ANTIDUMPING LAW IN DEVELOPING COUNTRIES WITH SPECIAL REFERENCE TO AFGHANISTAN

BY

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ABSTRACT

This dissertation examines Antidumping Law in Developing countries with special reference to Afghanistan. It questions the appropriateness and the effectiveness of this trade remedy measures as an instrument of international competition administration and suggests alternatives and improvements. It also further discusses the history of Antidumping laws and the introduction of GATT under WTO has well as the available remedies to states to protect the domestic industries and the fair competition. It mainly focuses on the overall substantive rules of World Trade Organization such as GATT and dumping agreement. This dissertation also discusses the Dumping under WTO and the laws against it. It further discusses the economic analysis of Dumping, in regards to price discrimination and the sale below cost. The welfare impact of Dumping and the rationale behind why there is an Antidumping law are analysed too. Last but not least, the Afghanistan's accession to the WTO and the needs for Afghanistan to harmonise its trade laws in accordance with WTO rules as well as to base its Antidumping laws from India as a model are further analysed. This study finds that Afghanistan needs to reform its laws in conformity with WTO rules, as Afghanistan will not be able to apply any anti-dumping, countervailing or safeguard measures until it has appropriate WTO-consistent laws in its own legal system. Afghanistan will only be able to apply such measures in conformity with the relevant WTO provisions.

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ملخص البحث

تبحث هذه الأطروحة قانون مكافحة الإغراق في البلدان النامية مع الإشارة بوجه خاص إلى أفغانستان. حيث تناقش هذه الأطروحة مدى ملائمة وفاعلية تدابير الانتصاف التجاري كأداة لإدارة التنافسية التجارية الدولية، كما أنها تقترح بدائل وتحسينات. كما أنها تناقش تاريخ قانون مكافحة الإغراق وإدخال منظمة (جات)ومنظمة التجارة العالمية ، كذلك السب المتاحة للدول لحماية صناعتها المحلية ، والمنافسة العادلة . إنها وبشكل أساسي تركز على القواعد والمباديئ الموضوعية الشاملة لمنظمة التجارة العالمية كـ (جات) و اتفاقية الأغراق. الأطروحة كذلك تناقش الإغراق تحت منظمة التجارة العالمية الأنظمة المضادة لها. وهي أيضاً تناقش التحليل الاقتصادي للإغراق من حيث التمييز السعري والبيع دون التكلفة.إضافة إلى أن التأثر المعيشي من الإغراق والسبب المنطقي وراء وجود قانون مكافحة الإغراق تم تحليله كذلك في هذه الأطروحة. أخيراً وليس آخراً ، تم تحليل انضمام أفغانستان إلى منظمة التجارة العالمية واحتياج أفغانستان لموائمة قوانينها التجارية مع قوانين منظمة التجارة العالمية كذلك اتخاذ قوانين مكافحة الإغراق واعتبار الهند كنموذج في هذا المجال.

هذه الدراسة وجدت أن افغانستان بحاجة إلى إعادة إصلاح قوانينها لتنساق مع قواعد منظمة التجارة العالمية. حيث أن أفغانستان لا تستطيع أن تكافح الإغراق أو تتخذ أي تدابير وقائية إلى أن يكون نظامها القانوني متوافق مع أنظمة وقوانين منظمة التجارة العالمية ، أفغانستان تستطيع تطبق هكذا تدابير حينما تكون تدابيرها متوافقة مع مالدى منظمة التجارة العالمية.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion; it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.

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DECLARATION

I hereby declare that this thesis is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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Dedicated to my dear family, especially my father and my mother, which certainly without their unconditional love support I wouldn't be able to come this far, I can't thank you enough for everything you have done for me. I would like also to dedicate this thesis to Y.BGH Prof. Datuk. Dr. Mizan, I want to thank Prof. Datuk for all you have taught me. The knowledge and wisdom you have imparted upon me have been a great help and support throughout my studies. I believe my success is at least in part due to your kind support and mentorship.

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Glory and gratitude be to Allah (*SWT*) who hath ordained law and guidance, may the peace and blessings of Allah be upon Prophet Muhammad (*SAW*), Members of his household, his companions and the rest of the believers till the day of judgement.

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LIST OF STATUTES

GATT 1994

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)

WTO Agreements

LIST OF ABBREVIATIONS

AD, A-D	Anti-dumping Measures
GATT	General Agreement on Tariffs and Trade
DSB	Dispute Settlement Body
TRIMs	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organisation
WTO	Christian Era
Agreement	Agreement Establishing the World Trade Organization
MFN	Most-favoured-nation
TBT	Technical barriers to trade
UNCTAD	UN Conference on Trade and Development
UR	Uruguay Round
SPS	Sanitary and phytosanitary measures
DDA	Doha Development Agenda
CVD	Countervailing duty (subsidies)
AFG	Afghanistan
DSU	Dispute Settlement Understanding
EC	European Communities
SCM	Subsidies and Countervailing Measures
SEZs	Free Zones and Special Economic Zones

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The General Agreement on Tariffs and Trade (GATT), since its inception, has authorized guarantors to apply anti-dumping actions in the form of special duties to offset dumping when its domestic industry is injured or threatened to be injured materially. National foreign trade policies consider Anti-dumping laws a vital element in countries where trade liberalization and open international trade are embraced. National anti-dumping legislation dates from well before the GATT. Canada enacted the first anti-dumping law in 1904. Several other western countries, including Australia, New Zealand, South Africa, and the United States, have adopted a comparable law over the two decades that followed. At the present time, over 98 countries in the world have already taken into consideration anti-dumping law and are ready for action against dumping in their domestic industry's defence .[1]

Regardless of their longstanding popularity, anti-dumping laws are commonly subject to harsh criticism, especially from academic economists. The methods and principles of anti-dumping are often criticized for their lack of economic rationale while the issue of dumping is being assessed. Anti-dumping laws are further questioned for not actually protecting fair competitive markets but rather for protecting domestic producers against competition internationally. Economic development can be very much harmed by the misuse of anti-dumping law protectionism, as national resources

[1] Ian Wooton and Maurizio Zanardi, "Trade and Competition Policy: Anti-Dumping versus Anti-Trust," 2002.

will be mismanaged and significant interests will be vested in industries that may be improper.[2]

Most countries have gradually transformed the process of globalization or trade policy regimes from those that are inward-oriented protectionist to trade regimes that are more outward and liberal. Therefore, the government has been forced to involve various "emergency" and "safety valve" protection measures in those countries due to dual pressure from trade liberalization on one hand, and, protection on the other hand, to guard against various multilateral trade systems and contingencies that arise out of the liberalization and tariff reduction. Part of the trade policy of a number of countries, both developed and developing, are trade remedies in the form of anti-dumping, anti-subsidy and safeguards measures.[3]

Anti-dumping proceedings showed a notable rise during the WTO era. In 2002, the number of investigations launched was almost double that of those initiated in 1995. It increased to 295 in 2002 in contrast with the 156 proceedings in 1995.

Despite the fact that the number of anti-dumping initiations has been somewhat reduced in the recent five years (2000-2005), the total amount of the anti-dumping actions are still very high, especially compared to instruments of other trade remedies.

Certain sectors seem to have been specifically targeted in 2014. Trade defence action has frequently affected the steel sector, the Mediterranean region in particular, although Latin America showed some effect as well. In fact, steel products concerned 12 of the new investigations initiated in 2014. Closely following was the chemical sector, with 11 new investigations started in 2014. At the same time, in 2014, especially

[2] Ibid.
[3] Tran Viet Dung, "Anti-Dumping Policy from a Competition Perspective: An Artificial Shield for National Champions in Open Market What to Do About It?," *Asia Competition Law Bulletin* 2 (2006).

targeted was the paper industry with 5 new investigations initiated followed by another one commenced early in 2015.[4]

India was the most active country in 2014. India has a total of 26 measures in force (22 anti-dumping measures). In 2014, it imposed 4 new anti-dumping measures and 4 new safeguard measures and initiated 7 new safeguards and 3 new anti-dumping investigations. It is followed by China and the US with 18 measures in force (16 anti-dumping and 2 anti-subsidy measures for China, and 17 anti-dumping and 1 anti-subsidy measure for the US). In 2014, China imposed 4 new measures (3 anti-dumping, 1 anti-subsidy) and initiated 1 anti-dumping investigation. The US imposed 1 new anti-dumping measure and did not initiate any new investigations.[5]

The most notable point here is that it is no longer a limited number of industrial countries, as in the past, that confines themselves to the use of anti-dumping law. Anti-dumping actions are now being launched by a large number of developing countries. Many of these countries, such as Brazil, India, Korea, Mexico, South Africa etc., recently had their market-oriented economic reforms through undergoing far-reaching trade liberalisation. This trend tends to spread out to other developing countries in Asia, such as China, Indonesia, and Thailand. Businesses, economic analysts and legal specialists are fearful of the large scale resort to anti-dumping. This could lead to its misuse of the purpose of protectionism, in turn, resulting from the competition between domestic and foreign producers being unfair. The anti-dumping legislation has been

[4] EUROPEAN COMMISSION, "Overview of Third Country Trade Defence Actions Against the European Uuion For The Year 2014," 2015.
[5] Ibid.

tainted inefficient by many scholars through their economic analysis and suggests that the protection explained in terms of economy is not obeyed by anti-dumping practices.[6]

On 11th March 2016, on a recent case regarding anti-dumping, a panel report was issued by the WTO in the case brought by Korea regarding "United States — Anti-dumping and Countervailing Measures on large residential washers from Korea."
The United States' absolute anti-dumping and countervailing duties were involved in the dispute due to the anti-dumping and countervailing duty proceedings conducted by the USDOC concerning imports of Korea's large residential washers. The anti-dumping claims of Korea concern certain aspects of the USDOC's approach to the comparison methodology provided in the second sentence of Article 2.4.2 of the AD Agreement (W-T comparison methodology). Some of the methodologies used by the USDOC to determine whether the conditions for the application of the W-T comparison methodology are met have been questioned on several aspects by Korea. Korea also uses the context of the W-T comparison methodology to challenge the USDOC's use of zeroing. Korea's subsidies claims concern the USDOC's determinations that two tax credit subsidy programmes are specific. Under the SCM Agreement and the GATT 1994, claims have also been raised by Korea, challenging the method in which the USDOC calculated the amount of funding convened on Samsung under those programmes. The United States, on 19th April 2016, notified the dispute settlement body of its decision to appeal certain issues of law and legal interpretation in the panel report to the Appellate Body.[7]

[6] Viet Dung, "Anti-Dumping Policy from a Competition Perspective: An Artificial Shield for National Champions in Open Market What to Do About It?"
[7] "WTO | Dispute Settlement - the Disputes - DS464," n.d.

Korea, in a very recent case, had a dispute filed against it over anti-dumping duties on pneumatic valves by Japan. Japan, on 15 March 2016, requested consultations with Korea under the dispute settlement system concerning measures imposing anti-dumping duties from Japan on valves for pneumatic transmission ("pneumatic valves"). The request for consultation, however, only formally pledges an argument in the WTO once it has been asked for. Consultations offer an opportunity for the parties to discuss the matter without proceeding further with litigation by providing a satisfactory solution. If consultations have failed to resolve the dispute, the complainant may request adjudication by a panel after 60 days.[8]

This study analyses the Antidumping Law in Developing countries with special reference to Afghanistan. It questions the appropriateness and the effectiveness of this trade remedy measures as an instrument of international competition administration and suggests alternatives and improvements.

1.2 STATEMENT OF THE PROBLEM

No comparative studies have been conducted on Antidumping and Antidumping Law in Developing countries with reference to Afghanistan. In addition, the measures that have to be taken by the dumped states, until the issue is settled, are to be decided by the Dispute Settlement Body (DSU) of World Trade Organization. Widely accepted principles are applied such as good faith, due process, non-discrimination, and proportionality.

There are certain problems in determining the price of dumping. The United States has produced three new elements to restructure the basis for price comparison.

[8] Ibid.

Firstly, the implementation of a new law that deducts from the "constructed export price" (which replaces the prior "exporter sales price") and allocated a portion of the total profit. Secondly, the new law emphasizes the importance of making comparisons at proportional levels of trade and revising the provisions on the frequency of trade adjustments. Thirdly, the new laws limit the offset for indirect selling expenses to those situations where a proper level of trade comparison or level of trade adjustment cannot formulate price comparability (the ESP offset). The new laws state that a related importer's profit shall be deducted from the constructed export price. However, it is not clear how the profit in the normal value shall be accounted for. This point needs to be examined further.

In addition, US law prescribes several factors to be considered in determining "affiliated parties," but in actual administration, the authorities only consider the percentages of shares held. This raises the risk to parties that are not essentially "affiliated parties" but will nevertheless be labelled as such. The Anti-dumping Agreement contains revisions requiring, in principle, that export price and normal price should be compared similarly, I.E weighted averages to weighted averages or individual transactions to individual transactions. However, under certain conditions, it also permits exceptions to this principle. The United States interpreted that this article does not apply to investigative reviews, but only administrative reviews. For this reason, under the US laws in administrative reviews, it is viable to compare weighted average normal price and individual export prices. Although this is one permissible interpretation since final determination of dumping margins is made in the administrative review, it is desirable that the United States compare weighted averages to weighted averages or individual transactions to individual transactions and during the

original investigation, there were cases in which comparisons of weighted average normal prices were not used.[9]

Problems Involved in Determining Injury

Under the Anti-dumping Agreement, the imposition of an anti-dumping duty requires evidence that dumping has resulted in an injury to a competing domestic industry in the importing country, and additionally, necessitates that the investigating authority to have enough evidence to substantiate dumping. Moreover, dumping is not an entirely deleterious practice as it may result in benefiting the consumers in the form of lower-priced goods.

Under the terms of the GATT, a country can take only actions against dumping when there is a factual finding of injury to an industry in an importing country. The Tokyo Round Anti-Dumping Code did not clearly establish the conditions necessary to establish injury. Unfortunately, the prior provisions have been interpreted differently by different countries. The determination of injuries is, however, provided in Anti-Dumping Agreement. Developing a general quantitative standard to measure the extent of the injury that has occurred has proven difficult. We must, therefore, be aware of potential discretionary problems. Specifically, we must ensure that when determining injuries, we take into account sufficient injuries. Also, that there is sufficient proof of causality between injury and dumping, and that there is no potential injury from other factors unrelated to dumping imports to be counted along with dumping injury.[10]

[9] "CHAPTER 5 ANTI-DUMPING MEASURES," accessed May 28, 2016, http://www.meti.go.jp/english/report/data/gCT9905e.html.
[10] Ibid.

1.3 RESEARCH QUESTIONS

1. What is anti-dumping and how it is defined under world trade organization?
2. How Anti-dumping law affects fairness in competition?
3. What is the welfare impact of dumping?
4. What are the methods in determining dumping and injuries under antidumping laws?
5. What are the rationales behind the anti-dumping laws?

1.4 OBJECTIVES OF STUDY

Objectives of the research are:

1. To determine what is anti-dumping and how it is defined under world trade organization.
2. To determine Anti-dumping and fairness in competition.
3. To determine what is the welfare impact of dumping
4. To determine what are the methods in determining dumping and injuries under antidumping laws.
5. To determine what are the rationales behind the anti-dumping laws.

1.5 SCOPE AND LIMITATION

This study would mainly focus on Antidumping, and the Antidumping Laws in Developing countries with special reference to Afghanistan, it questions the appropriateness and the effectiveness of this trade remedy measures as an instrument of international competition administration and suggests alternatives and improvements. While it will allude to the general framework of World trade organization which mainly

lays down the remedies available to the State to protect the domestic industries, and as well observes the fair competition. Its focus will be the overall substantive rules of World trade organization such as GATT and dumping agreement.

1.6 LITERATURE REVIEW

All WTO state countries are bound by an agreement to be part of a single undertaking that follow the same measures included in The Uruguay Round Agreements on Safeguards, Implementation of Article VI of the GATT 1994 (ADA), and the Agreement on Subsidies and Countervailing Measures.[11] The substantive and procedural rules on the discipline of dumping ‟ are elaborated upon in Article VI of the ADA. Article 18 of the ADA provides that, no specific action against dumping of exports from another member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." As such, we can take three key results from the Uruguay Round; firstly, the Agreements set forth rules regarding anti-dumping; secondly, the Subsidies and Countervailing Measures set out the rules regarding application of subsidies by member state governments; and finally, the Agreements also set forth safeguards which can be imposed if there is a surge in imports in a member state market. These are all trade remedies that a member state can invoke.

Moreover, the substantive rules in regards of AD agreement are described as follows: Article 1 of the AD Agreement establishes the basic principle that a Member may not impose an anti-dumping measure unless it determines, following an investigation conducted in conformity with the provisions of the AD Agreement, that

[11] Ikeagwuchi Godwin Andrew, "Implementing Effective Trade Remedy Mechanisms: A Critical Analysis of Nigeria‟ S Anti-Dumping and Countervailing Bill, 2010" (University of Pretoria, 2014).

there are dumped imports, material injury to a domestic industry, and a causal link between the dumped imports and the injury.[12]

Determination of dumping

Substantive rules, contained in Article 2, pave way for the determination of dumping. A "fair comparison" between normal value (the price of the imported product in the "ordinary course of trade" in the country of origin or export) and export price (the price of the product in the country of import) is what forms the basis of calculating dumping. The calculation of normal value and export price are detailed in Article 2 as well as elements of the fair comparison that must be made.[13]

Determination of injury

The rules regarding the determination of material injury caused by dumped imports is contained in Article 3 of the AD Agreement. Material injury is defined as "material injury itself, threat of material injury, or material retardation of the establishment of a domestic industry"[14]. The basic requirement for determinations of injury, is that there be an objective examination, based on positive evidence of the volume and price effects of dumped imports and the consequent impact of dumped imports on the domestic industry. Specific rules regarding factors to be considered in making determinations of material injury are contained in Article 3, while specifying that no particular factor is considered alone in determination. Article 3.5 requires determining the causal link between material injury and dumped imports, including known factors other than dumped imports which may be causing injury that must be

[12] "WTO — Trade Topics — Anti-Dumping — Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994," n.d.
[13] Ibid.
[14] Ibid.

examined, and that injury caused by these factors must not be attributed to dumped imports.[15]

A significant new provision, Article 3.3, establishes cumulative conditions in which an evaluation of the effects of dumped imports from more than one country may be undertaken. Under the rules, authorities must determine that the margin of dumping from each country is not de minimis, that the volume of imports from each country is not negligible, and that a cumulative assessment, in light of the conditions of competition among the imports and between the imports and the domestic like product, is appropriate.[16]

Definition of industry

Article 4 of the AD Agreement sets forth a definition of the domestic industry to be considered for purposes of assessing injury and causation. The definition of a domestic industry is a "like product". This term is defined in Article 2.6 as a product that is identical to, or in the absence of such a product, one that has characteristics closely resembling those of, the imported dumped product under consideration. Article 4 contains special rules for defining a "regional" domestic industry in incomparable circumstances where production and consumption in the importing country are geographically isolated, and for the evaluation of injury and assessment of duties in such cases. Article 4 also establishes that if there is a "relation" (defined as a situation of legal or effective control) between domestic producers and exporters or importers of the dumped product, the domestic producers may be excluded from consideration as part of the domestic industry.[17]

[15] Ibid.
[16] Ibid.
[17] Ibid.