping” (2006) 3 [http://unctad.org/en/docs/ditctncd20046\\_en.pdf](http://unctad.org/en/docs/ditctncd20046_en.pdf) (accessed 3 December 2020).

<sup>65</sup> Wolfrum et al *op. cit.* pp. 198-199

<sup>66</sup> Ibid.

<sup>67</sup>United Nations Conference on Trade and Development, *op. cit.*

<sup>68</sup> Wolfrum et al *op. cit.* p. 199

<sup>69</sup> Ibid.

<sup>70</sup>United Nations Conference on Trade and Development *op. cit.* p. 4.

<sup>71</sup>World Trade Organization *op. cit.* p. 44.

<sup>72</sup> Ibid.

<sup>73</sup> Institute of Economic Affairs “Anti-dumping as a trade remedy: the way forward for Kenya” (2013) 36 *Trade Notes Issue 2* <https://www.ieakenya.or.ke/downloads.php?page=Trade-Notes-Anti-Dumping-Final.pdf> (accessed 30 November 2020)

<sup>74</sup>WTO E-Learning “Trade remedies and the WTO” (2012) 92 [http://etraining.wto.org/admin/files/course\\_287/coursecontent/TR-R2-E-Print.pdf](http://etraining.wto.org/admin/files/course_287/coursecontent/TR-R2-E-Print.pdf) (accessed 30 November 2020).

<sup>75</sup>Brink, G. F. *One hundred years of anti-dumping in South Africa.* (Kluwer Law International, 2015)p. 154



The ADA provides for a mandatory review, by the authorities, of the continued imposition of an anti-dumping duty. This review may be initiated by the imposing authority, or where “a reasonable time has lapsed”, upon request by any interested party, which presents positive information establishing the need for a review.<sup>76</sup>

Essentially, the review is to enable authorities to determine whether “the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied or both.”<sup>77</sup>

In terms of the ADA, any reviews carried out under Article 11, which includes – administrative reviews, “shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.”<sup>78</sup>

As provided by the ADA, anti-dumping measures (both duties and price undertakings) must be terminated on a date no later than 5 years from the date of their imposition. As an exception to this general rule, the ADA allows an investigating authority, to keep the duty in force where following a review investigation initiated before the expiry of the measure (unofficially but universally called “sunset review”) it was established that the expiry of the measure would be likely to lead to continuation or recurrence of injurious dumping.<sup>79</sup> As to the number of times a measure may be extended through a sunset review, the ADA makes no provision on this.

Furthermore, The ADA requires members that have national legislation on anti-dumping to maintain judicial, arbitral or administrative tribunals, or procedures, for prompt review, or hearing appeals of, administrative actions regarding final determinations and reviews, and not for preliminary reviews. This provision guarantees the right of an interested party to seek a judicial review where it is not satisfied with the final decision of an investigating authority.<sup>80</sup> Importantly, tribunals or procedures set up for this purpose are required to be independent of the authorities making the determinations.<sup>81</sup>

The ADA provides that where the anti-dumping duties are assessed on a prospective basis, the investigating authorities must make provision for the prompt refund of any duty paid more than the actual dumping margin, upon request by an importer whose product was subject to the duty. The ADA further provides that the payment of such duty “shall normally take place within 12 months and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence has been made.”<sup>82</sup>

Finally, an anti-dumping action may be brought by a Member country on behalf of a third country. The ADA provides the applicable rules<sup>83</sup> in this event. According to Vermulst, *It is possible that country A producers dumping into country B cause injury to producers in country C, for example, by replacing country C exports to country B. Article 14, which goes back all the way to Article VI.6(b) of the GATT, allows the country C authorities in such*

<sup>76</sup>Art 11.2 Anti-Dumping Agreement

<sup>77</sup> Ibid.

<sup>78</sup>Art 11.4 Anti-Dumping Agreement

<sup>79</sup> Art 11.3, Ibid.

<sup>80</sup>Art 13

<sup>81</sup>United Nations Conference on Trade and Development *op. cit.* p. 37.

<sup>82</sup> Art 9.3.2, Anti-Dumping Agreement

<sup>83</sup> Art 14, Ibid.

*situations to request the country B authorities to initiate an anti-dumping investigation with regard to country A and to impose anti-dumping duties on country A exporters if they were to find dumping and resulting injury to the domestic industry of country C.*<sup>84</sup>

Antidumping actions on behalf of a third country are hardly initiated, possibly because of the requirement for the approval of the Council for Trade in Goods before such anti-dumping action and the likelihood that the importing country authorities may not find it in their interest to initiate the action.<sup>85</sup>

## LEGAL FRAMEWORK ON ANTI-DUMPING IN NIGERIA

It is worthy of note that most of the trade-related legislation in Nigeria dates back to the colonial era.<sup>86</sup> The only subsisting legislation regulating dumping and subsidized imports is the Customs Duties (Dumped and Subsidized Goods) Act 1958<sup>87</sup>. The Customs Duties (Dumped and Subsidized Goods) Act provides for “the imposition of a special duty on any goods deemed to be dumped by companies or subsidized by any government or authority outside Nigeria. When deemed necessary, the Customs Duties (Dumped and Subsidized Goods) Act allowed for the imposition of a special duty on any goods which is dumped in Nigeria or were subsidized by any government or authority outside Nigeria.”<sup>88</sup> The right to exercise this power is vested with the Federal Government which must be satisfied both material injury will be threatened or caused by the entry of such goods to a potential or established industry in Nigeria and such imposition will not conflict with Nigeria’s obligation under the General Agreements on Tariffs and Trade (GATT).<sup>89</sup> Under the legislation, goods are regarded as having been dumped if the export price is lower than the “fair market price.”<sup>90</sup>

Under the Customs Duties (Dumped and Subsidized Goods) Act, the President of Nigeria has power over such matters as the determination of dumping and the imposition of duties.<sup>91</sup> Section 3(1) of the Act provides that:

*Where it appears to the President that-*

- (a) goods of any description are being or have been imported into Nigeria in circumstances in which they are under the provisions of this Act, to be regarded as having been dumped; or*
- (b) a government or other authority outside Nigerian has been giving a subsidy affecting goods of any description which are being or have been imported into Nigeria; and*
- (c) having regard to all the circumstances, it would be in the national interest, he may exercise the power conferred on him by this Act to impose and vary duties of customs in such manner as he thinks necessary to meet the dumping or the giving of the subsidy:*

*Provided that where the President is not satisfied that the effect of the dumping or of the giving of the subsidy is such as to cause or threaten material injury to an established industry in Nigeria, or is such as to retard materially the establishment of an industry in Nigeria, he shall not exercise that power if it appears to him that to do so would conflict with the obligations of*

<sup>84</sup> Vermulst, E. *op. cit.* p. 214

<sup>85</sup> Vermulst, E. *op. cit.* p. 215

<sup>86</sup> Ogunkola, E. O. & Agah, Y. F. *op. cit.* 254.

<sup>87</sup> Now Cap. C48, Laws of the Federation of Nigeria 2004

<sup>88</sup> Sections 3 & 4, Customs Duties (Dumped and Subsidized Goods) Act

<sup>89</sup> Section 3(1), *Ibid.*

<sup>90</sup> Section 9, *Ibid.*

<sup>91</sup> Sections 3 & 4, *Ibid.*

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*the Federal Government under the provisions for the time being in force of the General Agreement on Tariffs and Trade concluded at Geneva in the year 1947.*

From the above provision, the President of Nigeria is the sole authority which determinates whether an exporting country is engaging in “dumping” of goods into Nigeria. Under the law, imported goods are regarded as having been “dumped”<sup>92</sup>:

- (a) If the export price from the country in which the goods originated is less than the fair market price of the goods in that country; or
- (b) In a case where the country from which the goods were exported to Nigeria is different from the country in which they originated-
  - (i) if the export price from the country in which the goods were so exported is less than the fair market price of those goods in that country; or
  - (ii) if the export price from the country from which the goods were so exported is less than the fair market price of those goods in that country.

Sections 8 and 9 of the Act deals with the ascertainment of the “export price” and “fair market price” of any goods. Section 8 provides that:

(1) *In relation to goods imported into Nigeria, the export price from the country in which the goods originated or from which they were exported shall be determined as provided for in this section.*

(2) *If the goods are imported under a contract of sale which is a sale in the open market between buyer and seller independent of each other, and the Minister is satisfied as to that fact, as to the price on that sale and as to such other facts as are material for this purpose, the export price shall be the price on that sale subject to a deduction for the cost of insurance and freight from the port or place of export in the said country to the port or place of import, and for any other costs, charges or expenses incurred in respect of the goods after they left the port or place of export, except so far as any such costs, charges or expenses have to be met separately by the purchaser.*

(3) *If subsection (2) of this section does not apply, the Minister shall determine the export price by reference to such sale of the goods (or of any goods in which the first-mentioned goods were incorporated) as he may select with such adjustments as may appear to him to be proper.*

In summary, it is the country in which the goods originated from that shall form the basis for the computation of the export price, except if the importation is a contract of sale entered into during an open market transaction. In other import transactions, the Minister (of Finance, Trade or Commerce) will determine the export price based on the prevailing sales prices of the goods and/or with any adjustments he may make to the price.

The fair market price shall be taken to be the price at which goods of the description in question<sup>93</sup> are being sold in the ordinary course of trade in the said country for consumption or use there.<sup>94</sup> Nonetheless, the price should be subject to any necessary adjustments, such as differences in conditions and terms of sale, taxation etc. The law allows makes it important that

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<sup>92</sup> Section 3(2), Ibid.

<sup>93</sup> that is to say, any identical or comparable goods

<sup>94</sup> Section 9(2), Customs Duties (Dumped and Subsidized Goods) Act

ascertainment of the fair market price must be such that the comparison between the fair market price and the export price is effectively a comparison between the prices on two similar sales.<sup>95</sup> Where a President determines that a good or goods have been dumped into Nigeria, he may make an Order imposing a customs duty on the importation of such goods at any rate which he may specify.<sup>96</sup> The matters by reference to which the description of goods in the order is framed shall include either the country in which the goods originated or the country from which the goods were exported to Nigeria.<sup>97</sup>

It is important to note that any Order made under the Customs Duties (Dumped and Subsidized Goods) Act on any good from an exporting country creates an additional customs duty on such goods and the importer is liable to pay for both custom duties.<sup>98</sup> There is no timeframe for the application of the order and this means that the order can last *in finitum* which tends distorting long-term trading relations with the offending exporting country. The law does not create a formal proceeding or platform whereby the anti-dumping measures can be reviewed or deliberated by both trading parties.

Furthermore, any order made by the President in accordance with section 4, 5 or 6 of the Customs Duties (Dumped and Subsidized Goods) Act must be confirmed by the National Assembly.<sup>99</sup> Such order must be presented to each House of the National Assembly at the first available opportunity and each House of the National Assembly may by resolution amend or revoke such order. Nonetheless, the amendment or revocation of the order does not invalidate any action or step lawfully done under such order before any such amendment or revocation.<sup>100</sup> We must note that a country does not need to have national legislation or domesticate Anti-dumping Agreement.<sup>101</sup> However, once a country decides to do so, it under obligation to draft its legislation to consistently adhere to the provisions of the WTO AD Agreement,<sup>102</sup> because if the aforementioned discrepancies are found in the national legislation, it may lead to a conflict of interest between its obligation to WTO and protecting the arbitrary interest of domestic industries; thereby the intent for which Anti-Dumping Agreement was promulgated will be defeated.<sup>103</sup> It can be seen that the provisions of the Customs Duties (Dumped and Subsidized Goods) Act does not provide for procedures or define substantive issues, for instance like the product and related parties as expected under the current Anti-dumping regime under the WTO Agreement.

It has been stated earlier that the Customs Duties (Dumped and Subsidized Goods) Act, the subsistent legislation on anti-dumping measures has been deemed inadequate and not in conformity with the present rules of the Anti-Dumping Agreement (ADA) of the World Trade Organisation (WTO). Hence, there have been two recent attempts to review the present legal

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<sup>95</sup> Ibid.

<sup>96</sup> Section 4(1), Ibid.

<sup>97</sup> Section 4(2), Ibid.

<sup>98</sup> Section 4(4), Ibid.

<sup>99</sup> Section 11, Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Art 16, Anti-Dumping Agreement

<sup>102</sup> Art 1, Ibid.

<sup>103</sup> Art 2.2, Ibid.

framework with the proposed Anti-Dumping and Countervailing Bill of 2010<sup>104</sup> and Anti-Dumping and Countervailing Bill of 2015.<sup>105</sup> Both Bills were sponsored by Hon. Abdullahi Umar Farouk and are very similar in nature. Unfortunately, the Bills were not passed by the National Assembly and the state of affairs is that the Nigerian legal framework for anti-dumping is still very rudimentary and does not cater for most of the contentious or recent issues on determination and sanctioning of dumping activities.

## RECOMMENDATIONS

In the past, the term ‘dumping’ was used to mean the act of discarding something unwanted, but at the beginning of the 20th century, it began being used in international trade. It was then used to illustrate the behaviour of producers of one country that sold goods in another country at exceptionally low prices.<sup>106</sup> Article VI of the General Agreement on Tariffs and Trade 1994 and the Anti-Dumping Agreement of 1994 provide the rules and the circumstances under which WTO members may exercise their rights to discipline dumped imports. The WTO rules govern the use of anti-dumping measures by national authorities; nonetheless, there are differences in countries’ readiness to use these duties, in their procedures, and their rules. As a result of these variations, some countries can protect their industries to a greater extent than others.<sup>107</sup>

As noted earlier, any legislation on anti-dumping measures was in accordance with or conformity with the ADA as laid out under the WTO Agreement. It is therefore imperative that any proposed legislation or review of the existing legislation conform to the salient provision of the ADA on dealing with dumping and the application of anti-dumping measures. In the light of the above premises, we feel the following recommendations should be considered by the Federal Government and the National Assembly in setting on a more effective legal framework for prohibiting dumping and applying anti-dumping measures in Nigeria:

**Enacting a Legislative Framework:** This is one of the basic requirements for taking anti-dumping action. Without this framework, it would be impossible to investigate to determine the effects of dumping. Per the ADA, Members will only apply anti-dumping measures under the provisions of Art VI of the GATT 1994, and only after investigations are initiated and carried out following the requirements of the ADA.<sup>108</sup> Therefore, as the ADA provides, the Nigerian law should establish exhaustive rules to determine dumping (calculation of normal values and export prices, adjustments to make normal values and export prices comparable, and calculation of the dumping margin) as well as a standard to determine that dumped imports cause injury to the local industry.<sup>109</sup>

<sup>104</sup> Anti-Dumping and Countervailing Bill 2010 <https://www.nassnig.org/document/download/436> (accessed 2 December 2020)

<sup>105</sup> Order Paper of the House of Representatives of Thursday, 18 January 2018 <https://www.nass.gov.ng/document/download/9535> (accessed 2 December 2020); Anti-Dumping and Countervailing Bill 2015 <http://placbillstrack.org/upload/HB90.pdf> (accessed 2 December 2020)

<sup>106</sup> Beseler, J & William, A. *Anti-dumping and Anti-subsidy Law: The European Communities* (Oxford University Press, 1986) 41.

<sup>107</sup> Young, L. & Wainio, J. ‘The Anti-dumping Negotiations: Proposals, Positions and Anti-dumping Profiles’ (2005) 6*Estey Centre Journal of International Law and Trade Policy* 7.

<sup>108</sup> Art 1, Anti-Dumping Agreement

<sup>109</sup> Aggarwal A ‘Anti-dumping Law and Practice: An Indian Perspective’ available at <http://www.icrier.org/pdf/antidump.pdf> (accessed 2 December 2020).

An administrative procedure must also be created which will be followed at the commencement and during the conduct of the investigations. Time periods must also be set within which to carry out the investigation and for the implementation and duration of these measures. Furthermore, in the creation of the legislation and before its adoption it would be advisable to have proper consultations between the government and private stakeholders from various sectors, and a free flow of information between them to ensure that all issues concerning them are addressed.

As Nigeria is in the process of establishing new anti-dumping law, the legislators need to keep in mind the reasons for the development of its anti-dumping system. Besides international price discrimination, the welfare of its people is also paramount. This concern includes consumers and industrial users. Thus, some issues which may affect their interests and influence the investigating authorities in the imposition of anti-dumping measures should be dealt with. These are matters relating to big policy questions, such as, the lesser duty rule and the public interest rule, which are substantive provisions found in the ADA and are discretionary in their application by Members.

An anti-dumping law's purpose is to protect the domestic industry from injury caused by imports of dumped goods. However, even though a local industry is harmed by alleged dumped imports, other parties benefit from them, such as downstream import-using industries and consumers, thereby causing a conflict of interest to arise between the latter and the former. An anti-dumping law without a public interest clause falls short in not taking into account these conflicting interests. If a positive finding of dumping and injury is made, the anti-dumping remedies for the local producers follow automatically without considering the consequences for other parties. This is not reasonable policymaking. A public interest provision in a national anti-dumping regime could therefore serve as a means of access to socio-economic justice for adversely affected parties, and as a way of balancing producer interest with that of the consumer.

**Setting-Up and Establishing Institutional Bodies to implement statutory provisions:** Who will the interested parties go to if they want to file an allegation of dumping and where will they go in search of a remedy? Legislators and policymakers in Nigeria should ensure that an institutional body responsible for managing anti-dumping cases is put in place. Anti-dumping investigations involve several different areas of professional activity; therefore people from different fields will be required. At least, for daily administration, these disciplines, among others, should be represented: law, economics and accountancy.

Lastly, an independent judiciary or tribunal is a paramount requirement, and it should be ensured that it not only exists but also functions well enough to be in a position to hear and adjudicate dumping matters freely and fairly. Parties who are not satisfied with the findings of, or the procedure followed by, the investigating authorities should have an opportunity to appeal to a court of law. As required by the ADA, each Member whose national legislation contains anti-dumping provisions shall maintain judicial or administrative procedures for review purposes. Moreover, these procedures should be independent of the investigating officials in charge of the determination or review in question.

**Reviewing or Enacting Legislations to reflect the Country's Progressive Industrial Policy:**

A considerable body of literature has emerged that makes a case for new types of trade policies and links to industrial policies. There is the recognition that countries have historically relied on industrial policy to promote economic growth and development, thus replacing the primacy of non-interventionism seen a couple of decades ago.<sup>110</sup> Taking account of a globalized market with growing inter-linkages between trade, investment, services, technology, and global value chains, today's industrial policy initiatives reflect a more comprehensive perspective on the steps required to build domestic capacities and systems.<sup>111</sup>

One reason that a government might intervene is in the case of a domestic 'infant industry', i.e., one with high initial fixed costs that make it initially uncompetitive but with an eventually competitive cost structure. New domestic companies may face established foreign enterprises with lower costs and dominant market share. Industrial policy support may come in the form of direct subsidies, access to below-market rates for capital, or provision of cheap inputs to the newly established domestic firms. Economic theory suggests that such support could be welfare-improving if there are important 'positive externalities', such as technological spillovers, that benefit the country as a whole and that are not part of the individual firm's decision-making calculus.

Nigeria, just every other developing nation, ensure that their industrial policies help guide the total strategic effort of all the industries and markets in the country. These policies influence the development of different sectors and create a stronger portfolio of national industry.

**CONCLUSION**

Dumping is to export products into the market of another state at a lower price than their normal value in the exporting country. Sometimes such export price is even equal to or lower than the cost of manufacture of the product, and the budget of making reported by the relevant company through investigation is usually found to be erroneous. It is an unfair practice, as it causes damage to the home industry of the importer country. Therefore, to address this problem, almost all countries have now adopted Anti-Dumping laws to safeguard their local industry.

Currently, the Customs Duties (Dumped and Subsidized Goods) Act, which was passed in 1958, obviously more than 35 years before the 1994 Anti-Dumping Agreement was signed, is only one anti-dumping law in Nigeria. This shows that the regulatory framework for the protection of a country from dumping is obsolete and more importantly, not in line with the current international legal framework. Furthermore, the enforcement of anti-dumping measures in compliance with the laws would lead to a WTO dispute. The gap inadequacy of both the legal and institutional framework has hampered the investigation of the dumping of imported goods and its effect on the local producers. This is a deprivation of their rights under the WTO. It is important for Nigeria to respect WTO rules, not only to avoid dispute settlement but because the rules-based system will also protect Nigerian exporters from abuse of trade remedies in other countries.

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<sup>110</sup> OECD and EDFI. 2013. Perspectives on Global Development 2013. Industrial Policies in a Changing World: Shifting up a Gear. OECD Development Centre. [http://www.irpa.eu/wp-content/uploads/2013/05/OECD\\_Pocket-EditionPGD2013.pdf](http://www.irpa.eu/wp-content/uploads/2013/05/OECD_Pocket-EditionPGD2013.pdf)

<sup>111</sup> Stiglitz, Joseph E., Justin Lin Yifu, and Ebrahim Patel (eds.). *The Industrial Policy Revolution II: Africa in the Twenty-first Century*. (Palgrave Macmillan, 2013)

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