

**AN INQUIRY INTO THE ADEQUACY OF KENYAN  
ANTIDUMPING LAWS IN COMBATING DUMPING**

**MARGARET MUTHONI MWANGI  
G62/82585/2015**

**THESIS SUBMITTED IN PARTIAL FULFILMENT OF  
THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS  
(LL.M) DEGREE OF THE UNIVERSITY OF NAIROBI**

**NOVEMBER, 2018**

## DECLARATION

I Margaret Muthoni Mwangi, hereby declare that this thesis is my original work and has not been submitted in whole or in part in any other University or any examination body for any reward whatsoever.

Signature .....

Date .....

**MARGARET MUTHONI MWANGI**  
**G62/82585/2015**

This thesis has been submitted for examination with my approval as University Supervisor.

Signature .....

Date .....

**DR. WAMUTI NDEGWA**

## **DEDICATION**

To my beloved son Ethan Mwangi; I call you my LL.M. baby. You have always been an inspiration to me and I am grateful for your patience with me as I worked long hours and attended the library to research on my thesis. This work is for you and because of you. I love you.

To Patrick John Mwangi and Catherine Wanjiru Mwangi for your unending support, encouragement and love.

## ACKNOWLEDGMENTS

I wish to thank my parents and my grandfather Dishon Munene who always believed in me and whose encouragement over the years has been my driving force.

To my friends Jane Mugo, Shiro Mwangi and Carol Kinyua who urged me on when I despaired and perceived the completion of this project as impossible.

To the Honourable Justice Mumbi Ngugi, Justice. D. K. N Marete and Justice Jane Onyango who always encouraged me to complete the project and pursue greater heights.

My supervisor Dr. Wamuti Ndegwa; a man with outstanding patience. I remain eternally indebted for your guidance and immense contribution to the quality of my work. I am grateful for the sacrifices you made from your time to ensure that I finished this project successfully.

You all have a special place in Heaven.

Above all I thank God. My rock! Thank you for good health and wisdom to complete this project. Thank you for always surrounding me with favour as with a shield. Psalms 5:12.

Eternally Grateful!

## **ACRONYMS**

COMESA	Common Market for East and Southern Africa
EAC	East African Community
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
IEA-Kenya	Institute of Economic Affairs (Kenya)
ISI	Import Substitution Industrialization
ITA	International Trade Administration Act (South Africa)
ITAC	International Trade Administration Commission of South Africa
SARS	South African Revenue Services
WTO	World Trade Organisation

## TABLE OF CONTENTS

<b>DECLARATION</b> .....	<b>ii</b>
<b>DEDICATION</b> .....	<b>iii</b>
<b>ACKNOWLEDGMENTS</b> .....	<b>iv</b>
<b>ACRONYMS</b> .....	<b>v</b>
<b>ABSTRACT</b> .....	<b>ix</b>

<b>CHAPTER ONE: INTRODUCTION TO AN INQUIRY INTO THE ADEQUACY OF KENYAN ANTIDUMPING LAWS IN COMBATING DUMPING</b> .....	<b>1</b>
1.0. Introduction.....	1
1.1. Statement Of The Problem.....	4
1.2. Research Questions .....	4
1.3. Objectives Of The Study.....	4
1.3.1. Specific Objectives.....	4
1.4. Hypothesis.....	5
1.5. Literature Review.....	5
1.5.1. The Existing Legislative Framework for Dumping in Kenya and Internationally.....	5
1.5.2. The Adequacy of Antidumping Laws in Kenya.....	8
1.6. Theoretical Framework .....	9
1.6.1. Public Interest Theory .....	10
1.6.2. The Utilitarian Theory .....	11
1.6.3. The Comparative Advantage Theory .....	11
1.6.4. The Absolute Advantage Theory.....	12
1.7. Research Methodology .....	12
1.7.1. Scope of Study.....	12
1.7.2. Sample of the Industry.....	13
1.7.3. Method of Collecting Data .....	13
1.7.4. Method Used to Analyze the Data.....	14
1.8. Chapter Breakdown .....	14

<b>CHAPTER TWO: LEGAL AND INSTITUTIONAL FRAMEWORK FOR DETECTING AND COMBATING DUMPING IN KENYA (COMPARATIVE ANALYSIS - SOUTH AFRICA CASE STUDY).....</b>	<b>16</b>
2.0. Legal Framework for Controlling Dumping in Kenya (1980-2017) .....	16
2.1. Justification for Use of South Africa as a Comparator .....	19
2.1.1. Consolidated Statute .....	22
2.1.2. Mechanisms for Detecting & Combating Dumping.....	23
2.1.3. Creation of a Specialized Body for Accepting, Investigating Complaints and Imposition of Anti-Dumping Duties: International Trade Administration Commission .....	25
.....	25
2.1.3.1. Independence of the Commission.....	25
2.1.3.2. Enforcement Procedures and Mechanisms .....	26
2.1.3.3. Well spelt-out Functions and Procedures .....	27
2.1.3.4. The Kenya Trade Remedies Act, a Solution to the Problem of Dumping in Kenya? .....	27
2.2. Conclusion .....	31
 <b>CHAPTER THREE: IMPACT OF INADEQUACY OF KENYA’S LAW ON THE PROCESS OF DETECTING, COMBATTING AND REDRESSING DUMPING . 33</b>	
3.0. Introduction.....	33
3.1. Gaps in Kenya’s Anti-Dumping Legal Framework.....	34
3.1.1 Lack of an Independent Commission/Specialized Body.....	34
3.1.2 Lack of Well Spelt -out Functions and Procedures .....	34
3.1.3 Lack of a Consolidated Statute.....	35
3.1.3 Mechanisms for Detecting and Combating Dumping .....	35
3.1.4 Lack of Proper Definitions of Key Concepts .....	35
3.2. Effects of the Gaps on Dumping in Specific Industries.....	36
3.2.1. The Fishing Industry.....	36
3.2.2. The Textile and Apparel Industry.....	40
3.2.3. The Manufacturing Sector .....	43

3.3.	Dumping as a barrier to Foreign and Local Investments in Kenya .....	47
3.4.	Conclusion .....	50
<b>CHAPTER FOUR: CONCLUSIONS AND RECOMMENDATIONS .....</b>		<b>52</b>
4.0.	Introduction.....	52
4.1.	Conclusions.....	52
4.2.	Lessons and Suggestions.....	54
4.2.1.	Enacting Effective Legislation to Regulate Dumping in Kenya .....	54
4.2.2.	Establish proper enforcement mechanisms .....	55
4.2.3.	Creation of an Institutional Framework and Capacity Building.....	56
<b>5.0.</b>	<b>BIBLIOGRAPHY .....</b>	<b>57</b>
5.1.	Books .....	57
5.2.	Journals.....	58
5.3.	Websites and Online Articles .....	59
5.4.	International, Regional and National Legal Instruments.....	62
5.4.1.	International Legal Instruments .....	62
5.4.2.	Regional Legal Instruments .....	62
5.4.3.	National Legal Instruments.....	62



## ABSTRACT

As the topic suggests, *An Inquiry into the Adequacy of Kenyan Antidumping Laws in Combating Dumping* involves an assessment of the current legal and institutional framework on dumping in Kenya. Chapter 1 identifies the research problem as trying to understand why the legal framework for dumping in Kenya is unable to combat prevent and redress dumping. To examine the problem, the study raises 3 pertinent questions; how should an ideal legal framework regulate dumping, is Kenya's legal framework on regulating dumping effective and what are the gaps in Kenya's anti-dumping legislations. The hypothesis of the study is that Kenya's law on dumping is inadequate and ineffective in combatting, preventing and redressing dumping in Kenya.

Chapter 2 '*Legal and Institutional Framework for Detecting & Combatting Dumping in Kenya (Comparative Analysis-South Africa Case Study)*' develops a theory for testing the hypothesis by building on the public interest theory. The public interest theory holds that legislation should seek the benefit of the public at large. From that premise, the study argues that an ideal legal framework on dumping should at the very least be able to protect the economy from material injury. The chapter examined the existing legal framework for dumping in Kenya. Guided by the argument the study identified the legal framework of South Africa as the ideal since it is established that it succeeds in controlling dumping. Therefore, the study adopted the legal framework of South Africa as the yardstick. In chapter 3 this yardstick was used to test the nature and competence of Kenya's legal framework in controlling dumping.

Chapter 3 '*Impact of Inadequacy of Kenya's Law on the process of Detecting, Combating and Redressing Dumping*' reports that upon testing, the study observed that the legal framework in Kenya has gaps that undermine its effectiveness. Further that these gaps may be contributing to the ineffectiveness in controlling dumping. The gaps identified by this study include: - lack of a consolidated statute, lack of an independent and specialized body to deal with cases of alleged dumping, lack of well laid out functions and procedures, to adequately define key terms in determination of dumping and lack of enforcement procedures and mechanisms.

To test whether these gaps actually undermine the competence of the framework in Kenya, the study interrogated the effect of each gap on effectiveness of the legal framework in controlling dumping in the sampled industries including the textile and apparel industry, the fishing industry, the manufacturing sector and foreign direct investments.

Chapter 4 '*Conclusions and Recommendations*' revisits the hypothesis and the problem statement. The study uses the theory developed in chapter 2 and the observations in chapter 3 to suggest lessons for the legal framework in Kenya.

# CHAPTER ONE: INTRODUCTION TO AN INQUIRY INTO THE ADEQUACY OF KENYAN ANTIDUMPING LAWS IN COMBATING DUMPING

## 1.0.INTRODUCTION

Dumping is regarded as having occurred where the price of a commodity in the importing country is less than the price of the commodity in the ordinary course of trade when sold in the exporting country.<sup>1</sup> When a country exports a product at a price that is lower than the price of the same commodity in the exporting country then dumping can be said to have taken place.<sup>2</sup> The GATT defines dumping as occurring where a firm sells a product at less than the price at which they are normally sold in the domestic market.<sup>3</sup> Dumping is viewed as a form of international price discrimination. It is discriminatory to charge different prices for a commodity.<sup>4</sup>

As a concept, dumping was long practiced before it could even be well articulated and defined.<sup>5</sup> Jacob Viner was the first scholar to systematically put together previous writings on the subject matter in his study *Dumping: A Problem in International Trade* (1923). He defined the concept as price discrimination between national markets.<sup>6</sup> Since the early 1950's the international trading community has distorted natural patterns of trade,<sup>7</sup> through various mechanisms, dumping being the most notable.

Due to the adverse effects of dumping on domestic producers and industries, countries are allowed to impose anti-dumping duties and fines so as to increase the price of the dumped commodities.<sup>8</sup> A caveat is however, placed on the amount of anti-dumping duties that can be imposed. The WTO rules sets the ceiling beyond which countries cannot exceed. The maximum

---

<sup>1</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201.

<sup>2</sup> Kevin Watkins and Penny Fowler: *Rigged Rules and Double Standards: Trade, Globalization and the Fight against Poverty* (Oxfam International 2002), at p.105.

<sup>3</sup> *Supra*, (n.1).

<sup>4</sup> B Dunlop, D. McQueen and M. Trebilcock, 'Canadian Competition Policy: A legal and economic Analysis' in R. S. Khemani, W. T. Stanbury (eds), *Historical Perspectives on Canadian Competition Policy* (Institute for Research on Public Policy, Toronto, 1991) at p.208.

<sup>5</sup> John Howard Jackson & Edwin A. Vermulst (eds), *Antidumping Law and Practice: A Comparative Study* (University of Michigan Press, 1989).

<sup>6</sup> Jacob Viner, 'Dumping: A Problem in International Trade' [2017]18(2) AJIL <<https://www.jstor.org/stable/2188424>> at p.391, accessed 31 September 2018.

<sup>7</sup> John J. Barceló III, 'Antidumping Laws as Barriers to Trade--The United States and the International Antidumping Code' (1972) Cornell Law Faculty Publications Paper 514 <<http://scholarship.law.cornell.edu/facpub/514>> accessed 26 August 2018.

<sup>8</sup> Agreement on Implementation of Article VI of the GATT 1994, *supra*, (n.2).

amount of antidumping duty that can be imposed is the full amount of the margin of dumping. However, Article 9 of the Antidumping Agreement provides that it is desirable to impose a lesser duty if the same is sufficient to offset dumping. Further, a country must demonstrate material injury to one or more of its domestic industries or a threat in the upcoming domestic industries.<sup>9</sup> Under the anti-dumping agreement, a country may react to dumping by issuing provisional measures, accepting voluntary price undertakings or through the imposition of definitive antidumping duties which should not in any event exceed the margin of dumping.

For an international trade regime that prides itself in liberalism and elimination of protectionism by countries, misuse of anti-dumping duties is viewed as retrogressive. These countries have to follow certain safeguards in terms of the procedure adopted in cases of dumping to ensure that such measures are not abused.<sup>10</sup>

The main goal of any exporter engaging in dumping is to unfairly acquire a market share in the specific industry in the country in which the goods are imported. The advantages of this practice for the country where the goods originate from include: market dominance, the creation of employment and increased cash flow. The reverse is true for the importing country which suffers destruction of infant industries, reduction in capacity utilization, reduced cash flow and unemployment are just to mention but a few effects that dumping has on any economy.<sup>11</sup>

The international rules against dumping are contained in Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter GATT),<sup>12</sup> as well as in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter the Anti-Dumping Agreement).<sup>13</sup> Article VI, aptly titled Anti-Dumping and Countervailing Duties, lays down umbrella provisions which guarantee member countries that they can apply duties and other protective measures to products deemed to have been dumped within their territories.

Kenya is a member of the World Trade Organisation (WTO) and therefore a party to Article VI on the General Agreement on Tariffs and Trade (GATT). The GATT provides that dumping

---

<sup>9</sup> Elizabeth J. Rowbotham, 'Dumping and Subsidies—Their Potential Effectiveness for Achieving Sustainable Development in North America' [1993]27(6) *Journal of World Trade*, at p.145 <<https://www.kluwerlawonline.com>> accessed 28 September 2018.

<sup>10</sup> Ademola Oyejide and Dominique Njinkeu (eds), *Africa and the World Trading System Vol. 2 Case Studies* (Africa World Press, Inc., 2007) at p.26.

<sup>11</sup> *Ibid.*

<sup>12</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

<sup>13</sup> Agreement on Implementation of Article VI of the GATT 1994, *supra* (n.1).

occurs when a product from a certain country otherwise referred to as the exporting country is brought into and sold in the economy of another country otherwise referred to as the importing country at a price that is lower than the price of the like product sold in the importing country in the ordinary course of trade. Normal or fair value is regarded as the price of the product in the home country of the exporting country and where there is no home market to compare with, the highest comparable price of the product in third countries.<sup>14</sup>

Therefore when the price in the exporting country of the like product is higher than the price in the importing country the product is regarded as having been dumped. In cases where there is no price with which to compare with in the exporting country, then the highest price of the product when sold in a third country or final sale price having considered a reasonable profit margin should be used as a comparator in order to determine whether dumping has occurred. This occurs after all the factors that may have an effect on the price of the commodity have been factored in such as taxation and differences in cost of production.

Article VI is devoid of detailed provisions that elaborate the exact mechanisms for assessing and determining whether dumping has occurred and imposing anti-dumping duties. Put differently, Article VI does not provide governments the tools for determining how they should react to dumping. This gap is satisfied by the provisions of the Anti-Dumping Agreement, which provides detailed rules and processes of determining whether dumping has occurred, the subsequent process of investigating, as well as the remedial actions.

Kenya's economy continues to suffer the adverse effects of dumping. These include weakening and killing of local industries and rampant unemployment and lower standards of living.<sup>15</sup> A possible reason why dumping is thriving in Kenya's economy may be the inadequacy of dumping legislation to deal with the same. Adequate legislation is important in providing the necessary safeguards for different sectors of the economy as it ensures that there are rules and regulations to guide and regulate international trade. It ensures a particular nations economic welfare and also that adequate measures are available in the event of breach.<sup>16</sup>

---

<sup>14</sup> Michael Leidy and Bernard Hoekman, 'Production Effects of Price and Cost Based Anti-Dumping Laws under Flexible Exchange Rates' [1990]23(4) The Canadian Journal of Economics, <<https://www.jstor.org/stable/135567>> accessed on 17 October 2018.

<sup>15</sup> The Institute of Economic Affairs, (Trade Notes) (July, 2013)31, 'Antidumping as a Trade Remedy: The Way Forward for Kenya' <<http://www.ieakenya.or.ke/publications/notes/anti-dumping-as-a-trade-remedy-the-way-forward-for-kenya>> accessed on 28<sup>th</sup> November 2018.

<sup>16</sup> Terence Daintith, *Law as an Instrument of Economic Policy-Comparative and Critical Approaches* (Volume 7 of European University Institute 1988) 26.

The adverse effects of dumping on Kenya's industries necessitates quick remedial action. Key among these is the review of the current legal framework on dumping in Kenya with a view to determine whether the same is adequate enough to deal with the vice and its adverse effects on Kenya's economy.

This research project seeks to review the current legislative framework on dumping in Kenya and where gaps are found in the law to recommend necessary measures to ensure that the law is effective in dealing with dumping. The research will compare the approaches of countries such as South Africa in combating dumping for several reasons. The main reason being that South Africa has anti-dumping legislation which succeeds in controlling dumping. In interrogating the inadequacy of Kenya's antidumping legislation, the study will draw from the experience of South Africa that has managed to control dumping.

### **1.1. STATEMENT OF THE PROBLEM**

The problem identified by this research is why the legal and institutional framework on dumping in Kenya is unable to combat, prevent and redress dumping in the country.

### **1.2. RESEARCH QUESTIONS**

The research seeks to answer several questions: How should an ideal legal framework regulate dumping? Is Kenya's legal and institutional framework on regulating dumping effective and what are the gaps in Kenya's anti-dumping legislations?

### **1.3. OBJECTIVES OF THE STUDY**

The objective of this study is to investigate whether the current legislative framework on dumping is adequate. If the law is inadequate this study will suggest reforms to control dumping.

#### **1.3.1. Specific Objectives**

This study seeks to achieve the following specific objectives: To examine what comprises an ideal legal and institutional framework in regulation of dumping; to analyze the effectiveness or otherwise of Kenya's legal and institutional framework that regulates and to Identify gaps in Kenya's anti-dumping laws and institutions and their effects with a view to suggesting solutions.

## **1.4. HYPOTHESIS**

This research expects to find that the law on dumping in Kenya is inadequate and ineffective in combatting, preventing, and redressing dumping and its effects in Kenya. The study also expects to make the finding that the legal and institutional framework on anti-dumping in Kenya does not provide an effective enforcement mechanism against dumping in the country.

## **1.5. LITERATURE REVIEW**

This section will review the literature available for anti-dumping nationally, regionally and internationally. In view of the wealth of scholarly material available on the subject, the study will limit itself to interrogating the literature under two broad themes, enumerated as follows:

- a) The existing legislative framework for dumping both nationally, regionally and internationally; and
- b) The inadequacy of Anti-dumping legislations in Kenya.

### **1.5.1. The Existing Legislative Framework for Dumping in Kenya and Internationally**

The Institute of Economic Affairs reviews the laws governing dumping in Kenya.<sup>17</sup> The Customs and Excise Act 2010, is the main legislation relating to dumping. The Act provides that if a product is introduced into Kenya's economy at a price less than the comparable price of the product when it is sold in the country of export and where such an act results in material injury dumping is said to have occurred.<sup>18</sup>

Dumping is expressed in only two substantive section of our laws. This forms part of the problem sought to be addressed by this research project. The adverse effects of dumping that continue to be felt in our economy suggest that the law may not be adequate.

Kenya is a member state of WTO<sup>19</sup> and therefore by dint of Article 2(5) & (6) of the Constitution of Kenya, all WTO agreements are applicable,<sup>20</sup> including: Article VI of the General

---

<sup>17</sup> The Institute of Economic Affairs, (Trade Notes) (July, 2013)31, 'Antidumping as a Trade Remedy: The Way Forward for Kenya' <<http://www.ieakenya.or.ke/publications/notes/anti-dumping-as-a-trade-remedy-the-way-forward-for-kenya>> accessed on 21 February 2018.

<sup>18</sup> Ibid, at p.2.

<sup>19</sup> [https://www.wto.org/english/thewto\\_e/countries\\_e/kenya\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/kenya_e.htm) accessed on 27 October 2018. Kenya has been a WTO member since 1 January 1995 and a member of GATT since 5 February 1964.

<sup>20</sup> Katasi, Grace N., 'The inadequacy of Kenya's antidumping law, regulations and administrative procedures under the wto/gatt 1994 framework', (2010) College of Humanities and Social Sciences (CHSS) [21825] <<http://erepository.uonbi.ac.ke/handle/11295/16458>> accessed on 25 October 2018.

Agreement on Tariffs and Trade (GATT) 1994<sup>21</sup>, and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 also referred to as the Agreement on Anti-Dumping (ADA),<sup>22</sup> which contain umbrella provisions for investigating cases of dumping and imposing anti-dumping duties by member states.<sup>23</sup> The Antidumping Agreement obligates member states who use the policy to develop and create an administrative procedure to investigate cases which call for antidumping protection.<sup>24</sup>

The study has opted to rely on the antidumping law of South Africa as a yardstick for several reasons: - South Africa has the International Trade Administration Act (ITA) (hereinafter referred to as the “Act”)<sup>25</sup> as well as the Regulations made thereunder as the main laws regulating dumping. The Act and the Regulations outline the procedure to be followed for investigating dumping and imposition of antidumping duties in South Africa.<sup>26</sup> The investigative body concerned is the International Trade Administration Commission (ITAC). Having in place a preexisting body ensures experience and expertise in the process of identification and investigating claims of dumping. The existing body also creates certainty and confidence on the part of the local industries. It is for this reason that this study will rely on the law in South Africa which is considered to be consistent with the WTO antidumping Agreement.<sup>27</sup>

Lowenfeld focuses on the issue of dumping and anti-dumping and describes the terms from both a layman's perspective as well as provided in Article VI of the GATT.<sup>28</sup> He provides a popular definition which involves a seller selling commodities at a price that is lower in order to dispose off surplus. In real sense the concept of dumping is more complex and involves consideration of more technical components.<sup>29</sup>

---

<sup>21</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). Article VI of GATT 1994 is titled “Anti-dumping and Countervailing Duties.”

<sup>22</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201.

<sup>23</sup> The Institute of Economic Affairs, (Trade Notes) (July, 2013)31, ‘Antidumping as a Trade Remedy: The Way Forward for Kenya’ *supra* (n.15).

<sup>24</sup> Chad P. Brown, “The WTO and Antidumping in Developing Countries,” (November 2007) [http://people.brandeis.edu/~cbrown/papers/AD\\_developing.pdf](http://people.brandeis.edu/~cbrown/papers/AD_developing.pdf) accessed on 28 October 2018.

<sup>25</sup> International Trade Administration Act (ITA), Act No. 71 of 2002, as introduced through South Africa’s Gazette No. 24287 on 22<sup>nd</sup> January 2003.

<sup>26</sup> Loinas Ndlovu, ‘An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa’s Dumping and Anti-dumping Law’ *supra* (note 5), at p.33.

<sup>27</sup> ITAC, <http://www.itac.org.za/pages/services/trade-remedies> accessed on 28 October 2018.

<sup>28</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *supra* (n.1).

<sup>29</sup> Andreas Lowenfeld, *International Economic Law* (Oxford University Press, 2008, Oxford).

Article 2.4 of the Uruguay Round Anti- Dumping Agreement restates the need for comparing fairly the price of the commodity in the country that imports it against the price of the commodity when sold in the country of origin in the ordinary course of trade otherwise referred to as the normal value.<sup>30</sup> Lowenfeld also provides useful literature on establishing whether indeed dumping has occurred and determining the margin of dumping both of which are crucial in any dumping determination. He interrogates the parameters that are to be considered when determining whether or not dumping has taken place.<sup>31</sup>

Critics of antidumping law such as Heokman and Leidy opine that the persuasive aspect of anti-dumping-law to prevent predatory pricing can be taken care of by antitrust or competition law and that therefore there is no strong need to preserve anti-dumping laws.<sup>32</sup> This argument is, however, simplistic and this study agrees with the counterargument thereof which holds that antidumping laws are not aimed chiefly at predatory pricing, but rather the disruption of fair trade by selling the commodity or product at a lower price in the country importing it while at the same time selling the same product at a higher price with no reasonable justification at a higher price in the country of origin.<sup>33</sup>

Tribelcock and Howse also provide information that is useful to the study.<sup>34</sup> They provide a background to the international legislative framework on the issue of antidumping as well as the amendments made thereto over the years. They focus on the history of antidumping law and the various rounds of negotiations. These include the Kennedy Round where the antidumping code was developed to clarify the ambiguity in Article VI of the GATT regarding the criteria and procedures for invocation of antidumping actions. The Tokyo round introduced key changes in respect of key concepts such as injury and causality. The Uruguay Round sought to bring consistency in applying antidumping principles through adopting the Antidumping Agreement. It also led to the creation of the World Trade Organization (WTO).<sup>35</sup>

---

<sup>30</sup> Ibid, at p.271.

<sup>31</sup> Ibid.

<sup>32</sup> Bernard Hoekman & Michael Leidy, 'Antidumping and Market Disruption: The Incentive Effects of Antidumping Laws in The Multilateral Trading System: Analysis and Options for Change' (Robert Stern ed., 1993) as cited in Richard J. Pierce, Jr., 'Antidumping Law as Means of Facilitating Cartelization' [2000]67(3) Antitrust Law Journal <<https://www.jstor.org/stable/40843448>> accessed 14 October 2018.

<sup>33</sup> Ibid.

<sup>34</sup> M. J. Trebilcock, Robert Howse & Antonia Eliason., *The Regulation of International Trade* (4<sup>th</sup> edn, Routledge, 2012) at p.517.

<sup>35</sup> GATT 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, *supra* (n.12).



Owais Khan also provides information useful to this study.<sup>36</sup> He traces the history of anti-dumping laws in the world citing the Canadian Anti-Dumping Act of 1904 which was the first act to be enacted on dumping in the world. He also notes that the main reason cited for enacting antidumping legislation among many countries in the world is the need to protect local industries from distortions that arise due to dumping. He however appears to make an argument against antidumping laws and suggests that the same are abused by countries for political reasons.

### **1.5.2. The Adequacy of Antidumping Laws in Kenya**

Having considered the legal framework for dumping in Kenya and the effects of dumping that continue to be felt, it is worth reviewing the question whether Kenya's antidumping law is adequate.

Sheehy and Feaver state that having ineffective legislation can be just as harmful to society as having no regulation or overregulation.<sup>37</sup> In their view they suggest that law makers should shift their focus from the consequences that laws have on society. The main concern for legislators in their view should be coming up with specific policy objectives where targets of legislation are clearly set out.<sup>38</sup> The Institute of Economic Affairs (IEA Kenya) reviews the law of dumping in Kenya. In its article, the Institute also provides statistics of dumping in the economy. The conclusion is that dumping continues to be felt across several sectors of the economy such as the plastics and textile industry.<sup>39</sup> Therefore raising the question whether the law in Kenya is adequate to combat dumping.

Kenya is a member of the East African Community (EAC)<sup>40</sup> and therefore party to the East African Community Customs Union: Anti-dumping Measures Regulation,<sup>41</sup> established to implement the provisions of Article 16 of the Protocol establishing the East African Community

---

<sup>36</sup> Owais Hassan Khan, *A Critique of Anti-Dumping Laws* (Cambridge scholars Publishing 2018) 12-13.

<sup>37</sup> Benedict Sheehy and Donald Fever, 'Designing Effective Legislation: A Normative Theory' [2015]38(1) University of New South Wales Law Journal, <<https://www.austlii.edu.au/au/journals/UNSWLJ/2015/14.html>> accessed 20 October 2018.

<sup>38</sup> Ibid.

<sup>39</sup> The Institute of Economic Affairs, (Trade Notes) (July, 2013)31, 'Antidumping as a Trade Remedy: The Way Forward for Kenya' *supra* (n.15).

<sup>40</sup> Established under the Treaty for the Establishment of the East African Community (Adopted 30<sup>th</sup> November 1999; entered into force 7<sup>th</sup> July 2000), Arusha (As amended on 14<sup>th</sup> December, 2006 and 20<sup>th</sup> August, 2007), see Article 2(1), <[http://eacj.org/?page\\_id=33](http://eacj.org/?page_id=33)> accessed 17 September 2018.

<sup>41</sup> EAC Customs Union Regulations: Anti-Dumping Measures, <<https://www.eac.int/customs/customs-regulations/anti-dumping-measures>> accessed on 17 September 2018.

Customs Union.<sup>42</sup> It seeks to ensure that partner states apply antidumping measures uniformly. Kenya is also a member state of the Common Market for East and Southern Africa (COMESA) established pursuant to the Treaty establishing the Common Market for East and Southern Africa.<sup>43</sup> Member states can apply COMESA safeguard regulations in dealing with cases of dumping.<sup>44</sup> These measures have enabled her to protect her industries from threats posed by countries such as India, Egypt China etc.<sup>45</sup>

Kenya has on several occasions invoked Article 52 of the COMESA protocol to deal with dumping of goods. However, it would appear that despite the legislation we have in place, adverse effects of dumping continue to be felt. It is therefore the purpose of this study to interrogate the adequacy and effectiveness of the existing national, regional and international laws against anti-dumping of goods in Kenya, and *ipso facto* make recommendations.

## **1.6.THEORETICAL FRAMEWORK**

The guiding theory for this study is that the reason why Kenya's legal framework is unable to control dumping is that the framework does not have certain qualities that are essential for a framework on dumping to be effective. Since there are no settled guidelines on what these qualities should be, this study asserts that the qualities can be identified by examining the legal frameworks that succeed in controlling dumping.

An ideal legal framework is one that succeeds in controlling the vice which it was aimed at controlling. In the case of dumping that would be a law that succeeds in controlling dumping. This study argues that Kenya's legal framework on dumping is ineffective because it does not make provision for an independent commission /specialized body but rather relies on an advisory committee appointed by the minister on an ad hoc basis.<sup>46</sup> Secondly, the law is ineffective because it does not contain well set out functions and procedures. The Act provides that the Minister shall publish regulations detailing the Procedure to be followed by the Advisory Committee in

---

<sup>42</sup> Protocol on the Establishment of the East African Customs Union (Enacted 8<sup>th</sup> March 2004; entered into force 1<sup>st</sup> January 2005) <[https://www.jus.uio.no/english/services/library/treaties/09/9-04/eac\\_establishment\\_protocol.xml](https://www.jus.uio.no/english/services/library/treaties/09/9-04/eac_establishment_protocol.xml)> accessed on 17 September 2018.

<sup>43</sup> Treaty establishing the Common Market for Eastern and Southern Africa, 33 ILM 1067 (1994) <<http://www.comesa.int/wp-content/uploads/2016/06/COMESA-Treaty.pdf>> accessed on 17 September 2018, see Article 1.

<sup>44</sup> Ibid, Articles 51, 54, and 125.

<sup>45</sup> Peter Munaita, 'Kenya to Invoke Anti-dumping Rules against Egypt' *The East African* (Kenya, 30 June 2006) accessed from <[www.theeastafrican.co.ke/business/2560-248628-uv12iu/index.html](http://www.theeastafrican.co.ke/business/2560-248628-uv12iu/index.html)> accessed on 26 June 2017.

<sup>46</sup> Customs and Excise Act, Cap 472 of the Laws of Kenya, section 125 (1).

investigating cases of dumping. Lack of enforcement mechanisms, lack of proper definitions of concepts such as material injury which are crucial in the determination of dumping. The Act only defines injury and the definition provided is narrow.<sup>47</sup> Both the South African legislation and the Anti-dumping Agreement have attempted to widen the scope of this definition by providing the following opening statements to the relevant sections that “unless the opposite intention appears from the context” The law is also ineffective as it does not provide for appointment and powers of investigators who are crucial in investigating cases of alleged dumping.

This argument is founded on four main theories namely, the public interest theory, the utilitarian theory, and the comparative advantage theory. This part will describe each of the theories and how they address the conceptual problem of adequacy of anti-dumping laws in Kenya.

### **1.6.1. Public Interest Theory**

The Public interest theory provides that regulation seeks the benefit of the public at large. The theory was first advanced by Arthur Cecil Pigou.<sup>48</sup> According to these public interest theorists, government regulation is the best way to deal with inefficient market in society such as imperfect competition and dumping. In the view of public interest theorists, legislation can improve the allocation of resources by facilitating and maintaining market operations.<sup>49</sup> The theory is based on two main assumptions. First those markets fail because of monopoly problems. Second, governments have the ability to correct market failures through legislation.<sup>50</sup> According to the theory, government regulation is the only sure way of dealing with market inefficiencies and disadvantages arising from competition.

This research project relies on this theory because it sheds light on the need for adequate legislation in order to correct distortions in free trade occasioned by dumping. The theory will also provide guidance on the factors that legislators should bear in mind when considering reforms to laws that are regarded as inadequate. This research agrees with the main proposition of the theory

---

<sup>47</sup> Ibid, section 126 (3).

<sup>48</sup> Johan den Hertog, ‘5000 General Theories of Regulation’ [1999] Economic Institute/ CLAV, Utrecht University <<https://majandus.ut.ee/sites/default/files/mtk/dokumendid/e35f555bc5922cc21262fabfac7de2fc.pdf>> accessed 21 October 2018.

<sup>49</sup> Ibid.

<sup>50</sup> Andrei Shleifer, ‘Understanding Regulation’ [2005]11(4) European Financial Management, <[https://scholar.harvard.edu/files/shleifer/files/02\\_eufm00121.pdf](https://scholar.harvard.edu/files/shleifer/files/02_eufm00121.pdf)> accessed 20 October 2018.

and suggests that the only way to effectively deal with the issue of dumping in Kenya is through regulation.

### **1.6.2. The Utilitarian Theory**

This theory was advanced by theorists such as Jeremy Bentham and John Stuart Mill two key utilitarian theorists. The core of Jeremy Bentham's philosophy is the utility principle. The principle presupposes that any actor should choose an action that results in the greatest good for the majority.<sup>51</sup> In his view, laws should be crafted in a way that produces the best results for the greater number of people.

Actions are classified as either good or bad depending on the amount of happiness they produce. The greatest happiness principle judges actions as good or bad depending on the proportion of happiness that they produce. The focus therefore appears to be on the consequences of the action. This theory is useful to this study as it sheds light on what legislators should focus on in reforming the anti-dumping law. It is critical to focus on the greater good of Kenyan's suffering as a direct result of dumping on industries such as fishing and textile in Kenya.

### **1.6.3. The Comparative Advantage Theory**

Comparative advantage theorists argue that countries with comparative advantage have lower operating costs of producing goods than the others. One of the key proponents of the theory is David Ricardo. The main argument advanced is that when a country is able to produce a particular more cheaply than another it is said to have a comparative advantage.<sup>52</sup> The main issue for consideration is whether a country can produce a certain product at a lower opportunity cost than another if so then the same country can be regarded as having a comparative advantage in respect of that product.<sup>53</sup>

This theory will inform this study in that it may be used to explain reasons why some countries are able to produce at low cost and therefore are able to sell their products at lower costs than other countries. This theory may be used to explain or justify the lower prices of commodities charged

---

<sup>51</sup> Philip Schofield, 'Jeremy Bentham and Nineteenth –Century English Jurisprudence' [1991] 12 J. Legal Hist. at p.59, < [www.tandfonline.com/doi/abs/10.1080/01440369108531028](http://www.tandfonline.com/doi/abs/10.1080/01440369108531028)> accessed on 23 September 2018.

<sup>52</sup> Andrea Maneschi, *Comparative Advantage in International Trade: A Historical Perspective* (Edward Elgar Publishing, 1998) 10.

<sup>53</sup> *Ibid.*

for the same commodities in the importing country. It is also useful in providing insight as to why some countries are reluctant to take any measures against dumping despite the harsh effects in their economies.

#### **1.6.4. The Absolute Advantage Theory**

The absolute advantage theory also informs this study. The theory was developed by Adam Smith in 1776.<sup>54</sup> Theorists under this school of thought argue that if a country has an absolute advantage, it produces a greater output of a good than another country employing the same amount of resources. They argue that countries will be more inclined to produce and export those goods in which they enjoy a relative lower marginal cost than competitors producing the same goods.<sup>55</sup> This theory is useful for this study and shall be used to explain how some unscrupulous exporters take advantage of inadequate legislation and maximize the economic advantages of dumping.<sup>56</sup> These traders may attempt to justify lower prices in the importing country by citing the fact that they have an absolute advantage in production of those particular goods or commodities.

The study will undertake a comparative analysis with countries like South Africa which have been successful in combating dumping through the use of legislation.

### **1.7. RESEARCH METHODOLOGY**

#### **1.7.1. Scope of Study**

The study was carried out between 1980's to 2017. The reason this period was selected is because Kenya did not have an antidumping law at the time. In the period before the 1980's Kenya like many other African countries that had gained independence implemented aggressive Import Substitution Industrialization (ISI) policies which imposed 100% duties on goods sold in Kenya and not sourced from Kenya in a bid to nurture young and budding industries and protect them

---

<sup>54</sup> Reinhard Schumacher, *Free Trade and Absolute and Comparative Advantage: A Critical Comparison of Two Major Theories of International Trade* (Universitätsverlag Potsdam, 2012) 13.

<sup>55</sup> Avinash Dixit and Victor Norman, *Theory of International Trade: A Dual, General Equilibrium Approach* (Cambridge University Press, 2010, Cambridge).

<sup>56</sup> Meng Tao, "Dumping and antidumping regulations with specific reference to the legal framework in South Africa and China," (LLM, University of The Free State, 2006)  
<<http://scholar.ufs.ac.za:8080/xmlui/bitstream/handle/11660/1542/TaoM.pdf?sequence=1&isAllowed=y>> accessed on 28 November 2018.

from unfair competition. This was in recognition of the fact that the Kenyan industries were not on a level playing field with the industries of the industrialized states.<sup>57</sup>

In the mid 1980's the country saw the introduction of Structural Adjustment Programs (SAP's) which led to increased liberalization and hence dumping of goods into the economy. The Structural Adjustment Programs included a set of policies which sought inter alia to open up the Kenyan market and allow prices to be dictated by the market forces. The policies were introduced by the World Bank and the International Monetary Fund as a pre-condition to granting of loans to the Kenyan people.<sup>58</sup>

It was at the time that many manufacturing industries were closed down with some downscaling their operations.<sup>59</sup> This study also takes notes that in 2017 the country introduced the Kenya Trade Remedies Act<sup>60</sup> and this shall be interrogated later in this study.

### **1.7.2. Sample of the Industry**

The study selected the fishing, textile and apparel as well as the manufacturing sectors in Kenya. The reason for this is that these sectors have for many years been affected by dumping.

### **1.7.3. Method of Collecting Data**

The research will evaluate and investigate the adequacy of anti-dumping legislation in Kenya and on this basis it will make use of qualitative methods of research as is appropriate.

To answer the question of whether the law on dumping in Kenya is inadequate, this research will require information on the existing antidumping law in Kenya and the gains made by this laws achieved in combating the adverse effects of dumping. The research project will also compare the law of Kenya with that which is existent in other countries such as South Africa which have been

---

<sup>57</sup> Dianah Ngui et.al, "Kenya's Industrial Development: Policies, Performance, and Prospects" in Carol Newman, et.al (eds), *Manufacturing Transformation Comparative Studies of Industrial Development in Africa and Emerging Asia* (Oxford Scholarship Online, August 2016) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198776987.001.0001/acprof-9780198776987-chapter-4> accessed on 28 October 2018.

<sup>58</sup> Joseph Rono, 'The Impact of Structural Adjustment Programs on Kenyan Society' (2002) Vol 17 No. 1 Journal of Social Development in Africa, 81.

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.604.5211&rep=rep1&type=pdf>> accessed on 26<sup>th</sup> November 2018.

<sup>59</sup> Supra (n 57).

<sup>60</sup> Kenya Trade Remedies Act, No. 32 of 2017 (Government Printers, 2017, Nairobi).

successful in combating dumping. Comparing the law of Kenya against the ideal will give a pointer as to the gaps in our antidumping law.

The research will employ desk-based research to determine the effectiveness of the law in combating the adverse effects of dumping in Kenya as well as other countries such as South Africa. The research will undertake a comparative approach borrowing from the historical data and literature of South Africa which has in the past suffered the adverse effects of dumping and has managed to combat the problem to a large extent through the use of anti-dumping legislation. The study will, therefore borrow from the experience of South Africa.

#### **1.7.4. Method Used to Analyze the Data**

The research project will employ a qualitative approach to analyze the data obtained from the various sources highlighted above. It will analyze the quality of the law on dumping in Kenya. The study will analyze secondary sources to determine what an ideal law on dumping is or should look like. A qualitative analysis of the data obtained will give clarity on the relationship between the inadequacy of the law and the effects of dumping in Kenya.

### **1.8. CHAPTER BREAKDOWN**

The following is a sequence of the chapters in the research:

**Chapter one**, previously the proposal, provides the necessary background and setting up the topic of research. It contains the following subheadings: the background to the study, statement of the problem, literature review, theoretical framework, and objectives of the study, hypotheses (basic assumptions, research questions, methodology of research, and a preliminary chapter breakdown.

**Chapter Two** will examine the essentials of an ideal legal and institutional framework on dumping, analyze Kenya's laws on dumping and assess the effectiveness thereof. The Chapter will examine the antidumping law of South Africa in sufficient detail with a view to drawing out the Key elements that have contributed to its success in controlling dumping in South Africa.

**Chapter Three** will use the ideal elements identified in South Africa's antidumping laws as a yard stick in determining the gaps in Kenya's laws on dumping. The chapter will also examine the impact of the gaps and ineffectiveness of Kenya's anti-dumping law on various sectors of the

country's economy. The effects have both direct and indirect consequences and stall the achievements of Kenya's Vision 2030, the country's blueprint for development.

Finally, **Chapter Four** will culminate the research by making conclusions on whether the primary and secondary objectives have been fulfilled, and whether the hypotheses have been tested true or false. Further, based on analysis of national, regional and international laws on dumping that are applicable to Kenya, review of various literature and examination of effects of the problem of dumping, this Chapter will propose a number of recommendations as a means of scholarly contribution to the problem of dumping.



## CHAPTER TWO: LEGAL AND INSTITUTIONAL FRAMEWORK FOR DETECTING AND COMBATING DUMPING IN KENYA (COMPARATIVE ANALYSIS - SOUTH AFRICA CASE STUDY)

### 2.0. Legal Framework for Controlling Dumping in Kenya (1980-2017)

The study noted that during the period between 1980- 2017 the substantive law applicable on issues relating to dumping was sections 125 and 126 of the Customs and Excise Act which were largely ineffective as effects of dumping worsened during this period. It is however noteworthy that Kenya has now enacted the Kenya Trade Remedies Act No. 32 of 2017 which is the substantive and procedural law on issues relating to dumping in Kenya and this will be interrogated later in this study.

The Act makes provision for appointment of an advisory committee by the Minister to investigate cases of dumping in Kenya.<sup>1</sup> The committee is appointed on an *ad hoc* basis and is to be guided by regulations issued by the Minister.<sup>2</sup> The study also noted that the Customs and Excise (Antidumping and Countervailing Measures) Regulations, 1999 are applicable in cases of dumping though the same have proved ineffective.

The Institute of Economic Affairs (IEA) reviewed the laws governing dumping in Kenya.<sup>3</sup> The Customs and Excise Act 2010, is the main legislation applicable in cases of dumping. The Act provides that goods shall be considered as dumped where the export price of the good is lower than the normal value of the same product when sold in the ordinary course of trade in the exporting country. Further for a commodity to be regarded as having been dumped there must be positive evidence of material injury real or threatened to an existing domestic industry or to the establishment of a domestic industry.<sup>4</sup>

Other than defining what constitutes dumping, the Act does not define key elements that would be relevant in considering whether dumping has occurred. Some of the key concepts include injury, *de minimis* principle, like product, normal value, causation and antidumping duties. These concepts are crucial in the determination of determining and therefore should be well defined. In

---

<sup>1</sup> Customs and Excise Act, Cap 472, Laws of Kenya, section 125(1).

<sup>2</sup> Ibid, Section 12(2).

<sup>3</sup> The Institute of Economic Affairs, (Trade Notes) (July, 2013)31, 'Antidumping as a Trade Remedy: The Way Forward for Kenya' at p.4 <<http://www.ieakenya.or.ke/publications/notes/anti-dumping-as-a-trade-remedy-the-way-forward-for-kenya>> accessed on 21<sup>st</sup> February 2018.

<sup>4</sup> Ibid, at p.2.

defining what constitutes dumping the Act makes mention of a “product” and leaves no room for the “like product”. The study noted that the Act as well as the Antidumping Agreement both make mention of the concept of like product. In the Kenyan context it would appear that dumping would be hard to prove if the products under consideration as the Act does not give room for product differentiation.

The definition of injury contained in the Customs and Excise Act is simplistic and narrow. It does not cover a wide base. The study notes that Article VI of the GATT as well as the Anti-Dumping Agreement do not define injury per se but rather provide for how injury may be determined. Article 3 provides that dumping should not be based on conjecture but rather on positive evidence. The process of determining whether dumping has occurred involves an examination of the volume of dumped goods as well as the impact if any that they may have on the prices of goods in the domestic market.<sup>5</sup>

However, it is well established that this framework is not effective in controlling dumping in Kenya. The question that arises is how should Kenya’s legal framework regulate dumping? The literature review established that there is no known criterion for establishing an effective legal framework. Consequently, this study set out to develop an argument for designing an ideal legal framework. The study was guided by the public interest theory.

Public interest theory provides that any law or regulation enacted should have as its primary goal to benefit the public. The theory was first advanced by Arthur Cecil Pigou.<sup>6</sup> According to these public interest theorists, government regulation is the best way to deal with inefficient market in society such as imperfect competition and dumping. In the view of public interest theorists, legislation can improve the allocation of resources by facilitating and maintaining market operations.<sup>7</sup> The theory is based on two main assumptions. First those markets fail because of monopoly problems. Second, governments have the ability to correct market failures through legislation.<sup>8</sup>

---

<sup>5</sup> Article VI (3) GATT, 1994.

<sup>6</sup> Johan den Hertog, ‘5000 General Theories of Regulation’ [1999] Economic Institute/ CLAV, Utrecht University <<https://majandus.ut.ee/sites/default/files/mtk/dokumendid/e35f555bc5922cc21262fabfac7de2fc.pdf>> accessed 21 October 2018.

<sup>7</sup> Ibid.

<sup>8</sup> Andrei Shleifer, ‘Understanding Regulation’ [2005]11(4) European Financial Management, <[https://scholar.harvard.edu/files/shleifer/files/02\\_eufm00121.pdf](https://scholar.harvard.edu/files/shleifer/files/02_eufm00121.pdf)> accessed 20 October 2018.

In developing the argument for designing the legal framework, the study noted that dumping is not in and of itself illegal, for dumping to be considered illegal within the meaning provided under the WTO rules, it has to result in ‘material injury’ to the domestic industries.<sup>9</sup> From the definition of dumping discussed widely in Chapter 1, dumping is actionable or dumping measures can only be taken where it is found through positive evidence that dumping has occurred and that the same has resulted to material injury in the economy of the importing country.<sup>10</sup>

The study noted that there is no explicit definition of the concept of material injury. It was noted however that it can be said to result when there is a high dumping margin and significant differences in prices.<sup>11</sup> The determination of whether there is material injury occasioned on the domestic industry, an investigating body must on the basis of positive evidence and objectively examine the changes in quantities of the product alleged to have been dumped and the effects if any that it has on the domestic industry. The investigating officer must ask bear in mind 2 key questions: - first whether there are signs of injury on the domestic industry and secondly whether the signs of the injury evident on the local industry are a direct consequence of dumping or whether there are other factors contributing to them.<sup>12</sup>

In most instances, commissions, investigators and other relevant actors are able to easily answer the first question. However, issues arise and they find themselves in a conundrum when it comes to the second questions, to wit, whether the said injury is as a result of the alleged dumping. The Uruguay Round Anti-Dumping Agreement (ADA) has attempted to provide insight on satisfying a tribunal or Court on the second question. The Agreement provides that an investigating body should take into account any other relevant factors that may be contributing to the signs and symptoms of injury such as return on investments, market share, actual and potential decline in sales, profits amongst other factors.<sup>13</sup>

The causation effect is demonstrated through examining the relationship between goods that are alleged to have been dumped and the injury or loss to the domestic industry. The anti-dumping

---

<sup>9</sup> Customs and Excise Act, section 12(2).

<sup>10</sup> Ibid.

<sup>11</sup> Economic framework for injury and causation analysis (Frontier Economics Pty. Ltd., Australia, 2017) at p.7, <<https://www.adcommission.gov.au/adssystem/Documents/Injury%20and%20causation%20framework%20overview.pdf>> accessed on 7 September 2018.

<sup>12</sup> Brian Hindley, ‘Cause-of-Injury Analysis in European Antidumping Actions’ ECIPE Working Paper No. 05/2009 <<http://www.ecipe.org/app/uploads/2014/12/cause-of-injury-analysis-in-european-anti-dumping-investigations.pdf>> accessed on 7 September 2018.

<sup>13</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201, Article 3.4.

authority of the relevant State ought to examine all relevant evidence including any other factors apart from the dumped goods which may at the same time be causing injury to the producers in the importing country.<sup>14</sup> Therefore, on the question of how the legal framework should control dumping and guided by the public interest theory and the provisions of the WTO rules. This study concluded that an ideal legal framework should protect the economy from material injury.

To find out how a legal framework should protect the local industries from material injury, the study examined the frameworks of countries that have succeeded in protecting their industries. The study then examined those legal frameworks and extracted the qualities that make those frameworks effective. The legal of South Africa is one such case.

### **2.1. Justification for Use of South Africa as a Comparator**

This study has chosen to use the legal framework of South Africa due to its success. It is established that the legal framework in South Africa controls dumping effectively.<sup>15</sup> This argument is based on several reasons as discussed below South Africa utilize the WTO Anti-dumping provisions.<sup>16</sup> South Africa began to use antidumping laws in 1914 ranking it as the 4<sup>th</sup> country in the world to use such a law. The first reference to antidumping actions was in the country's Customs Tariff Act of 1914.<sup>17</sup> The remedies at the time were dealt with by the Customs department and there after Board on Tariffs and Trade.<sup>18</sup> In the year 1921 it successfully imposed antidumping duties thereby making it the first country in the world to do so.<sup>19</sup>

South Africa is one of the first few countries to enact a progressive antidumping legislation and was an avid user of antidumping duties between the years of 1900- 1950.<sup>20</sup> South Africa's

---

<sup>14</sup> Ibid, Article 3.5.

<sup>15</sup> Meng Tao, "Dumping and antidumping regulations with specific reference to the legal framework in South Africa and China," (LLM, University of The Free State, 2006) <<http://scholar.ufs.ac.za:8080/xmlui/bitstream/handle/11660/1542/TaoM.pdf?sequence=1&isAllowed=y>> accessed on 28 October 2018.

<sup>16</sup> Frank Flatters, 'Trade and Trade Policy in South Africa: Recent Trends and Future Prospects (2007) accessed from <[www.dnaeconomics.com/assets/dlas/FILE\\_063020080109\\_FILE\\_101820070217\\_Trade\\_and\\_Trade\\_Policy\\_in\\_South\\_Africa.pdf](http://www.dnaeconomics.com/assets/dlas/FILE_063020080109_FILE_101820070217_Trade_and_Trade_Policy_in_South_Africa.pdf)> pg 6 on 15<sup>th</sup> September 2018.

<sup>17</sup> Section 8 Act No. 26 of 1914.

<sup>18</sup> Niel Joubert 'The Reform of South Africa's Anti-dumping Regime' <[www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm#fnt1](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm#fnt1)> accessed on 15<sup>th</sup> September 2018.

<sup>19</sup> Gustav Brink 'Antidumping in South Africa' accessed from <[www.tralac.org/publications/article/4208-anti-dumping-in-south-africa.html](http://www.tralac.org/publications/article/4208-anti-dumping-in-south-africa.html)> accessed on 15 September 2018.

<sup>20</sup> Jacques Duvenhage, "The Impact of Antidumping and antidumping Regulations between South , the European union and China :A comparative Study," (LLM, University of Pretoria,

antidumping law is largely compliant with and has been framed within the context of the WTO antidumping provisions.<sup>21</sup> In a nut shell the antidumping legislation in South Africa is a clear example of how a developing country can enact effective antidumping legislation that is in line with the WTO provisions in order to protect her local industries from adverse effects of dumping.<sup>22</sup> South Africa has for a long time adhered strictly to the provisions of the WTO on dumping and has therefore been regarded as a successful antidumping regime in the international trading system.<sup>23</sup>

South Africa's success in controlling dumping can also be attributed to the coherent and seamless coordination between several departments. The South African Revenue Services (SARS) and the Departments of Trade and Industry perform the administrative aspect or function of anti-dumping.<sup>24</sup> South Africa's unrelenting use of antidumping measures is driven by socio economic reasons and the need to protect local industries from unfair competition.<sup>25</sup>

When discussing the success of South Africa's antidumping legislation, the study cannot fail to discuss how the law was effective in protecting the local poultry industry. The local poultry industry players made allegations of dumping against the United States on November 5<sup>th</sup> 1999. The body in charge of investigating such allegation at the time was the Board on Tariffs and Trade. After conducting the relevant investigations, it was concluded that there was dumping of chicken

---

2011)<<https://repository.up.ac.za/bitstream/handle/2263/25301/dissertation.pdf?sequence=1&isAllowed=y>> accessed on 28<sup>th</sup> November 2018.

<sup>21</sup> Niel Joubert, 'Managing the Challenges of WTO Participation: Case Study 38: The Reform of South Africa's antidumping Regime' < [https://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm](https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm) accessed on 28<sup>th</sup> November 2018.

<sup>22</sup> Ibid.

<sup>23</sup> Murigi Catherine, "The Development of a Successful Anti-dumping Regime in Kenya", (University of the Western Caape, South Africa, 2013) 4  
[http://etd.uwc.ac.za/bitstream/handle/11394/2175/Murigi\\_LLM\\_2013.pdf?sequence=1](http://etd.uwc.ac.za/bitstream/handle/11394/2175/Murigi_LLM_2013.pdf?sequence=1) >accessed on 28<sup>th</sup> November 2018.

<sup>24</sup> Omphemetse Sibanda 'Dumping the Competition, And Scarring off Investors: The Impact and Influence of the South African Antidumping and Competition Measures on Foreign Direct Investment' International Business & Economics Research Journal [2015]14  
[https://www.researchgate.net/profile/Omphemetse\\_Sibanda/publication/297750739\\_Dumping\\_The\\_Competition\\_And\\_Scarring\\_Off\\_Investors\\_The\\_Impact\\_And\\_Influence\\_Of\\_The\\_South\\_African\\_Anti-Dumping\\_And\\_Competition\\_Measures\\_On\\_Foreign\\_Direct\\_Investment/links/57fcd0ce08aeb857afa08825/Dumping-The-Competition-And-Scarring-Off-Investors-The-Impact-And-Influence-Of-The-South-African-Anti-Dumping-And-Competition-Measures-On-Foreign-Direct-Investment.pdf?origin=publication\\_detail](https://www.researchgate.net/profile/Omphemetse_Sibanda/publication/297750739_Dumping_The_Competition_And_Scarring_Off_Investors_The_Impact_And_Influence_Of_The_South_African_Anti-Dumping_And_Competition_Measures_On_Foreign_Direct_Investment/links/57fcd0ce08aeb857afa08825/Dumping-The-Competition-And-Scarring-Off-Investors-The-Impact-And-Influence-Of-The-South-African-Anti-Dumping-And-Competition-Measures-On-Foreign-Direct-Investment.pdf?origin=publication_detail) accessed on 18<sup>th</sup> September 2018.

<sup>25</sup> Ibid, at p.671.

leg quarters from the United States of America and proceeded to impose relevant antidumping duties.<sup>26</sup>

Another success is the case of dumping frozen fowl of the species *Gallus Domesticus* from Brazil lodged by the South African Poultry Association (SAPA) in June 2011.<sup>27</sup> Following the investigations that were conducted, it was concluded that dumping had occurred.<sup>28</sup> Brazil then challenged the imposition of these duties at the World Trade Organizations Dispute Settlement Body and sought consultations over the dispute.<sup>29</sup> Brazil complained that South Africa had breached its obligations under the GATT as well as under the Antidumping Agreement. The dispute appears to have resolved itself when the Department of Trade and Industry stopped the imposition of antidumping duties on poultry products from Brazil.<sup>30</sup>

The study concedes that the South African antidumping legislation is not 100 percent fail proof. It has often been criticized for not being consistent with the WTO provisions in so far as the determination of injury and causality is concerned.<sup>31</sup> It is further criticized for failing to take into account factors that have an effect on the industry other than the products alleged to have been dumped.<sup>32</sup>

South Africa's legislation on dumping has also been criticized for having procedural inconsistencies. The procedure for determining the normal value in a case involving pharmaceutical products from South Africa was found to fall short the standard prescribed in the WTO provisions on dumping.<sup>33</sup> The International Trade Administration Commission has also been criticized for its inability to conform with the timelines for conducting investigations on cases of alleged dumping as set out under the Antidumping Agreement and the ITA which leads to delays

---

<sup>26</sup> Kilshore Kulkani 'Trade Barriers: A case of South-African Poultry Imports from South Africa,' [http://www.kulkarnibooks.com/assets/downloads/kishore\\_papers/antidumpingpaperfinaldraft.pdf](http://www.kulkarnibooks.com/assets/downloads/kishore_papers/antidumpingpaperfinaldraft.pdf) accessed on 15 September 2018.

<sup>27</sup> In On Africa IOA, "South African Trade: Too Chicken to Definitively Challenge Brazilian Poultry Imports?" (17<sup>th</sup> September 2013) <<http://www.polity.org.za/article/south-african-trade-too-chicken-to-definitively-challenge-brazilian-poultry-imports-2013-09-17>> accessed on 18 September 2018.

<sup>28</sup> Ibid, at p.671.

<sup>29</sup> 'Brazil Challenges South Africa over Poultry at WTO' (22<sup>nd</sup> June 2012) <https://www.reuters.com/article/ozatp-trade-brazil-safrica-poultry-idAFJ0E85L05Z20120622> accessed on 18<sup>th</sup> September 2018.

<sup>30</sup> *Supra*, (n.22).

<sup>31</sup> Gustav Brink, 'One Hundred Years of Antidumping in South Africa' 25 < [https://repository.up.ac.za/bitstream/handle/2263/56637/Brink\\_One\\_2015.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/56637/Brink_One_2015.pdf?sequence=1&isAllowed=y)> accessed on 28<sup>th</sup> November 2011.

<sup>32</sup> Ibid.

<sup>33</sup> Omphemetse Sibanda, South African Antidumping Law and Practice: A Comparative Analysis of Procedural and Substantive Issues," (University of Botswana 2011) 12 < <https://dspace.nwu.ac.za/browse?type=dateissued>> accessed on 28<sup>th</sup> November 2018.

in investigation of cases of dumping.<sup>34</sup> Other criticisms that have been levelled against the South African antidumping legislation include lack of clarity on circumstances that may permit ITAC to impose antidumping investigations *suo moto* as well as lack of proper definitions of terms and lack of proper procedures on refunds.<sup>35</sup> The above few shortcomings notwithstanding the study opted to rely on South Africa as a yardstick for assessing the effectiveness or otherwise of Kenya's antidumping legislation due to the success of the Law over the years in combating dumping.

Upon examining the legal framework of South Africa, the study established that the success of the legal framework may be attributed to certain qualities. These include: consolidated statute, mechanism for detecting dumping, a specialized investigating body, independence of the commission, enforcement procedures and mechanism, well spelt out functions and procedures. In the following part, the study identifies these qualities and discusses how each individual quality contribute to the effectiveness of the legal framework in controlling dumping.

### **2.1.1. Consolidated Statute**

A consolidated statute may be defined as a collection or a compilation of laws relating to a particular subject in one code or volume.<sup>36</sup> The value of having a consolidated statute on a particular subject cannot be overstated. Fragmented or convoluted legislation leads to wasting of valuable time and resources. People are forced to spend needless time searching for relevant provisions applicable to certain situations. In cases where the legislation is consolidated concerned parties are able to be more efficient as minimal time is expended in grappling with fragmented legislation.

The main law applicable to dumping and antidumping in South Africa is the International Trade Administration Act (ITA) (hereinafter referred to as the "Act").<sup>37</sup> The regulations made thereunder (the "Regulations") also make a huge contribution to South Africa's legal framework on dumping. The preamble to the Act provides its main object as establishing the International Trade Administration Commission and providing for its functions which include *inter alia* the control of imports and exports of goods. The Act as read together with the Regulations is regarded

---

<sup>34</sup> Ibid p 364.

<sup>35</sup> Ibid.

<sup>36</sup> The Law Dictionary, <<https://thelawdictionary.org/consolidatedlaws-or-statutes/>> accessed on 27<sup>th</sup> January 2017.

<sup>37</sup> International Trade Administration Act (ITA), Act No. 71 of 2002, as introduced through South Africa's Gazette No. 24287 on 22<sup>nd</sup> January 2003.

as the most important with respect to dumping and antidumping because it provides definitions for key terms such as dumping, like product, normal value which are the basic elements to be considered when considering whether dumping has occurred. It also outlines the procedure to be followed when investigating dumping and in the imposition of antidumping duties.<sup>38</sup>

The Act replaced the Customs and Excise Act<sup>39</sup> which still remains relevant in so far as it provides guidelines to the International Trade Commission for imposing anti-dumping duties.<sup>40</sup>

### **2.1.2. Mechanisms for Detecting & Combating Dumping**

Generally, the presence of a law on a particular subject is crucial in deterring errant behavior. The Deterrence theory presupposes that ‘would-be-offenders’ would avoid certain actions if they were aware that the same would attract a penalty or sanctions. According to the theory, human beings are rational beings and their actions will be based on analysis of the negative effects that may arise as a consequence.<sup>41</sup> According to this theory, people weigh the adverse effects of a particular action before engaging in it. Consequently, where a law exists and that law prescribes sanctions for certain behavior, then this would deter offenders.

The South African legal framework makes adequate provision on the sanctions for dumping on the offending party. Going by the deterrence theory, it can be argued that this is one of the reasons why traders both individual and corporate would think twice before dumping in South Africa.

Dumping in South Africa is detected through an elaborate investigation procedure. The elaborate procedures are classified as general, pre-initiation, investigation and post investigation procedures to ensure that the entire process is covered. The investigation process is commenced by publishing an initiation notice in the national gazette.<sup>42</sup> The Act as well as the Regulations contain elaborate provisions on the investigation of dumping.

---

<sup>38</sup> Loinas Ndlovu, ‘An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa’s Dumping and Anti-dumping Law’ *supra* (n.5), at p.33.

<sup>39</sup> Customs and Excise Act, Act No. 91 of 1964, reprinted in the Government Gazette G/ADP/N/I/ZAF/I ON 8<sup>th</sup> December 1995.

<sup>40</sup> *Supra*, (note 21).

<sup>41</sup> Ronald L. Akers, Rational Choice, Deterrence and Social Learning Theory in Criminology: The Path Not Taken, (1990-1991) 81 J. Crim. L & Criminology, <<https://pdfs.semanticscholar.org/8e5a/dfeaf31edc9db15690e0aedd3c90b3cae27b.pdf>> at p.654, accessed on 17<sup>th</sup> August 2017.

<sup>42</sup> Antidumping Regulations South Africa, Regulation 28 (1)



The investigation process for any alleged incidents of dumping is well spelt out under the Act as well as the Regulations and the same can be summarized as follows: - properly documented applications by the SACU concerned, commencement of the investigation process by publishing an initiation notice in the gazette, responses by interested parties i.e exporters and importers and verification of information, preliminary determination by the Commission.

The Act provides for the Commission's power to undertake certain functions that aid in its efficiency in detecting dumping, for instance, the power to appoint investigators<sup>43</sup>. The investigators carry out their functions and in so doing are guided by the ITA and the Regulations made thereunder. Among the powers bestowed upon the investigators include: -the power to conduct inspections of imports and exports, power to conduct searches of premises and persons and the power to summon relevant persons to provide valuable information that may aid the investigation process.

Investigators are also empowered to conduct searches of premises and persons within the confines of the Act and the Regulations.<sup>44</sup> Of particular importance is the powers granted to search without a warrant. The investigating officer has powers to enter and search premises without a search warrant in instances where he believes and reasonably so that a search warrant would be issued by the High Court or the Magistrate's court. He must also reasonably believe that the delay in obtaining the search warrant would render it useless.<sup>45</sup> Searches without warrants are considered to be an infringement of the rights of citizens.<sup>46</sup> That notwithstanding there may be circumstances where such searches may be justified. These circumstances have often been referred to as "exigent circumstances",<sup>47</sup> which arise where "real immediate and serious consequences" are bound to arise if the police officer or the investigating officer in this case postpones the search to a later date or time when he has a search warrant.<sup>48</sup>

Destruction of evidence is considered as one of the exigent circumstances where an investigating officer may forego the normal procedure of obtaining a search warrant before conducting a search.<sup>49</sup> The action of the investigator must be "now or never" in order to safeguard

---

<sup>43</sup> International Trade Administration Act (ITA) Act No. 71 of 2002, *supra*, (note 20), Section 38.

<sup>44</sup> *Ibid*, section 42.

<sup>45</sup> *Ibid*, section 44.

<sup>46</sup> Huff J, 'Warrantless Entries and Searches Under Exigent Circumstances: Why Are They Justified and What Types of Circumstances Are Considered Exigent.' (2010) 87(3) U Det Mercy L Rev 373 p.379.

<sup>47</sup> *Ibid*, at p.380.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*, at p.385.

the value of the evidence. The warrantless searches are therefore justified in that they ensure efficiency in the functioning of the Commission as critical evidence is safeguarded.

Additionally, the Commission is also empowered to summon individuals to provide information necessary in the investigation process.<sup>50</sup> This ensures that the efficiency in the functioning of the Commission is not compromised. The investigation process would otherwise be subject to delays occasioned by the need to obtain court orders for a relevant person to appear and provide information key to the investigation process.

### **2.1.3. Creation of a Specialized Body for Accepting, Investigating Complaints and Imposition of Anti-Dumping Duties: International Trade Administration Commission**

The preamble to the ITA Act provides its core functions as establishing the International Trade Administration Commission (ITAC) and makes provision for its functions. The Commission is established under chapter 3 of the Act. The Commission replaced its predecessor the Board of Tariffs and Trade which had been established under the previous Act.<sup>51</sup>

There are certain key features of the Commission which contribute to its success in its functioning including the function of controlling dumping. These features include: -

- (i) Independence of the Commission;
- (ii) Effective Enforcement Mechanism;
- (iii) Properly spelt out procedures

#### **2.1.3.1. Independence of the Commission**

Independence refers to a state of being free from dependence or control of a body or person.<sup>52</sup> Independence of a body should not be regarded as the ultimate goal. It should be viewed as a means to ensuring that a body clothed with such independence will be better placed to carry out its functions effectively.<sup>53</sup> The independence of the Commission is spelt out under the Act.<sup>54</sup> The

---

<sup>50</sup> Section 39(2) International Trade Administration Act, No.71 of 2002.

<sup>51</sup> International Trade Administration Commission of South Africa (ITAC) <<http://www.itac.org.za/pages/about-itac/an-overview-of>> accessed on 13<sup>th</sup> February 2018.

<sup>52</sup> <https://thelawdictionary.org/independence> accessed on 26<sup>th</sup> January 2018.

<sup>53</sup> The Governance of Regulators (*Being an Independent Regulator*), <[https://www.oecd-ilibrary.org/governance/being-an-independent-regulator\\_9789264255401-en](https://www.oecd-ilibrary.org/governance/being-an-independent-regulator_9789264255401-en)> OECD (2016), at p.34.

<sup>54</sup> International Trade Administration Act (ITA), Act No. 71 of 2002, *supra*, (n.20), section 7 (1).

Act ensures that the Commission is only subject to the Constitution, the law and any trade policies and directives as well as notices issued by the Minister under the Act.<sup>55</sup> State organs within the Republic of South Africa are also mandated to assist the Commission in maintaining its independence and impartiality.<sup>56</sup>

The importance of ensuring the independence of anybody cannot be overstated. First, independence creates public confidence. The public is confident that an impartial Commission will make its own independent decisions. Autonomy of the Commission also increases public confidence as to its integrity and impartiality.<sup>57</sup> This is particularly important in a sector where both local and importing firms are in competition. Competing importers can trust that the process of investigating and regulating dumping in South Africa is free from governmental control and interference.<sup>58</sup> Investors are therefore confident that there will be a level playing field in investigations relating to allegations of dumping.<sup>59</sup> The Chief Commissioner is a presidential appointee.<sup>60</sup> This process of appointment may create an avenue for compromising the independence of the Commission.

### **2.1.3.2. Enforcement Procedures and Mechanisms**

The Act also ensures that the Commission is not a toothless dog by making enforcement provisions under part 5 of the Act. Ensuring that the Commission is not a toothless dog is critical in ensuring public and investor confidence. The enforcement provisions also serve as a deterrent to would be unscrupulous traders.

After investigations and the evaluation on alleged cases of dumping are finalized the Commission is empowered to take all the relevant actions as required under the Act including the imposing definitive Anti-dumping duties.<sup>61</sup> Where it is merited the Commission may make

---

<sup>55</sup> Ibid.

<sup>56</sup> Ibid, section 7(3).

<sup>57</sup> Paul D. Carrington & Roger C. Cramton, 'Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court' (2009) 94(3) Cornell L Rev 587, <<http://cornelllawreview.org/files/2013/02/CarringtonCramtonJudicialIndependenceinExcess.pdf>> at p.80, accessed on 24<sup>th</sup> January 2018.

<sup>58</sup> Ibid, at p.34.

<sup>59</sup> Ibid, at p.36.

<sup>60</sup> International Trade Administration Act, Act No. 71 of 2002, *supra* (note 20), section 8(2).

<sup>61</sup> Ibid, section 16(3).

recommendations for the imposition of antidumping duties as prescribed under the Act, the SACU Agreement as well as the Regulations.<sup>62</sup>

Part V of the Act creates such offences such as hindering the administration of the Act, giving false information under oath, failure to honor summons from the Commission, breach of confidence etc. The Act also prescribes fines and penalties for the various offences.

### **2.1.3.3. Well spelt-out Functions and Procedures**

The value of well laid out procedures ensures the efficient functioning of any body. It also increases public as well as investor confidence that rules and procedures are well set out and that the same will be followed. One of the core functions of the Commission is to investigate and evaluate any allegations of dumping.<sup>63</sup> The investigation, adjudication and evaluation procedure is also carefully set out in part 4 of the Act including the procedure for carrying out searches and seizing property.

The well set out functions ensures the seamless functioning of the Commission. Members of staff and those charged with specific functions in the investigation process are well aware of the process to be followed. This ensures that minimal time is wasted and ensures efficiency and speed of the entire investigation and evaluation process.

### **2.1.3.4. The Kenya Trade Remedies Act, a Solution to the Problem of Dumping in Kenya?**

As previously highlighted in the course of this study, Kenya recently enacted the Kenya Trade Remedies Act<sup>64</sup>. The Act came into operation on 16<sup>th</sup> August 2017.<sup>65</sup> The Act represents a consolidated and self-contained legislation for all issues related to dumping. Although enacted during the lifetime of this study, it is worth interrogating whether the Act is the final solution to the issue of dumping in Kenya.

The Act expressly repeals the provisions of Section 125, 125A and 126 of the Customs and Excise Act.<sup>66</sup> The Act however does not expressly provide for the repeal of the antidumping regulations made under the repealed Act. However, noting that the Regulations are made under

---

<sup>62</sup> Antidumping Regulations of South Africa, Regulation 55.

<sup>63</sup> International Trade Administration Act, Act No. 71 of 2002, section 16(1).

<sup>64</sup> The Kenya Trade Remedies Act No. 32 of 2017.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid Section 43.

the repealed sections it may be assumed that the Regulations are no longer applicable in cases of dumping. The Cabinet Secretary is also empowered to come up with relevant regulations that will aid the functioning of the Agency and the implementation of the Act as a whole.<sup>67</sup>

The preamble to the Act provides its function as to establish the Kenya Trade Remedies Agency as well as to make provisions for investigating cases of dumping as well as the imposition of antidumping duties. The Kenya Trade Remedies Agency is established under the Act as a body corporate with perpetual succession.<sup>68</sup> Management of the Agency is vested in the Board whose membership and composition is set out under the Act.<sup>69</sup>

Another key function of the Agency is training and sensitizing the public on the provisions of the Act as well as the functions of the Agency.<sup>70</sup> This is crucial in ensuring that members of the public are made aware of the trade remedies available to them under the Act. The public should also be sensitized on how they should present their applications and the process of gathering relevant evidence to aid the investigation process.

Unlike the International Trade Administration Act which is the substantive law on dumping in South Africa, the Kenya Trade Remedies Act does not make provision for independence of the Agency. As previously highlighted, independence of such a body is essential in ensuring that the body carries out its functions without fear, favor or prejudice. Furthermore, no obligation is placed on the other organs of government to assist in safeguarding the independence of the Agency. Another factor that is likely to inhibit the independence of the Agency is the fact that the Act does not expressly protect the salaries, allowances and benefits of the Commissioners during their term.<sup>71</sup> This is unlike the law in South Africa which expressly provides that the Minister may not alter the remuneration, benefits or allowances payable to the Commissioners during their term. Therefore, while appreciating that the Kenya Trade Remedies Act now makes provision for a specialized body namely the Kenya Trade Remedies Agency, the study notes that the independence of the body has not been expressly provided for.

Another key feature of the Act is that it gives powers to the Cabinet Secretary to impose antidumping duties where there has been positive determination of serious injury on an industry.

---

<sup>67</sup> Ibid Section 42 (1).

<sup>68</sup> Ibid Section 3.

<sup>69</sup> Ibid Section 6.

<sup>70</sup> Ibid Section 5 (d).

<sup>71</sup> International Trade Administration Act, Act No. 71 of 2002, Section 7 (1).

This study notes that the Kenya Trade Remedies Act deviates from the use of the phrase “material injury” as used in Article VI of the GATT, the Antidumping Agreement and the ITA and instead uses the term “serious injury” The Minister may impose dumping duties that are equivalent to or less than the margin of dumping.<sup>72</sup>

It is apparent that the new Act has taken the stance established in the lesser duty principle. The Antidumping Agreement provides the ceiling beyond which members cannot impose antidumping duties. The maximum amount of antidumping duties that a country can impose is an amount equal to the margin of dumping. However, the Agreement notes that it is desirable for members to impose a lesser amount of duty where the same is sufficient to offset the adverse effects of dumping in the domestic industry of the economy.<sup>73</sup> In so doing Kenya joins the majority of member states that opt to adopt the lesser duty rule. USA and Canada are the few exceptions that impose the full amount of anti-dumping duty that is equivalent to the margin of dumping.<sup>74</sup> It may be argued that the imposition of full antidumping duties is more desirable as it acts as a greater deterrent to would be offenders who would be tempted to engage in dumping.

The Kenya Trade Remedies Agency is tasked with amongst other functions to investigate and evaluate cases of dumping.<sup>75</sup> The second schedule to the Act contains elaborate provision in respect of investigating of cases of alleged dumping. The section details the procedure for determination of dumping, like product, injury, normal value, export price and also provides clear definition of the terms. As highlighted earlier in this chapter, these elements are crucial in the determination of dumping and it is therefore imperative that they are clearly defined.

Part V of the Act contains elaborate enforcement procedures which aid the efficient functioning of the Agency. The section creates several offences including breach of confidence<sup>76</sup> hindering administration of the Act by attempts to bribe or otherwise unduly influence any person carrying out functions under the Act,<sup>77</sup> and failure to appear when summoned.<sup>78</sup> These enforcement provisions will ensure that the Agency is not a toothless dog.

---

<sup>72</sup> Ibid, Section 23(1).

<sup>73</sup> Antidumping Agreement, Article 9.

<sup>74</sup> Lakshmikumuran & Sridharan, ‘Application of Lesser Duty Rule in Anti-Dumping Investigations’ <<https://www.lexology.com/library/detail.aspx?g=3b36556e-94fa-4f01-8261-e6cd9259711a>> accessed on 26<sup>th</sup> November 2018.

<sup>75</sup> The Trade Remedies Act No. 32 of 2017. Section 5 (a).

<sup>76</sup> Ibid Section 31 (a).

<sup>77</sup> Ibid Section 39.

<sup>78</sup> Ibid Section 40.

The Kenya Trade Remedies Act contains well spelt out functions and procedures. The functions and powers of the Board are clearly spelt out. The Act also makes provision for the appointment of investigators by the Board and that such appointment should be published in the Kenya Gazette.<sup>79</sup>The Act grants extensive powers to the investigators in so far as investigation of cases of alleged dumping is concerned. Their powers include questioning of persons under oath,<sup>80</sup> accepting responses,<sup>81</sup>conducting searches with warrants<sup>82</sup>or without warrants as the case may be. The Act also prescribes a fine of Kshs. 5,000,000 or imprisonment for a term not exceeding 5 years.<sup>83</sup>The Act also provides that where necessary the Agency may enlist the services of the police officers to aid in the investigation process where the circumstances of the case so require.<sup>84</sup>

It is noteworthy that some critical sections of the Act are ambiguous in the way they are crafted. The Second schedule provides by whom an investigation procedure is to be initiated that is by or on behalf of a domestic industry. However, it does not provide to whom the application is to be made. This ambiguity may result in the wastage of unnecessary time as sending an application to the wrong body or person could well lead to its rejection. The Act ought to be clear as to whether the application ought to be addressed or made to the Cabinet Secretary of the Kenya Trade Remedies Agency.

The Procedure for carrying out investigations on cases of alleged dumping, timelines for filing responses and the manner in which they are to be filed is well defined. Provisions on how hearings will be conducted are also clearly spelt out. This as previously highlighted ensures the seamless functioning of the Agency and also spurs public confidence.

The Act introduces a feature of national interest consideration before the imposition of antidumping duties.<sup>85</sup> For the imposition of antidumping duties under the regime of the GATT there has to be positive evidence of material injury. However, it appears that the Trade Remedies Act introduces a new consideration. After determining that there is positive evidence of material injury on the relevant domestic industry, the Cabinet Secretary is to give due regard to the interests of the country prior to the imposition of antidumping duties. The Act does not point out what

---

<sup>79</sup> The Trade Remedies Act No. 32 of 2017, Section 30.

<sup>80</sup> Ibid, Section 31 (1).

<sup>81</sup> Ibid, Section 32 (1).

<sup>82</sup> Ibid, Section 33.

<sup>83</sup> Ibid, Section 41.

<sup>84</sup> Ibid, Section 30 (3).

<sup>85</sup> Ibid Section 21 (1) (a).

factors should be taken into account in determining the national interest aspect. This provision may well be a provision that may be abused. Despite positive evidence of serious injury resulting from dumped products the Cabinet Secretary has a wide discretion to determine whether or not to impose an antidumping duty which may well be abused.

The Act as it is, save for the few ambiguities highlighted in this section may well be answer to Kenya's dumping problem. The study noted that the Cabinet Secretary is empowered under the Act to formulate regulations to further the objects of the Act.<sup>86</sup> These ambiguities may be clarified in such regulations. As highlighted previously the government temporarily lifted the ban of fish from China citing the reasons that further consultation needed to be carried out. While conceding that Kenya would be in breach of its international trade obligations by arbitrarily banning all fish imports from China without clear investigations, the status of the fishing industry is a critical point and it remains to be seen whether the Kenya Trade Remedies Agency will move urgently to deal with dumping of fish from China. There must be political goodwill if the Act is to have a positive impact and achieve its intended objective.

## **2.2. Conclusion**

This chapter in line with the first objective examined what constitutes an ideal legal framework on dumping. The comparative context of this chapter sought to compare the antidumping law in Kenya with its South African counterpart. The study found that the South African legislation on dumping which can be found in the International Trade and Administration Act 2002,<sup>87</sup> as well as the Anti-dumping Regulations has been effective in combating dumping in South Africa. The chapter also drew out some vital elements of an ideal legislation on dumping from the law in South Africa. These elements will be used as a yardstick in drawing out the gaps in Kenya's law on dumping. The study also interrogated the effectiveness of Kenya's law on dumping in line with the first objective.

---

<sup>86</sup> Ibid, Section 42 (1).

<sup>87</sup> Ibid.



In chapter three, the study will use these qualities of the legal framework in South Africa as the criteria for testing the quality of the legal framework in Kenya. If the framework in Kenya is found to lack these qualities, the study will examine how the lack of each individual quality contributes to the inability of Kenya's framework to control dumping affecting various sectors of the economy.

## **CHAPTER THREE: IMPACT OF INADEQUACY OF KENYA'S LAW ON THE PROCESS OF DETECTING, COMBATTING AND REDRESSING DUMPING**

### **3.0.Introduction**

Chapter two discussed at length the legal and institutional framework on anti-dumping in Kenya, and in doing so, revealed the huge gaps in the law regulating dumping in Kenya. This Chapter will substantially delve into examining the real and practical impact on inadequacy of the law on several industries in the country. Further, the contrast between Kenya and South Africa with regard to effectiveness of the law in regulating dumping as brought up in the previous chapter will inform some proposals geared to informing how to redress the gaps in the legal and institutional framework of detecting, combatting and redressing dumping in Kenya.

As highlighted in the previous chapter, the only substantive provision for dumping in Kenya is contained under sections 125 and 126 of the Customs and Excise Act<sup>88</sup> which clearly bolsters the finding that Kenya's law on regulating dumping is clearly inadequate. Kenya also recently enacted The Excise Duty Act 2015,<sup>89</sup> was enacted to make relevant provision for excise duty including its assessment and collection.<sup>90</sup> Pursuant to this Act, all substantive provisions as well as regulations made under the Customs and Excise Act that provided for imposition of taxes, penalties and other duties continue to be in effect until other regulations are enacted pursuant to the Excise Duty Act.<sup>91</sup>

The previous chapter having laid down a yardstick or basis upon which to test the effectiveness or otherwise of Kenya's antidumping legislation, thus chapter will seek to test the existing Kenyan law against the key elements identified in the previous chapter as being the reason behind the effectiveness of South Africa's antidumping legislation in combating, preventing and redressing dumping. The chapter will also interrogate gaps and the effects of the gaps in Kenya's antidumping laws on various sectors across the economy.

---

<sup>88</sup> Customs and Excise Act, Cap 472, Laws of Kenya (Government printer, Nairobi, 2012).

<sup>89</sup> The Excise Duty Act, No. 23 of 2015 ((Government printer, Nairobi, 2015).

<sup>90</sup> Ibid, see Preamble.

<sup>91</sup> Ibid, section 46(4).

### **3.1.Gaps in Kenya’s Anti-Dumping Legal Framework**

#### **3.1.1 Lack of an Independent Commission/Specialized Body**

While its South African counterpart establishes an independent Commission specially tasked with the investigation of dumping, the Kenyan law provides for an advisory committee on dumping appointed on an *ad hoc* basis.<sup>92</sup> Like its name suggests the role played by the committee is merely advisory. The Act provides for the appointment of not more than 10 persons in the advisory committee but does not make mention of the specific sectors the members are to be drawn from. Therefore, unlike its South African counterpart which specifies the sectors that the commissioners are to be drawn from such a committee may contain members lacking the appropriate expertise to investigate and deal with cases of dumping.

The committee is appointed on a case by case basis. This means that the committee lacks the independence of a body which has security of tenure. Naturally, an *ad hoc* committee does not spur investor and public confidence. Besides lack of public confidence, an *ad hoc* committee lacks the experience built on the job. The Commission charged with the investigation of dumping benefits from years of experience in handling several cases on dumping and is therefore more effective at it.

The Kenyan advisory committee therefore lacks the advantage of having a specialized body whose membership, constitution and conduct are predetermined by an Act of Parliament, This removes the element of independence and relevant professionals in the committee.

#### **3.1.2 Lack of Well Spelt -out Functions and Procedures**

The Customs and Excise Act provides that the Minister shall prescribe the procedure to be followed by the advisory committee through publication of regulations.<sup>93</sup> Unlike its South African counterpart which sets out the functions and procedures to be followed by the Commission in investigating cases of alleged dumping, the Kenyan advisory committee is dependent on the regulations published by the Minister as and when cases of alleged dumping arise.

This creates inefficiency, delay and erodes the confidence of the investors both local and foreign. It also wastes a lot of unnecessary time as the advisory committee has to wait for the rules to be published by the Minister. Kenya’s legal framework also falls short in that it does not provide

---

<sup>92</sup> *Supra*, (n.1), section 125(1).

<sup>93</sup> *Ibid*.

for the appointment of investigators and their powers. This is unlike the South African law which contains elaborate provisions on the powers of the investigators such as powers of entry and search.

### **3.1.3 Lack of a Consolidated Statute**

As previously mentioned in this study the law on dumping in Kenya is only found in two sections of the Customs and Excise Act. Unlike its South African counterpart Kenya does not have a consolidated statute to effectively deal with dumping. This fragmented legislation leads to loss of useful time in searching for laws on dumping to cater for certain situations as and when they arise across diverse sectors of the economy.

### **3.1.3 Mechanisms for Detecting and Combating Dumping**

Unlike its South African counterpart which contains elaborate provisions for the detecting and combating dumping through rigorous investigating procedures, Kenya does not contain any provisions on the procedure to be followed in investigating cases of alleged dumping. Instead the Act provides for formation of regulations by the Minister as and when cases arise.

### **3.1.4 Lack of Proper Definitions of Key Concepts**

As previously stated in this study it is not every injury that results in dumping but material injury. The Customs and Excise Act, Cap 472 of the Laws of Kenya contains a brief definition of injury which it defines as “**“injury”** means material injury, threat of material injury or material retardation.”<sup>94</sup> The South African Anti -Dumping Regulations defines material injury in a more broad sense. The opening of the provision uses the phrase that “unless the opposite is clear from the context”<sup>95</sup> It is evident that the Kenyan definition of injury is narrow and does not cover a wide base as does its South African counterpart.

Most of Kenya’s industries that have collapsed as a result of cheap imports would have been saved if Kenya had an appropriate legal and institutional framework to address dumping.<sup>96</sup> An

---

<sup>94</sup> Ibid Section 126 (3)

<sup>95</sup> Regulation 1 of The International Trade Administration Commission Antidumping Rules, Government Gazette No. 25684, 14<sup>th</sup> November 2003 <<http://www.itac.org.za/upload/Anti-Dumping-Regulations.pdf>> accessed on 6<sup>th</sup> November 2018.

<sup>96</sup> Chris Kiptoo, ‘Why a trade remedies agency could save Kenyan industries’, *The Business Daily* (Kenya, 16<sup>th</sup> January 2018) <<https://www.businessdailyafrica.com/analysis/ideas/Why-a-trade-remedies-agency-could-save-Kenyan-industries/4259414-4266064-b4sj9oz/index.html>> accessed on 19 May 2018.

effective legal and institutional framework creates certainty and confidence amongst members of the public. They are certain of where to report incidences of dumping which result in injury and or loss to the domestic industries.

Like many other developing countries, Kenya has continued to suffer from the effects of dumping due to its liberal approach as far as dumping is concerned. It is argued that more industrialized nations tend to flex their economic muscles and show case their economic prowess much to the disadvantage of the developing and less developed nations.<sup>97</sup> China is one of the countries that has been seen to be taking advantage of its economic dominance to the disadvantage of its “economic partners” partners in Africa. This is so due to the surge of cheap imports from China into the continent.<sup>98</sup>

### **3.2.Effects of the Gaps on Dumping in Specific Industries**

Several sectors in the Kenyan economy which are generally young and not well developed have been affected by the apparent ineffectiveness of our laws in identifying, combating, preventing and redressing dumping. There has been a surge in cheap imports into the Kenyan economy affecting diverse sectors of the economy such as the fishing industry, the textile industry among others.

This section will seek to investigate how the gaps in our laws have made it difficult or impossible to identify dumping in some of this sectors thus encouraging the proliferation of dumping. The section will focus on the effects of dumping on an industry-specific basis, as follows:

#### **3.2.1. The Fishing Industry**

This study reviewed the relevant statutes governing the fishing industry in Kenya which include The Fisheries Management and Development Act 2016<sup>99</sup> and the Maritime Zones Act.<sup>100</sup>

---

<sup>97</sup> Timothy A Falade Obalade, ‘Analysis of Dumping as a Major Cause of Import and Export Crisis,’ (2014)4(5) International Journal of Human and Social Science  
<[http://www.ijhssnet.com/journals/Vol\\_4\\_No\\_5\\_March\\_2014/25.pdf](http://www.ijhssnet.com/journals/Vol_4_No_5_March_2014/25.pdf)> accessed on 21 May 2018.

<sup>98</sup> ‘Cheap Chinese imports in Africa: Implications and remedies’ (6 March 2014)  
<<http://www.polity.org.za/article/cheap-chinese-imports-in-africa-implications-and-remedies-2014-03-06>> accessed 2 June 2018.

<sup>99</sup> The Fisheries Management and Development Act, No. 35 of 2016 (Government Printers, 2016, Nairobi) which repealed the Fisheries Act, Cap 378 Laws of Kenya.

<sup>100</sup> Maritime Zones Act, Cap 371 Laws of Kenya.

The preamble to the Fisheries Management and Development Act provides for using and, managing and conserving fisheries and other aquatic resources in order to better the lives of Kenyan families that depend on the industry for a living.

Part IV of the Act provides for amongst other things the import and export of fish into Kenya and out of Kenya respectively. The Act provides that live fish can only be imported into Kenya with the written approval of the Director General.<sup>101</sup> The Act also provides that the Cabinet Secretary should make Regulations prohibiting or controlling the regulation of fish of any species into Kenya.<sup>102</sup> The study noted that the Act does not contain any provisions on dumping of fish into the Kenyan market.

The preamble to the Maritime Zones Act provides that the function of the Act is to provide *inter alia* for the exploration, exploitation and management of the resources obtained from Kenya's maritime zones. It is noteworthy that none of these 2 Acts which regulate the fishing industry in Kenya contains any provision to curb dumping in the fishing industry in Kenya.

Kenya is a coastal state with a marine coastline of 536 Kilometers.<sup>103</sup> The country has a relatively well-developed marine fishing industry which as at 2005 employed over 500,000 people who are either engaged directly in fishing or in related industries. Kenya's fishing industry and accounted for 0.3% of the country's Gross Domestic Product (GDP) for the period between 1999 and 2003.<sup>104</sup>

Today the fishing sector in Kenya has grown expansively and become an employer to over 2,000,000 Kenyans. These include those engaged directly in fishing, construction and repair of crafts, processing of fish as well as distribution of the same.<sup>105</sup> From this comparison of growth in the fishing sector in terms of average people employed provided by the Export Processing Zone as well as the Kenya Marine and Fisheries Research Institute it is evident that the fishing sector has the potential to grow and provide more employment opportunities for Kenyans and make a substantial contribution to our GDP.

---

<sup>101</sup> *Supra*, (n.7), section 54(1).

<sup>102</sup> *Ibid*, section 208.

<sup>103</sup> Fishery Industry in Kenya (2005), <<http://www.epzakenya.com/UserFiles/files/Fishkenya.pdf>> accessed on 19 May 2018.

<sup>104</sup> *Ibid*.

<sup>105</sup> Kenya Marine and Fisheries Institute (13 November 2017), <<http://www.kmfri.co.ke/index.php/fact-sheet-2/86-inland-fisheries>> accessed on 19 May 2018.

Fishing is indeed the main source of livelihood for many lakeside communities in Kenya. However, this source of livelihood has been threatened by the current surge of imports of frozen fish from China. In 2016 alone China is reported to have imported roughly \$30 Million (Kshs. 3,012,015,000) of fish to Kenya which is double what it had “imported in 2015.<sup>106</sup> Besides employing over 2,000,000 Kenyans in Kenya,” the fishing industry has made several other significant impacts on the economy. First is the impact on trade.<sup>107</sup> A report from The Food and Agriculture Organization (FAO) indicated that Kenya’s total fish export had been declining over the years.<sup>108</sup> The fishing industry also contributes to food security as the protein needs of Kenyan rural communities both coastal and riparian are catered for by the fish caught at a subsistence level. The industry also contributes to development of Kenya’s rural communities where fishing is practiced.<sup>109</sup>

There are problems ailing the fishing industry that must be addressed such as illegal fishing, pollution, destruction of wetlands, expensive fish feeds and overfishing.<sup>110</sup> However, the focus of this section is the effects of dumping of cheap fish from China and how this affects the fishing sector in our economy. For the majority of Kenyans, saving an extra coin through buying a similar product at a cheaper price is always a welcome move especially due to the harsh economic times. A piece of fish from China retails at Kshs. 150.00 while that from Kenya retails at Kshs. 400.00 Most Kenyans prefer the cheaper options having little regard to the quality of fish they are consuming.<sup>111</sup>

In the Kenyan context, the example of fish shows predatory pricing at play. The Chinese exporters have priced their fish at a level that the Kenyan producers cannot possibly match while at the same time making a profit. The Kenyan consumer oblivious of the effects of the fish on the economy in the long run, is happy to have imported fish which is considered to be of a higher value on their plates at a lower price than that charged for the local fish. The apparent reluctance of the

---

<sup>106</sup> Why Kenyans are eating Chinese fish, *Citizen Digital* (17 April 2018) <<https://citizentv.co.ke/news/why-kenyans-are-eating-chinese-fish-197407/>> accessed on 19 May 2018.

<sup>107</sup> Ibid.

<sup>108</sup> Fishery and Aquaculture Country Profiles, The Republic of Kenya, *FAO* (February 2015), <<http://www.fao.org/fishery/facp/KEN/en#CountrySector-SectorSocioEcoContribution>> accessed 19 May 2018.

<sup>109</sup> Ibid.

<sup>110</sup> Allan Olingo, ‘China imports hurting processors, traders and fishermen in East Africa’ *The East African* (3 February 2018) <<http://www.theeastafrican.co.ke/business/China-fish-trade-eating-East-Africa-fishermen-livelihoods/2560-4290510-tb8620/index.html>> accessed on 19 May 2018.

<sup>111</sup> ‘Why Kenyans are eating Chinese fish’, *supra* (n.18).

government to take any action against the dumping of fish from China can be attributed to international hegemony where the government prefers to maintain the status quo.

Kenya is a major beneficiary of development loans and grants from China and hence the reason why it appears beneficial to maintain the status quo and avoid any retaliation from China.<sup>112</sup> The problem could also be attributable to the lack of an appropriate legal and institutional framework. As a member of the WTO, Kenya is precluded from imposing bans on the cheap fish that comes from China. The best that Kenya can do in the wake of surging imports of cheap fish from China is to investigate whether the said fish is being dumped within the WTO rules and where it finds that such fish is being dumped it can impose safeguard measures in line with the provisions of the WTO rules.<sup>113</sup>

This study argues that lack of a proper legal framework has contributed largely to the worsening problem of dumping in various sectors including the fishing sector<sup>114</sup>. As highlighted above the amount of fish imported every year from China increases every year and there is a likelihood that this will persist as time goes by if no action is taken against the same. Having in place an institutional framework will create certainty on where reports of injury in the fishing sector can be made and provide guidelines on how such reports should be prepared.

The institution, should have appropriate professionals and investigating officers with the technical know-how and experience gained over time. This will be the final solution to the menace of dumping of fish as the investigating authority will take the appropriate trade remedies in line with WTO rules and thereby deter future incidences of dumping in the sector as explained by the deterrence theory.

---

<sup>112</sup> Tony Mukere, 'China Threatens Uhuru Over Ban on Fish Imports' (Pulse Live, 31<sup>st</sup> October 2018) <https://www.pulselive.co.ke/news/politics/china-threatens-trade-war-with-kenya-over-ban-on-fish-imports-id9049435.html> accessed 28th November 2018.

<sup>113</sup> WTO, 'Understanding the WTO Agreements :Antidumping, Subsidies, Safeguards Contingencies etc [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm) > accessed on 28<sup>th</sup> November 2018.

<sup>114</sup> The Institute of Economic Affairs, (Trade Notes) (July, 2013)31, 'Antidumping as a Trade Remedy: The Way Forward for Kenya' <<http://www.ieakenya.or.ke/publications/notes/anti-dumping-as-a-trade-remedy-the-way-forward-for-kenya>> accessed on 28th November 2018.



### 3.2.2. The Textile and Apparel Industry

The study reviewed various legislations in this sector including the Crops Act,<sup>115</sup> The Agriculture and Food Authority Act,<sup>116</sup> and the Export Processing Zones Act<sup>117</sup>. The objectives of the Crops Act include *inter alia*, accelerating the growth and development of agriculture in general and enhancing productivity and incomes of farmers.<sup>118</sup> The 2<sup>nd</sup> Schedule to the Act lists several laws that were repealed by the Crops Act, key among these is the Cotton Act.<sup>119</sup> The 1<sup>st</sup> Schedule provides list of scheduled crops that are governed under the Act including cotton. The same schedule also provides the fact that the Agriculture and Food Authority took over the functions of several institutions including the Cotton Development Authority.

The Agriculture and Food Authority Act,<sup>120</sup> has its main objective as to consolidate the laws on regulation and promotion of agriculture. The Act also establishes the Food and Agriculture Authority.<sup>121</sup> The Act provides for the functions of the Authority but contains no provisions on dumping in so far as the textile industry is concerned.<sup>122</sup>

The Export Processing Zones Act<sup>123</sup> The Act establishes the Export Processing Zones and the Authority. The preamble to the Act provides its functions to include *inter alia* to promote and facilitate export oriented investments. It is noteworthy that none of these key Acts makes any provision on dumping in the Cotton and apparel industry and this may be the reason that dumping had continued to cripple the sector.

In its big 4 agenda, the government projects that it will achieve growth from Kshs. 350,000,000/- to Kshs. 2 Billion from the textile /apparel/cotton subsector. It also projects that 500,000 new jobs will be created from this subsector. With such an ambitious strategy to be achieved within the next four (4) years, it will be necessary to come up with clear cut strategies and ensure that the same are implemented.

---

<sup>115</sup> Crops Act, No. 16 of 2013 (Government Printers, 2013, Nairobi).

<sup>116</sup> The Agriculture and Food Authority Act, No. 13 of 2013 (Government Printers, 2013, Nairobi).

<sup>117</sup> Export Processing Zones Act, Cap 517 of the Laws of Kenya.

<sup>118</sup> Crops Act, *supra*, (n. 20), section 3.

<sup>119</sup> Cotton Act, Cap 335 of the Laws of Kenya.

<sup>120</sup> Agriculture and Food Authority Act.

<sup>121</sup> *Ibid* section 3.

<sup>122</sup> *Ibid* section 4.

<sup>123</sup> The Export Processing Zones Act, Cap 517 Laws of Kenya.

The industry has the potential to spur the country to become a deeper middle-income status. The sector can also boost employment of the younger population to a great extent.<sup>124</sup> Kenya's textile industry is now on an upward trend of recovering from the downward trend that had been occasioned by amongst other factors a surge in cheap imports and *mitumba* or second hand clothes.<sup>125</sup>

The textile industry in Kenya begun to flourish in the 1980's. The sector advanced and became a major employer of Kenya's active labour force employing about thirty percent (30%) in the national manufacturing sector.<sup>126</sup> The growth of the sector was attributed to the aggressive Import Substitution Industrialization (ISI) policies which imposed 100% duties on goods sold in Kenya and not sourced from Kenya in a bid to nurture young and budding industries and protect them from unfair competition. This was in recognition of the fact that the Kenyan industries were not on a level playing field with the industries of the industrialized states.<sup>127</sup>

This was dealt a major blow by the cheap *mitumba* exports that were imported into Kenya. The surge of *mitumba* clothing was further exacerbated by the fact that the economy had become more liberalized. The textile industry virtually collapsed in the 1980's and is yet to recover from this. The obvious result of this was that innumerable people who were employed in the textile industry lost their jobs.<sup>128</sup>

The surge in second hand clothes in the Kenyan market was as a result of increased liberalization of the economy and removal of safeguards that had been put in place in the post-independence period. These market liberalization policies were spearheaded by the World Bank and adopted by countries the world over. Another reason why the textile industry was hit so hard is because the markets for apparels and clothing items at the time were particularly price sensitive.

---

<sup>124</sup> Ministry of Trade, Industrialization and Cooperatives, 'Kenya Apparel and Textile Industry: Diagnosis, Strategy and Action Plan' <http://www.industrialization.go.ke/index.php/downloads/322-kenya-apparel-and-textile-industry-diagnosis-strategy-and-action-plan> accessed on 28 October 2018.

<sup>125</sup> Allan Odhiambo, 'Kenya's Clothing Sector on the Mend' <https://www.businessdailyafrica.com/markets/marketnews/Kenya-s-clothing-sector-on-the-mend-/3815534-4200142-i4mbpmz/index.html> *Business Daily* (23<sup>rd</sup> November 2017) accessed on 14<sup>th</sup> September 2018.

<sup>126</sup> Rael, C. Maiyo & Beatrice E. Imo, 'The Kenyan Textile Industry in a liberalized Economy: An Analysis of Performance and Challenges,' (2012)3(1) JETEMS <<http://jetems.scholarlinkresearch.com/articles/The%20Kenyan%20Textile%20Industry%20in%20a%20Liberalized%20Economy.pdf>> accessed on 7 September 2018.

<sup>127</sup> Ibid.

<sup>128</sup> The Institute of Economic Affairs, (Trade Notes) (July, 2013)31, 'Antidumping as a Trade Remedy: The Way Forward for Kenya' <<http://www.ieakenya.or.ke/publications/notes/anti-dumping-as-a-trade-remedy-the-way-forward-for-kenya>> accessed on 7 September 2018.

This meant that a small change in price would lead to a significant change in demand of commodities in question. The majority of consumers in Kenya at the time for clothing items quickly changed and took a preference for the *mitumba* clothing as opposed to the Kenyan made fabrics which could not stand to be compared with the price and quality of the second hand clothes.

The textile industry was unable to compete with the low priced and apparently high quality clothing that was being dumped on the Kenyan market and which soon became a darling of many locals.<sup>129</sup> Reduced sales, profit and cash flows ultimately meant that local firms that were unable to compete with the low prices of the dumped *mitumba* clothing were forced to close shop. Some of these include firms such as Kisumu Cotton Mills (Kicomi), and Heritage Woolen Mills and Rift Valley Textiles (Rivertex).<sup>130</sup>

A direct result of closure of the firms was that their employees lost their jobs. With no source of livelihood they had no means of fending for their families and ultimately their standard of living was lowered. The effects of dumped *mitumba* on the Kenyan textile industry continue to be felt to date. Most Kenyans still prefer the cheap and high quality *mitumba* clothing as opposed to the expensive Kenyan made clothing. It is therefore unlikely that the Kenyan textile industry will ever survive the effect of the cheap *mitumba*.<sup>131</sup>

The Kenyan government should have responded rapidly to the dumping that was evident in the textile industry at the time and perhaps imposing antidumping duties would have helped this industry to survive. However, it appears that the factors at play in the political economy would not permit such a move by government. Heavily reliant on foreign aid, the government of the day would not dare defy the hegemonic powers of the time.

Be that as it may, lack of proper legal and institutional framework has contributed to our inability to identify dumping in its early stages. If Kenya had the appropriate legal framework as well as institutions then it is highly likely that dumping would have been identified at its inception stages and many of the textile industries that were shut down would have been saved.

---

<sup>129</sup> Rael, C. Maiyo & Beatrice E. Imo, 'The Kenyan Textile Industry in a liberalized Economy: An Analysis of Performance and Challenges,' *supra* (n.35), at p.111.

<sup>130</sup> Leopold Obi, 'Will a Revived Cotton Industry Push Mitumba out of the Market?' *Daily Nation* (18<sup>th</sup> July 2018) < <https://www.nation.co.ke/lifestyle/dn2/Will-a-revived-textile-industry-push-mitumba-out-of-market/957860-4667720-p1cb33z/index.html> > accessed on 28<sup>th</sup> November 2018.

<sup>131</sup> Peter Chando, 'Banning Mitumba will Certainly not Revive the Local Textile Industry' *Daily Nation* (17<sup>th</sup> March 2016) < <https://www.nation.co.ke/oped/opinion/Banning-mitumba-will-not-revive-the-local-textile-industry/440808-3119936-jpehb/index.html> > accessed on 28<sup>th</sup> November 2018.

### 3.2.3. The Manufacturing Sector

The study reviewed some of the legislations governing the manufacturing industry which include the Special Economic Zones Act,<sup>132</sup> the Sugar Act,<sup>133</sup> Competition Act 2010,<sup>134</sup> Investment Promotion Act 2004,<sup>135</sup> The Anti-Counterfeit Act 2008,<sup>136</sup> The Export Processing Zones Authority (EPZA) Act,<sup>137</sup> Micro and Small Enterprises Act<sup>138</sup> among others.<sup>139</sup>

The preamble to the Special Economic Zones Act provides its purpose as to establish special economic zones and promoting and facilitating global and local investments. Part III of the Act establishes the Special Economic Zones Authority.

The preamble to the Competition Act<sup>140</sup> provides its function as promoting and protecting competition in Kenya and protecting consumers from unfair and misleading market conduct. The Act also establishes the Competition Authority as well as the Competition Tribunal. The Act is also aimed at creating a conducive environment for both foreign and local investment.

The preamble to the Anti-Counterfeit Act provides its function as to stop altogether trade in counterfeit goods and establish the Anti-Counterfeit Agency. Part IV of the Act provides for inspection of goods suspected to be counterfeits by inspectors. The part also provides for powers of the inspectors to enter and search any premises as well as to seize any goods suspected to be counterfeits. The Anti-Counterfeit Regulations established under the Act also do not contain any provisions on dumping of goods in the manufacturing sector.

The Sugar Act<sup>141</sup> provides for the development, regulation and promotion of the sugar industry. The Act also establishes the Kenya Sugar Board. Schedule 2 of the Act provides that one of the functions of the Kenya Sugar Board is to monitor the importation of sugar and its by products in order to ensure that the industry remains viable.<sup>142</sup> The Schedule also provides for the imposing of

---

<sup>132</sup> The Special Economic Zones Act, No. 16 of 2015 (Government Printers, 2015, Nairobi).

<sup>133</sup> Sugar Act, No. 10 of 2001 (Government Printers, 2001, Nairobi).

<sup>134</sup> Competition Act No. 12 of 2010 (Government Printers, 2010, Nairobi)..

<sup>135</sup> Investment Promotion Act (Government Printers, 2004, Nairobi).

<sup>136</sup> The Anti-Counterfeit Act (Government Printers, 2008, Nairobi).

<sup>137</sup> The Export Processing Zones Authority (EPZA) Act, Cap 517 Laws of Kenya.

<sup>138</sup> Micro and Small Enterprises Act, Act No. 55 of 2012 (Government Printers, 2012, Nairobi).

<sup>139</sup> Ministry of Industry, Trade and Cooperatives <<http://www.industrialization.go.ke/index.php/policies>> accessed on 28<sup>th</sup> October 2018.

<sup>140</sup> Competition Act, (n.41).

<sup>141</sup> Sugar Act, *supra*, (n.40).

<sup>142</sup> *Ibid*, section 38.

antidumping duties and further that the Minister should establish a five-person committee to investigate cases of dumping.<sup>143</sup>

Whilst it is encouraging that the Act makes a mention of dumping duties and the imposition of the appointment of an investigating committee, it should be noted that these provisions are inadequate. First, they do not define what constitutes dumping of sugar or material injury which is crucial in any investigation of dumping. The law makes reference to a committee appointed on an ad hoc basis and therefore does not the advantage of an independent commission following well laid out procedures to investigate cases of dumping. The committee to be appointed also falls short as it does not enjoy the advantage of experience that would be gained from a committee employed on a permanent or contractual basis as opposed to an ad hoc one.

The preamble to the Micro and Small Enterprises Act,<sup>144</sup> provides its function as to provide for the promotion and regulation of the micro and Small Enterprises. The study noted that none of the key Acts highlighted above contain any provisions on the regulation of dumping in manufacturing sector in Kenya and this could be the reason why the sector has continued to be crippled by the adverse effects of dumping.

The manufacturing sector is one of the key contributors to Kenya's Gross Domestic Product (GDP). It was the third largest by sectoral contribution to the country's GDP (10.3%) after transport and communication (11.3%) and the agriculture and forestry being in the leading position at (23.4%).<sup>145</sup> The average annual growth rate of real GDP for the manufacturing sector declined from 10 per cent in the period 1974–9 to 4.8%, 2.5%, and 3.8 % in the periods 1980–9, 1990–9, and 2000–7 respectively.<sup>146</sup> It is provided as one of the key sectors in the vision 2030. Vision 2030 provides the role of the manufacturing sector as the creation of employment and wealth. It is expected that the sector will contribute at least 10% per annum to Kenya's GDP. One of the interventions provided for the achievement of this target is the strengthening of the capacity and local content of domestically manufactured goods.<sup>147</sup>

---

<sup>143</sup> Ibid, section 15 (4).

<sup>144</sup> Ibid.

<sup>145</sup> Dianah Ngu et.al., 'Kenya's Industrial Development' in Carol Newman et.al (eds) *Manufacturing Transformation: Comparative Studies of Industrial Development in Africa and Emerging Asia* (Oxford Scholarship Online, 2016)

<<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198776987.001.0001/acprof-9780198776987-chapter-4>> accessed on 7<sup>th</sup> September 2018.

<sup>146</sup> Ibid.

<sup>147</sup> Kenya Vision 2030, Manufacturing Sector, <<http://www.industrialization.go.ke/index.php/vision-2030-manufacturing-sector>> accessed 19 May 2018.

The manufacturing sector in Kenya grew at 3.5% in 2015 and 3.2% in 2014 contributing to 10.3% of the Gross Domestic Product (GDP) KNBS 2016. On average the manufacturing sector has been growing at a slower rate than the economy which expanded by 5.6% in 2015. This implies that the share of manufacturing in GDP has been reducing over time.<sup>148</sup>

The manufacturing sector is a focal point in the country's vision 2030. The role of the manufacturing sector therein is to spur employment and wealth in the country amongst its citizenry. One of the key action points towards achievement of this target is the strengthening of the capacity and local content of domestically manufactured goods.<sup>149</sup> One of the biggest threats facing domestically produced goods in Kenya is the surge in cheap imports. To achieve the vision 2030 targets as far as manufacturing is concerned, it is imperative that the government takes steps towards reducing cases of dumping.

The contribution of the manufacturing sector to Kenya's GDP has for a long time stagnated at around 10% and was at 9.2% in 2016.<sup>150</sup> The real value added went up dismally by 0.2% in 2017 compared to 2.7 % in 2016.<sup>151</sup> The governments keen attention to the manufacturing sector can be gleaned from the speech of 12<sup>th</sup> December 2017 by H. E. President Uhuru Kenyatta President of the Republic of Kenya wherein he stated that it is high time that Kenyans have faith in their ability to produce goods that are at par and competitive in the world market.<sup>152</sup>

One of the governments big 4 agenda is to revamp the manufacturing sector of the economy. The Kenyan government has ambitious plans to have the sector move from 9.2% of the GDP where it has stagnated for a while to 20% of the GDP by the year 2022.<sup>153</sup> In line with this ambitions, the government has put in place measures which are aimed at increasing food processing, agro processing, leather and textiles subsectors.<sup>154</sup>

---

<sup>148</sup> Anzette Were, 'Manufacturing in Kenya: Features, Challenges and Opportunities,' (August 2016), <<https://set.odi.org/wp-content/uploads/2016/09/Manufacturing-in-Kenya-Anzette-Were.pdf>> accessed on 19 May 2018.

<sup>149</sup> <http://www.industrialization.go.ke/index.php/vision-2030-manufacturing-sector> accessed on 14 September 2018.

<sup>150</sup> Manufacturing Priority Agenda 2018, 'Sparking Kenya's Industrial Transformation for Job Creation' from <http://kam.co.ke/kam/wp-content/uploads/2018/02/2018-Manufacturing-Priority-Agenda.pdf> accessed on 14<sup>th</sup> September 2018, at p.13.

<sup>151</sup> Economic Survey 2018 accessed from <https://www.knbs.or.ke/download/economic-survey-2018/> accessed on 14 September 2018, at p.162.

<sup>152</sup> Manufacturing Priority Agenda 2018, 'Sparking Kenya's Industrial Transformation for Job Creation' Accessed from <<http://kam.co.ke/kam/wp-content/uploads/2018/02/2018-Manufacturing-Priority-Agenda.pdf>> accessed on 14 September 2018.

<sup>153</sup> <<http://www.president.go.ke/enhancing-manufacturing>> accessed on 14<sup>th</sup> September 2018.

<sup>154</sup> Economic Survey 2018 <<https://www.knbs.or.ke/download/economic-survey-2018/>> accessed on 14 September 2018, at p.173.

The manufacturing sector is intertwined with several other sectors of the economy. It is also noteworthy that the sector has the greatest effect on direct and indirect employment in any given economy.<sup>155</sup> The manufacturing sector contributed to 13.4% of the total private sector employment in the year 2017.<sup>156</sup>

It is therefore crucial for any government to prioritize the manufacturing sector if any substantial benefits will be felt across other sectors. Getting it right with the manufacturing sector will also translate to more people earning not just a meagre living but substantial amounts which will ultimately increase the standard of living and reduce poverty levels amongst its citizenry.<sup>157</sup>

Despite the foregoing achievements, the sector has not been spared either from the ills of dumping,<sup>158</sup> and the consequences have been far reaching for the textile industry<sup>159</sup> especially on account of Kenya's decision to go liberal as far as access to her markets is concerned. Critics have argued that this liberalization is to blame for the surge in dumping experienced in Kenya. They argue further that the same should have been done in phases so as to protect the local upcoming industries.<sup>160</sup>

The situation is further compounded by the heavy taxes imposed on businesses thus creating a disincentive for those who would otherwise have invested in the manufacturing industry. Kenyans are also fond of cheaper imported goods. This is so for those in business who seek to make more profit and edge out competitors as well as consumers who are happy to make a saving.<sup>161</sup>

South Africa too has not been spared from the surge in cheap imports from China. However, what has made a difference in protecting her local industries has been her proactive approach which is guided by the presence of a proper legal and institutional framework. For instance, Graftech, a company in South Africa lodged a complaint with the ITAC against dumped graphite electrodes from China. The Commission conducted proper investigations as it had investigating

---

<sup>155</sup> *Supra*, (n.59).

<sup>156</sup> *Supra*, (n.61).

<sup>157</sup> *Ibid*.

<sup>158</sup> Kenya Economic Report 2017 Popular Version, <<http://kippra.or.ke/wp-content/uploads/2017/05/KER-2017-Popular-Version-1.pdf>> accessed 19 May 2018.

<sup>159</sup> Justus Ochieng, 'Dumping hurts state economy' *The Star* (Kenya, 11 May 2013), <[https://www.the-star.co.ke/news/2013/05/11/dumping-hurts-state-economy\\_c773001](https://www.the-star.co.ke/news/2013/05/11/dumping-hurts-state-economy_c773001)> accessed on 2 June 2018.

<sup>160</sup> Evans Ombiro, 'Dumping wreaks havoc on manufacturing sector,' *Daily Nation* (Kenya, 14 September 1999) from <<https://www.nation.co.ke/lifestyle/1190-384730-fcvajjz/index.html>> accessed 2 June 2018.

<sup>161</sup> *Ibid*.

officers in place and concluded that there was evidence of material injury.<sup>162</sup> Besides Graftech, other companies such as Sappi Southern Africa and Franke Kitchen Systems South Africa have also successfully instituted claims against dumped goods from China. The ITAC has conducted investigations and found dumping to have occurred and proceeded to impose antidumping duties thereby saving many local industries from possible collapse.<sup>163</sup>

Despite the surge in cheap imports from China, Kenyan industries have not lodged a single complaint in the WTO<sup>164</sup> and neither has an *ad hoc* commission been appointed by the Minister of Trade to investigate the same *suo moto* and consequently has never imposed antidumping duties.<sup>165</sup> This means that the local industries continue to suffer with some even closing down or scaling down their operations. It is therefore clear that the gaps in our laws make it difficult to identify, investigate and curb dumping. If there was an institutional framework already in place, manufacturers would have a sense of certainty and confidence in presenting their claims against dumping. The institution would then through the expertise of investigating officers conduct speedy and efficient investigations to ensure that dumping is curbed early enough.

It is clear that manufacturing is one of the key focus areas for the Kenyan government. It is therefore imperative that adequate measures are taken to address the gaps in our antidumping laws so as to ensure that the sector is guarded from dumping among other threats.

### **3.3. Dumping as a barrier to Foreign and Local Investments in Kenya**

The study reviewed various laws on the regulation of Foreign and local investments in Kenya key among them being the Investments Promotion Act<sup>166</sup>. The purpose of the Act as set out in its preamble is to promote and facilitate investments in Kenya by assisting investors to obtain the requisite licenses.

The Kenya Investments Authority is established under Part IV of the Act. The study noted that the Act does not contain any provisions on dumping by foreign investors.

---

<sup>162</sup> 'Cheap Chinese imports in Africa: Implications and remedies' *supra* (n.10).

<sup>163</sup> *Ibid*.

<sup>164</sup> WTO, 'Kenya and the WTO' < [https://www.wto.org/english/thewto\\_e/countries\\_e/kenya\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/kenya_e.htm) > accessed on 28<sup>th</sup> November 2018.

<sup>165</sup> WTO, Trade Policy Reviews: First Press Release, Secretariat and Government Summaries Kenya January 2000 < [https://www.wto.org/english/tratop\\_e/tpr\\_e/tp124\\_e.htm](https://www.wto.org/english/tratop_e/tpr_e/tp124_e.htm) > accessed on 28<sup>th</sup> November 2018.

<sup>166</sup> Investments Promotion Act, No. 6 of 2004.



Foreign Direct Investment (FDI) as well as local investments play a major role in boosting the economic growth of any country and more particularly a developing or a less developed country. The incoming capital, innovation and advanced technology plays a major role in enhancing the development of such countries.<sup>167</sup>

It is for this reason that FDI has always been attractive to Kenya. Kenyan trade policies have therefore over the years been structured in such a way as to enhance FDI. FDI has resulted in improved infrastructure, innovation increased foreign exchange earnings and enhanced innovation. In economies where dumping has taken its roots and dumping firms are well established, investments will be lower. The reason for this is that there are higher risks associated with economies where dumping is taking place e.g. lower returns on investments. They would be forced to cut costs and engage in sort of price wars in order to access their market share.

With time dumping creates a trade environment that is unfavorable to foreign investors who would otherwise consider investing in such markets. The reason for this is that potential investors are unable to compete with the low prices of products in the markets that have been dictated by the foreign firms that are engaging in dumping since they may not be receiving any benefits from their home markets that would justify and sustain the low prices charged in a foreign country.<sup>168</sup> This coupled with factors such as a weak legislative framework acts as a deterrent to would be investors as the markets are highly uncertain. Chances of loses are high and therefore these firms opt to invest elsewhere where the laws on dumping are watertight and the same are enforced.

Kenya is a country which is heavily reliant on FDI for its economic growth. However, the government appears to be reluctant to take any remedial action against firms that are found to have engaged in dumping. For instance, investors both local and international would shy off from investing in the textile industry due to the *mitumba* industry which has taken root in Kenya. Kenyans prefer the cheap and high quality second hand clothes.

In the recent past Kenya has noted an increase in business closures. The main reason for such closures is a hostile economic environment in which it is impossible for any business to flourish. One investor who many Kenyans would term as most daring; Mr. Peter Kuguru who was the brains

---

<sup>167</sup> Anne Wangui Muya & Fred Mugambi, 'Investment Decisions Among International Companies investing in Kenya: A Case Study of Coca Cola Bottlers Mombasa,' (2015)5(9) I JSRP <<http://www.ijsrp.org/research-paper-0915.php?rp=P454527>> accessed on 31<sup>st</sup> May 2018.

<sup>168</sup> Thomas R. Howell & Dewey Ballantine, 'Dumping still a Problem in International Trade,' in Charles W. Wessner (ed) *International Friction and Cooperation in High-Technology Development and Trade: Papers and Proceedings The Compass Series* (National Academies Press, 1997), at p.326.

behind Softa soft drink brand was also forced out of the market. The directors of Sameer Africa had issued a statement to the effect that it was facing financial difficulties due to a surge in cheap imports and would be forced to close shop if the same was not remedied. It bears noting that if the government of the day had acted with haste then they would have prevented the ultimate closure of its Yana tyres manufacturing plant located in Nairobi. Unfortunately, the government turned a blind eye leading to the closure of the plant.<sup>169</sup>

Other companies that have been forced to close their plants in order to scale down their operations with a view to making albeit some profit include Eveready East Africa which shut down its manufacturing plant located in Nakuru, Cadbury which shut down its Nairobi plant, Procter and Gamble and Reckit Benckiser. All these companies have cited one of the main reasons for their scaling down of operations to be a hostile business environment occasioned by a surge in cheap imports.<sup>170</sup> Other firms that have suffered similar effects include Colgate Palmolive, Bridgestone and Devki Steel.<sup>171</sup>

The fish industry is yet another example. Foreign firms that would have otherwise invest in the fish industry tend to shy off due to the dumped fish from China which is prevalent in the market. This coupled with the apparent support from the government and apparent reluctance to take any actions against the firms engaged in dumping acts as a deterrent to investors.

It is noteworthy that Kenya has steadily been rising up the list of 'Doing Business' that is published annually by the World Bank. In the 2018 report, Kenya was ranked at position 80 out of 190 countries.<sup>172</sup> This is a slight improvement to the previous year 2017 when it had been ranked at position 92. The improvement is indicative of the fact that Kenya is increasingly becoming more and more attractive to investors.<sup>173</sup> However, if the government is to achieve its ambitious strategy

---

<sup>169</sup> Brian Ngugi, 'Cheap Imports High Costs: Why Many Businesses are Closing Shop' *Daily Nation* (Kenya, 19 December 2016) <<https://www.nation.co.ke/lifestyle/smartcompany/Cheap-imports--high-costs--Why-many-businesses-are-closing-shop/1226-3491388-52x5q4z/index.html>> accessed on 14<sup>th</sup> September 2018.

<sup>170</sup> Ibid.

<sup>171</sup> Paul Wafula 'Manufacturing Nightmare that is Turning Kenya into Graveyard for Companies' *Standard Digital-Financial Standard* (Kenya, 1<sup>st</sup> March 2016) <https://www.standardmedia.co.ke/business/article/2000193411/manufacturing-nightmare-that-is-turning-kenya-into-graveyard-for-companies> accessed on 14<sup>th</sup> September 2018.

<sup>172</sup> 'Rankings & Distance to Frontier,' <<http://www.doingbusiness.org/rankings>> accessed on 14<sup>th</sup> September 2018.

<sup>173</sup> Constant Munda, 'Kenya up 12 Places in World Bank Ease of Doing Business Index' *Daily Nation* (Kenya, 2<sup>nd</sup> November 2017) <<https://www.nation.co.ke/business/Property-registration-blots-ease-of-business-ranking/996-4165866-840a2p/index.html>> accessed on 14<sup>th</sup> September 2017.

of rank 50 by the year 2022,<sup>174</sup> it is imperative that key steps are taken towards making Kenya a hub for investors and their choice destination. One of this measures should be a clear and sound regulatory environment which will reduce cases of dumping or flush it out altogether thereby enhancing investor confidence.

Kenya's Foreign Direct Investments increased significantly from 2016-2017. In 2016, the Foreign Direct Investment in Kenya was at USD 393 Million whereas as at 2017 it rose up to USD 672 Million.<sup>175</sup> While this is a good improvement, if the country is to realize its projected surge in Foreign Direct Investment of Kshs. 200 Billion in 2018<sup>176</sup> then efforts must be doubled towards activities that will spur investor confidence.

### **3.4. Conclusion**

This chapter had set out to investigate the gaps and effects of the gaps in Kenya's antidumping laws in identifying, investigating and addressing dumping. In doing so, the chapter examined the effects of dumping across several sectors of the economy. In view of the above discussion on the effects of the gaps in our law in identifying and addressing dumping, it is undeniable that our antidumping laws require amendment if not a complete overhaul so as to address the gaps.

While the opponents of antidumping laws may make a strong case for the removal altogether of the antidumping laws citing reasons such as the adverse effects of dumping on competition and the fact that dumping may have numerous positive welfare gains for the consumers. These perceived gains ought to be measured against the losses to the consumer and local industries. Whilst importing countries might be tempted to consider the short term benefits of dumping such as reduced prices of goods, it is important to note that this small gain which is temporal in nature is not worth considering bearing in mind the adverse effects that dumping has on the economy and social welfare of the importing country.

---

<sup>174</sup> 'Enhancing Manufacturing from 9.2% to 20 % of GDP by 2022' <http://www.president.go.ke/enhancing-manufacturing/> accessed on 14<sup>th</sup> September 2018.

<sup>175</sup> United Nations Conference on Trade and Development 'World Investment Report 2018' Accessed from [http://unctad.org/sections/dite\\_dir/docs/wir2018/wir18\\_fs\\_ke\\_en.pdf](http://unctad.org/sections/dite_dir/docs/wir2018/wir18_fs_ke_en.pdf) on 14th September 2018.

<sup>176</sup> Kenya's Foreign Direct Investment to Hit over Shs 200 Billion' Accessed from <http://www.industrialization.go.ke/index.php/media-center/blog/253-kenya-s-foreign-direct-investment-to-hit-over-sh-200-billion> accessed on 14th September 2018.

It is for these reasons that various countries the world over have enacted comprehensive laws to combat the practice in a bid to albeit minimize the adverse effects that dumping has on their economies.

Reduction of poverty and creation of sustainable employment has been one of the main goals of the successive governments since independence<sup>177</sup> and has formed part of the manifestos of all governments that have formed the government of the day in Kenya. The rapid economic growth rate that has been witnessed in Kenya has also led to many challenges key among these being the high rate of unemployment among young people.<sup>178</sup> Kenya would indeed be doing itself a great favour in addressing the glaring gaps in her antidumping legislation.

---

<sup>177</sup> Jacob O. Omolo, 'The Textiles and Clothing Industry in Kenya' in Herbert Jauch / Rudolf Traub-Merz (eds) *The Future of the Textile and Clothing Industry in Sub-Saharan Africa* (Bonn: Friedrich-Ebert-Stiftung, 2006), at p.148 <<http://library.fes.de/pdf-files/iez/03796/11kenya.pdf>> accessed 7 September 2018.

<sup>178</sup> Kenya's Youth Unemployment Challenge, UNDP (January 2013), <[http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Kenya\\_YEC\\_web\(jan13\).pdf](http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Kenya_YEC_web(jan13).pdf)> accessed on 7 September 2018.

## CHAPTER FOUR: CONCLUSIONS AND RECOMMENDATIONS

### 4.0.Introduction

In Chapter three, the study used the theory developed in Chapter Two and the observations in Chapter Three to suggest lessons for the legal framework in Kenya. The chapter identifies the observation and suggests lessons for the legal framework for Kenya.

### 4.1.Conclusions

The Statement of the Problem of the research as set forth in Chapter 1 was the need to investigate *“Why the legal and institutional framework on dumping in Kenya is unable to combat, prevent and redress dumping in the country.”*

This study investigated the gaps in the existing anti-dumping laws with a view to finding out how these gaps affect the law’s effectiveness in identifying, preventing and redressing dumping. In a nutshell, the study found Kenya’s antidumping law which is basically comprised substantively in 2 sections of the Customs and Excise Act<sup>1</sup> to be inadequate in identifying, preventing and redressing dumping.

The chapter also found that there is a rich theoretical framework on the topic which would necessitate the enactment of an adequate law which would be useful in identifying, preventing and redressing dumping in Kenya. The public interest theory for example holds government regulation is the best way to deal with inefficient market in society such as imperfect competition and dumping. Having concluded that Kenya’s existing anti-dumping law is inadequate then the government of the day must of necessity rise to the occasion and enact adequate laws to combat the menace.

Chapter 2 sought to investigate the legal and institutional framework for detecting and combating dumping in Kenya. The chapter also undertook a comparative study with South Africa which has been successful in reducing cases of dumping to a large extent. This was in line with the first two objectives of the study which were stated as follows:-

- (a) To examine what constitutes an ideal legal and institutional framework on dumping; and
- (b) To analyze the effectiveness or otherwise of Kenya’s legal and institutional framework that regulates dumping.

---

<sup>1</sup> Customs and Excise Act, Cap 472, Laws of Kenya (Government printer, Nairobi, 2012).

The chapter concluded that the only provision for regulating dumping in Kenya which is sections 125 and 126 of the Customs and Excise Act<sup>2</sup> is sub-standard. The study found the said sections contain numerous loopholes and are therefore inadequate in protecting local industries against dumping.

The comparative context of this chapter sought to compare antidumping law in Kenya with its South African counterpart. The study found that the South African legislation on dumping which can be found in the International Trade and Administration Act 2002<sup>3</sup> as well as the Anti-dumping Regulations has been effective in combating dumping in South Africa. The chapter also drew out some vital elements of an ideal legislation on dumping from the law in South Africa. These elements were used as a yardstick in drawing out the gaps in Kenya's law on dumping.

Chapter 2 also considered whether the enactment of the Kenya Trade Remedies Act<sup>4</sup> is the solution to Kenya's antidumping problem. The study observed that quite a number of the recommendations such as the creation of a specialized body (the Kenya Trade Remedies Agency) to investigate cases of dumping, elaborate enforcement mechanisms, training and capacity building for users of the Act, provision for appointment and powers of investigation officers, proper enforcement mechanisms and definition of key terms relevant in a determination of dumping have been actualized in the enactment of this Act.

However, the study pointed out some ambiguities in the Kenya Trade Remedies Act including failure to clarify to whom a complaint on dumping should be made and the procedure for determining the margin of dumping for purposes of imposition of antidumping duties. The Act also gives a wide discretion to the Cabinet Secretary responsible for matters relating to trade to consider whether it is the national interest to impose antidumping duties. This wide discretion has not been tampered by providing for factors relevant in determination of national interests and may therefore be subject to abuse. These ambiguities should be clarified by the Cabinet Secretary through Regulations as the Act empowers him to come up with Regulations under the Act.

Chapter 3, in line with the third objective of this study sought to investigate the effects of the gaps in Kenya's antidumping legislation in investigating, redressing and preventing dumping. The

---

<sup>2</sup> Supra (n.1).

<sup>3</sup> International Trade Administration Act (ITA), Act No. 71 of 2002, as introduced through South Africa's Gazette No. 24287 on 22nd January 2003.

<sup>4</sup> Kenya Trade Remedies Act, No. 32 of 2017.

chapter found that the glaring gaps and loopholes in our laws had adverse effects on diverse sectors of our economy. The chapter focused on adverse effects of dumping on the fishing as well as the textile industry and also investigated the effects of dumping on foreign direct investments in Kenya. The study concluded that the gaps in our antidumping law immensely contributed to the adverse effects of dumping in these industries.

It was noted that the adverse effects of dumping across diverse sectors of the economy translates into cyclic effects of unemployment and poverty amongst the citizens. The chapter also concluded that it was therefore necessary to amend the existing antidumping law or enact a new law altogether.

Based on the research questions set out in chapter 1, the study therefore concluded that the inability of the legal framework in Kenya to control dumping in the period of study identified in chapter 1 of this report that is from 1980 to 2017 can be attributed to the lack of the qualities identified in the legal frameworks of the countries which are more successful in controlling dumping, namely, lack of an independent/specialized absence of a consolidated statute, lack of proper enforcement mechanisms, and lack of well-spelt out functions and procedures.

## **4.2. Lessons and Suggestions**

The study makes the following recommendations:-

### **4.2.1. Enacting Effective Legislation to Regulate Dumping in Kenya**

With regard to the observation that Kenya does not have an effective law for combating, preventing and redressing dumping, this study suggests reforming or indeed carrying out a complete overhaul of the existing laws on dumping in Kenya will go a long way in ensuring reduction in instances of dumping. Needless to mention, chances are high that the effects of dumping across diverse sectors of the economy will decrease significantly. Parliament should enact a law that is in line with the Anti-dumping Agreement.<sup>5</sup> The Act should define the concept of dumping, circumstances under which it occurs, establishes a body mandated with receiving complaints, investigating and meting out sanctions against those found guilty of dumping.

---

<sup>5</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201.

The enacted legislation should establish an independent institution whose officials or commissioners should be from relevant fields such as economics, international trade law accounting etc. The commissioners should enjoy security of tenure to ensure their independence. Their duties and term should be clearly spelt out in the law.

The investigation procedure should be clearly spelt out. Appointment of investigators and their roles and the procedures for carrying out investigations should be provided for. The value of proper investigations cannot be overstated. The results of the investigation procedure are what lead to a conclusion of whether there was material injury and therefore dumping on a particular industry. Where investigations are properly conducted, this will ensure that perpetrators of dumping are brought to book and that appropriate sanctions are taken against them.

As highlighted above Kenya has now enacted the Kenya Trade Remedies Act which inter alia provides for establishing the Kenya Trade Remedies Agency, a body charged with amongst other functions investigating and evaluating cases of dumping in Kenya. The study noted some ambiguities in the new act and proposes that the Cabinet Secretary in charge of matters relating to trade should clarify the ambiguities through Regulations promulgated pursuant to the Act.

#### **4.2.2. Establish proper enforcement mechanisms**

With regard to the observation that Kenya's antidumping law lacks proper enforcement mechanisms, the law should also clearly spell out the sanctions that would apply to those found to be guilty of dumping. This will serve as a deterrent to those considering engaging in dumping of products in Kenya. This will also shelter many of our industries from the shocks caused by dumped goods. It is one thing to have a comprehensive law on dumping and an entirely different thing for it to be enforced. Therefore, the law should also provide a proper enforcement mechanism. Failure to enforce a good law will render it ineffective.

The enforcement provisions should be geared towards enhancing the functioning of the independent body to be formulated. It should for instance create penalties for those who knowingly give false or misleading information under oath, fail to honor summons, attempt to bribe or in any other way influence the decision of the body. Penalties and fines should also be prescribed for the offences.



The Study notes that Part 5 of the Kenya Trade Remedies Act now provides for elaborate enforcement mechanisms. The Act creates several offences including breach of confidence, failure to honour summons and hindering administration of the Act. The Act also prescribes a fine of Kshs. 5,000,000/- or an imprisonment term not exceeding 5 years or to both.<sup>6</sup>

#### **4.2.3. Creation of an Institutional Framework and Capacity Building**

With regard to the observation made that Kenya lacks a proper institutional framework to deal with cases of dumping, the law should also make provision for training of people across various sectors of the economy on the concept of dumping. It is appreciated that the concept is not a simple one to grasp even for the most educated of us. It is therefore necessary to sensitize individuals across various sectors of the economy on how to identify cases of dumping, how to collect evidence on cases of dumping, and how to make complaints to the commission to be established under the comprehensive legislations.

The trainings should be conducted by the commission through individuals with expertise in the area of dumping. This will ensure that Kenya does not just have a law in place but that the said law is effective and well utilized for its intended purposes.

The study that the Kenya Trade Remedies Act<sup>7</sup> mandates the Agency to conduct trainings and sensitization programs. It is appreciated that the concept of dumping is technical and may not be easy to grasp especially for users of the Act who may need to make complaints that meet the threshold in the Act. The training should also encompass such issues as collating evidence to sustain an antidumping investigation.

Finally, it bears noting that a law may lose its significance or effectiveness where there is no goodwill from the political class. It is therefore imperative that after a comprehensive law on dumping is enacted that the political class supports it through and through. The political class should not create barriers to its effectiveness. Instead they should allow the Commission established to carry out its mandate without undue interference.

---

<sup>6</sup> Section 41, The Kenya Trade Remedies Act, No 32 of 2017.

<sup>7</sup> Ibid Section 5 (d)

## 5.0.BIBLIOGRAPHY

### 5.1.Books

Ademola Oyejide and Dominique Njinkeu (eds), *Africa and the World Trading System Vol. 2 Case Studies* (Africa World Press, Inc., 2007).

Amirta Narlikar, *International Trade and Developing Countries: Bargaining together in the GATT and WTO* (RIPE Series in Global Political Economy, Routledge, 2003, New York).

Andreas Lowenfeld, *International Economic Law* (Oxford University Press, 2008, Oxford).

Avinash Dixit and Victor Norman, *Theory of International Trade: A Dual, General Equilibrium Approach* (Cambridge University Press, 2010, Cambridge).

B Dunlop, D. McQueen and M. Trebilcock, 'Canadian Competition Policy: A legal and economic Analysis' in R. S. Khemani, W. T. Stanbury (eds), *Historical Perspectives on Canadian Competition Policy* (Institute for Research on Public Policy, Toronto, 1991).

Dianah Ngui et.al, 'Kenya's Industrial Development' in Carol Newman et.al (eds) *Manufacturing Transformation: Comparative Studies of Industrial Development in Africa and Emerging Asia* (Oxford Scholarship Online, 2016)

<<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198776987.001.0001/acprof-9780198776987-chapter-4>> accessed 7 September 2018.

E. Choi and James Hartigan (eds), *Handbook on International of Trade Policy and Institutions* (Blackwell Handbooks in Economics, Vol. 2, Wiley-Blackwell, 2005, New Jersey).

Jacob O. Omolo, 'The Textiles and Clothing Industry in Kenya' in Herbert Jauch / Rudolf Traub-Merz (eds) *The Future of the Textile and Clothing Industry in Sub-Saharan Africa* (Bonn: Friedrich-Ebert-Stiftung, 2006), at p.148 <<http://library.fes.de/pdf-files/iez/03796/11kenya.pdf>> accessed 7 September 2018.

John Howard Jackson & Edwin A. Vermulst (eds), *Antidumping Law and Practice: A Comparative Study* (University of Michigan Press, 1989).

Kevin Watkins and Penny Fowler: *Rigged Rules and Double Standards: Trade, Globalization and the Fight against Poverty* (Oxfam International 2002).

M. J. Trebilcock, Robert Howse & Antonia Eliason., *The Regulation of International Trade* (4<sup>th</sup> edn, Routledge, 2012).

Thomas R Howell & Dewey Ballantine, 'Dumping still a Problem in International Trade,' in Charles W. Wessner (ed) *International Friction and Cooperation in High-Technology Development and Trade: Papers and Proceedings The compass series* (National Academies Press, 1997).

## 5.2. Journals

Andrei Shleifer, 'Understanding Regulation' [2005]11(4) *European Financial Management*, <[https://scholar.harvard.edu/files/shleifer/files/02\\_eufm00121.pdf](https://scholar.harvard.edu/files/shleifer/files/02_eufm00121.pdf)> accessed 20 October 2018.

Anne Wangui Muya & Fred Mugambi, 'Investment Decisions Among International Companies investing in Kenya: A Case Study of Coca Cola Bottlers Mombasa,' (2015)5(9) *I JSRP* <<http://www.ijsrp.org/research-paper-0915.php?rp=P454527>> accessed 31<sup>st</sup> May 2018.

Benedict Sheehy and Donald Fever, 'Designing Effective Legislation: A Normative Theory' [2015]38(1) *University of New South Wales Law Journal*, <<https://www.austlii.edu.au/au/journals/UNSWLJ/2015/14.html>> accessed 20 October 2018.

Bernard Hoekman & Michael Leidy, 'Antidumping and Market Disruption: The Incentive Effects of Antidumping Laws in The Multilateral Trading System: Analysis and Options for Change' (Robert Stern ed., 1993) as cited in Richard J. Pierce, Jr., 'Antidumping Law as Means of Facilitating Cartelization' [2000]67(3) *Antitrust Law Journal* <<https://www.jstor.org/stable/40843448>> accessed 14 October 2018.

Elizabeth J. Rowbotham, 'Dumping and Subsidies—Their Potential Effectiveness for Achieving Sustainable Development in North America' [1993]27(6) *Journal of World Trade*, at p.145 <<https://www.kluwerlawonline.com>> accessed 28 September 2018.

Huff J, 'Warrantless Entries and Searches Under Exigent Circumstances: Why Are They Justified and What Types of Circumstances Are Considered Exigent.' (2010) 87(3) *U Det. Mercy L Rev*, at p.379.

Jacob Viner, 'Dumping: A Problem in International Trade' [2017]18(2) *AJIL* <<https://www.jstor.org/stable/2188424>> at p.391, accessed 31 September 2018.

Jorge Miranda, 'Should Anti-dumping Laws Be Dumped?' [1996]28 *Law & Poly Int'l Bus.*  
Kanika Gupta & Vinta Choudury, 'Anti-dumping and Developing Countries', (2011) 10 *Kor. U.L. Rev.*  
<<https://heinonline.org/HOL/LandingPage?handle=hein.journals/korunilre10&div=9&id=&page=>> accessed 21<sup>st</sup> September 2017, at pp.129-30.

Loinas Ndlovu, 'An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa's Dumping and Anti-dumping Law' (2010) 5(1) *J. Intl Com. L& Tech*, <<http://www.jiclt.com/index.php/jiclt/article/viewFile/98/97>> accessed 4 October 2018

Michael Leidy and Bernard Hoekman, 'Production Effects of Price and Cost Based Anti-Dumping Laws under Flexible Exchange Rates' [1990]23(4) *The Canadian Journal of Economics*, <<https://www.jstor.org/stable/135567>> accessed 17 October 2018.

Paul D. Carrington & Roger C. Cramton, 'Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court' (2009) 94(3) *Cornell L Rev* 587,

<<http://cornelllawreview.org/files/2013/02/CarringtonCramtonJudicialIndependenceinExcess.pdf>> at p.80, accessed on 24<sup>th</sup> January 2018.

Philip Schofield, 'Jeremy Bentham and Nineteenth –Century English Jurisprudence' [1991] 12 J. Legal Hist. at p.59, <[www.tandfonline.com/doi/abs/10.1080/01440369108531028](http://www.tandfonline.com/doi/abs/10.1080/01440369108531028)> accessed 23 September 2018.

Rael, C. Maiyo & Beatrice E. Imo, 'The Kenyan Textile Industry in a liberalized Economy: An Analysis of Performance and Challenges,' (2012)3(1) JETEMS <<http://jetems.scholarlinkresearch.com/articles/The%20Kenyan%20Textile%20Industry%20in%20a%20Liberalized%20Economy.pdf>> accessed 7 September 2018.

Ronald L. Akers, Rational Choice, Deterrence and Social Learning Theory in Criminology: The Path Not Taken, (1990-1991) 81 J. Crim. L & Criminology, <<https://pdfs.semanticscholar.org/8e5a/dfeaf31edc9db15690e0aedd3c90b3cae27b.pdf>>, accessed on 17 August 2017.

Timothy A Falade Obalade, 'Analysis of Dumping as a Major Cause of Import and Export Crisis,' (2014)4(5) International Journal of Human and Social Science <[http://www.ijhssnet.com/journals/Vol\\_4\\_No\\_5\\_March\\_2014/25.pdf](http://www.ijhssnet.com/journals/Vol_4_No_5_March_2014/25.pdf)> accessed 21 May 2018.

### **5.3.Websites and Online Articles**

Allan Olingo, 'China imports hurting processors, traders and fishermen in East Africa' *The East African* (3 February 2018) <<http://www.theeastafrican.co.ke/business/China-fish-trade-eating-East-Africa-fishermen-livelihoods/2560-4290510-tb8620/index.html>> accessed on 19 May 2018.

Anzette Were, 'Manufacturing in Kenya: Features, Challenges and Opportunities,' (August 2016), <<https://set.odi.org/wp-content/uploads/2016/09/Manufacturing-in-Kenya-Anzette-Were.pdf>> accessed on 19 May 2018.

Ardhna Aggarwal, 'The WTO Antidumping Code: Issues for Review in Post Doha Negotiations' (May 2013), Indian Council for Research on international Economic Relations Working paper No.110 of 2013, <<http://icrier.org/pdf/WP99.pdf>> accessed on 22 October 2017.

Brian Hindley, 'Cause-of-Injury Analysis in European Antidumping Actions' ECIPE Working Paper No. 05/2009 <<http://www.ecipe.org/app/uploads/2014/12/cause-of-injury-analysis-in-european-anti-dumping-investigations.pdf>> accessed on 7 September 2018.

Cheap Chinese imports in Africa: Implications and remedies' (6 March 2014) <<http://www.polity.org.za/article/cheap-chinese-imports-in-africa-implications-and-remedies-2014-03-06>> accessed on 2 June 2018.

Christian Petersen, 'African Dumping Grounds: South Africa's Struggle Against Unfair Trade' (1996) 14 (1) B. U. ntl L. J. at p.377 as cited in Murigi Wanja Catherine, 'The Development of a

Successful Antidumping Regime in Kenya', LLM Thesis (2013, University of the Western Cape, South Africa),  
<[https://etd.uwc.ac.za/bitstream/handle/11394/2175/Murigi\\_LLM\\_2013.pdf?sequence=1&isAllowed=y](https://etd.uwc.ac.za/bitstream/handle/11394/2175/Murigi_LLM_2013.pdf?sequence=1&isAllowed=y)> accessed on 20 September 2017.

Economic framework for injury and causation analysis (Frontier Economics Pty. Ltd., Australia, 2017) at p.7,  
<<https://www.adcommission.gov.au/adsystem/Documents/Injury%20and%20causation%20framework%20overview.pdf>> accessed on 7 September 2018.

Evans Ombiro, 'Dumping wreaks havoc on manufacturing sector,' Daily Nation (Kenya, 14 September 1999) <<https://www.nation.co.ke/lifestyle/1190-384730-fcvajiz/index.html>> accessed on 2 June 2018.

Fishery and Aquaculture Country Profiles, The Republic of Kenya, FAO (February 2015),  
<<http://www.fao.org/fishery/facp/KEN/en#CountrySector-SectorSocioEcoContribution>>  
accessed on 19 May 2018.

Fishery Industry in Kenya (2005),  
<<http://www.epzakenya.com/UserFiles/files/Fishkenya.pdf>> accessed on 19 May 2018.

Gustav Brink, 'Anti-dumping in South Africa' (2012) Tralac Working Paper No. D12 WP07/2012,  
<<http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf>> accessed on 17 August 2017.

International Trade Administration Commission of South Africa (ITAC)  
<<http://www.itac.org.za/pages/about-itac/an-overview-of>> accessed on 13 February 2018.

Johan den Hertog, '5000 General Theories of Regulation' [1999] Economic Institute/ CLAV, Utrecht University  
<<https://majandus.ut.ee/sites/default/files/mtk/dokumendid/e35f555bc5922cc21262fabfac7de2fc.pdf>> accessed on 21 October 2018.

John J. Barceló III, 'Antidumping Laws as Barriers to Trade--The United States and the International Antidumping Code' (1972) Cornell Law Faculty Publications Paper 514,  
<<http://scholarship.law.cornell.edu/facpub/514>> accessed on 26 August 2018.

Justus Ochieng, 'Dumping hurts state economy' *The Star* (Kenya, 11 May 2013),  
<[https://www.the-star.co.ke/news/2013/05/11/dumping-hurts-state-economy\\_c773001](https://www.the-star.co.ke/news/2013/05/11/dumping-hurts-state-economy_c773001)> accessed on 2 June 2018.

Kenya and the WTO, <[https://www.wto.org/english/thewto\\_e/countries\\_e/kenya\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/kenya_e.htm)>  
accessed on 12 February 2018.

Kenya Economic Report 2017 Popular Version, <<http://kippra.or.ke/wp-content/uploads/2017/05/KER-2017-Popular-Version-1.pdf>> accessed on 19 May 2018.  
Kenya Marine and Fisheries Institute (13 November 2017),

<http://www.kmfri.co.ke/index.php/fact-sheet-2/86-inland-fisheries>> accessed on 19 May 2018.

Kenya Vision 2030, Manufacturing Sector,  
<<http://www.industrialization.go.ke/index.php/vision-2030-manufacturing-sector>> accessed on 19 May 2018.

Kenya's Youth Unemployment Challenge, UNDP (January 2013),  
<[http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/KenyaYECweb\(jan13\).pdf](http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/KenyaYECweb(jan13).pdf)> accessed on 7 September 2018.

Ousenni Illy, 'Trade Remedies in Africa: Experiences, Challenges and Prospects'  
<<https://www.princeton.edu/~pcglobal/conferences/GLF/oilly.pdf>> at p.5, accessed on 4 April 2017.

Peter Munaita, 'Kenya to Invoke Anti-dumping Rules against Egypt' *The East African* (Kenya, 30 June 2006), <[www.theeastafrican.co.ke/business/2560-248628-uv12iu/index.html](http://www.theeastafrican.co.ke/business/2560-248628-uv12iu/index.html)> accessed on 26 June 2017.

South Africa and the WTO,  
<[https://www.wto.org/english/thewto\\_e/countries\\_e/south\\_africa\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm)> accessed on 19 August 2017.

The Governance of Regulators (*Being an Independent Regulator*), at p.34 <[https://www.oecd-ilibrary.org/governance/being-an-independent-regulator\\_9789264255401-en](https://www.oecd-ilibrary.org/governance/being-an-independent-regulator_9789264255401-en)> OECD (2016) accessed on 21 March 2018.

The Institute of Economic Affairs, (Trade Notes) (July, 2013)31, 'Antidumping as a Trade Remedy: The Way Forward for Kenya' <<http://www.ieakenya.or.ke/publications/notes/anti-dumping-as-a-trade-remedy-the-way-forward-for-kenya>> accessed on 21 February 2018.

The Institute of Economic Affairs, (Trade Notes) (July, 2013)31, 'Antidumping as a Trade Remedy: The Way Forward for Kenya' <<http://www.ieakenya.or.ke/publications/notes/anti-dumping-as-a-trade-remedy-the-way-forward-for-kenya>> accessed on 21 February 2018.

The Institute of Economic Affairs, (Trade Notes) (July, 2013)31, 'Antidumping as a Trade Remedy: The Way Forward for Kenya' <<http://www.ieakenya.or.ke/publications/notes/anti-dumping-as-a-trade-remedy-the-way-forward-for-kenya>> accessed 7 September 2018.

The Law Dictionary, <<https://thelawdictionary.org/consolidatedlaws-or-statutes/>> accessed on 27 January 2017.

Tran Viet Dung, 'Anti-dumping Policy from a Competition Perspective: An artificial shield for National Champions in Open market-What to do about it?' [2006]2 Asia Competition Law Bulletin, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1708270](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708270)> accessed on 17 October 2018.

United Nations Conference on Trade and Development, 'Training Module on the WTO Agreement on Anti-Dumping' (United Nations, New York and Geneva, 2006) <[http://unctad.org/en/Docs/ditctncd20046\\_en.pdf](http://unctad.org/en/Docs/ditctncd20046_en.pdf)> accessed on 21 March 2018.

Why Kenyans are eating Chinese fish, *Citizen Digital* (17 April 2018) <<https://citizentv.co.ke/news/why-kenyans-are-eating-chinese-fish-197407/>> accessed on 19 May 2018.

## **5.4. International, Regional and National Legal Instruments**

### **5.4.1. International Legal Instruments**

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201.

General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

Agreement on Implementation of Article VI of The General Agreement on Tariffs and Trade 1994, <[https://www.wto.org/english/docs\\_e/legal\\_e/19-adp.pdf](https://www.wto.org/english/docs_e/legal_e/19-adp.pdf)>;

General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994);

### **5.4.2. Regional Legal Instruments**

EAC Customs Union Regulations: Anti-Dumping Measures, <<https://www.eac.int/customs/customs-regulations/anti-dumping-measures>> accessed on 17 September 2018.

Protocol on the Establishment of the East African Customs Union (Enacted 8<sup>th</sup> March 2004; entered into force 1<sup>st</sup> January 2005) <[https://www.jus.uio.no/english/services/library/treaties/09/9-04/eac\\_establishment\\_protocol.xml](https://www.jus.uio.no/english/services/library/treaties/09/9-04/eac_establishment_protocol.xml)> accessed on 17 September 2018.

Treaty establishing the Common Market for Eastern and Southern Africa, 33 ILM 1067 (1994) <<http://www.comesa.int/wp-content/uploads/2016/06/COMESA-Treaty.pdf>> accessed on 17 September 2018.

Treaty for the Establishment of the East African Community (Adopted 30<sup>th</sup> November 1999; entered into force 7<sup>th</sup> July 2000), Arusha (As amended on 14<sup>th</sup> December, 2006 and 20<sup>th</sup> August, 2007), see Article 2(1), <[http://eacj.org/?page\\_id=33](http://eacj.org/?page_id=33)> accessed on 17 September 2018.

### **5.4.3. National Legal Instruments**

#### **Kenya**

Competition Act No. 12 of 2010 (Government Printers, 2010, Nairobi);

Cotton Act, Cap 335 of the Laws of Kenya.

Crops Act, No. 16 of 2013 (Government Printers, 2013, Nairobi).

Export Processing Zones Act, Cap 517 of the Laws of Kenya.

Investment Promotion Act (Government Printers, 2004, Nairobi);  
Kenya Trade Remedies Act, No. 32 of 2017 (Government Printers, 2017, Nairobi);  
Micro and Small Enterprises Act, Act No. 55 of 2012 (Government Printers, 2012, Nairobi);  
Sugar Act, No. 10 of 2001 (Government Printers, 2001, Nairobi);  
The Agriculture and Food Authority Act, No. 13 of 2013 (Government Printers, 2013, Nairobi).  
The Anti-Counterfeit Act (Government Printers, 2008, Nairobi);  
The Constitution of Kenya, (Government Printers, Nairobi, 2010);  
The Customs and Excise Act, Cap 472, Laws of Kenya (Government printer, Nairobi, 2012);  
The East African Community Customs Management Act (EACMA) of 2004;  
The Excise Duty Act, No. 23 of 2015 ((Government printer, Nairobi, 2015);  
The Export Processing Zones Authority (EPZA) Act, Cap 517 Laws of Kenya;  
The Special Economic Zones Act, No. 16 of 2015 (Government Printers, 2015, Nairobi).

### **Subsidiary legislations under the Customs and Excise Act, Cap 472, Laws of Kenya**

Appointment and Limits of Ports, Customs Areas, etc., 1984;  
Customs and Excise (Remission) (Aid Projects) Order;  
Customs and Excise (Remission) (Medicaments) Order;  
Orders deemed to have been made under section 138(1) by virtue of section 235 (2) of the Act;  
Customs and Excise (Remission) (Safari Rally) Order;  
Customs and Excise (Restricted Imports) (Commercial Vehicles) (Revocation) Order, 1993;  
Customs and Excise (Small-Scale Industries) Order, 1993;  
Customs and Excise (Small-Scale Industries) (No. 2) Order, 1993;  
Customs and Excise (Rate of Exchange) Order, 1993;  
Customs and Excise (Dumping Duty) Order, 994;  
Customs and Excise (Remission) (Charitable Organisations) Order, 1999;  
Customs and Excise (Disposal of Prohibited Goods) Regulations, 1999;  
Customs and Excise (Anti-Dumping and Countervailing Measures) Regulations, 1999;  
Customs and Excise (Appeals) Rules, 2000;  
Customs and Excise (Refund of Duty) (Private Power Producers) Regulations, 2000;  
Customs and Excise (Exports) Regulations, 2000;  
Customs and Excise (Restricted Imports) (Commercial Trailers) Order, 2002;  
Customs and Excise (Duty Remission) Regulations, 2002;  
Customs and Excise (Refund of Duty) Order, 2002;  
Customs and Excise (Investments) Regulations, 2003;  
Customs and Excise (Gaming Tax) (Procedure) Regulations, 2004;  
Customs and Excise (Remission) (Investments) Regulations, 2004;  
Customs and Excise (Petroleum Oils) (Remission) Order, 2004;  
Customs and Excise (Duty Remission) Order, 2005; Customs and Excise Regulations, 1983;  
Customs and Excise (Unassembled Motor Vehicles) Regulations, 1993;  
Customs and Excise (Remission of Excise Duty) Regulations, 2005 (*Revoked*);  
Customs and Excise (Petroleum Oils) (Excise) Regulations, 2005;  
Customs and Excise (Excise Duty Stamps) Regulations, 2008 (*Revoked*);  
Guidelines on Specifications for Measurement Devices, 2011;  
Customs and Excise (Determination of Retail Selling Price) Regulations, 2012;  
Customs and Excise (Remission of Excise Duty) Regulations, 2013;  
Customs and Excise (Excisable Goods Management System) Regulations, 2013;



Customs and Excise (Railway Development Levy Fund) Regulations, 2013;  
Mutual Tariff Concession - Common Market for Eastern and Southern Africa (COMESA).

**South Africa**

Antidumping Regulations, Government of South Africa;

International Trade Administration Act (ITA), Act No. 71 of 2002, as introduced through South Africa's Gazette No. 24287 on 22<sup>nd</sup> January 2003;

The Constitution of the Republic of South Africa, Section 231(3)

[www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf](http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf) accessed on 19<sup>th</sup> August 2017.