

UCT – MPHIL COMMERCIAL LAW

Anti - Dumping or Protection: An analysis of competition issues in
dumping investigations

Final Thesis

Name: Shupikile Mastara

Student ID: MSTSHI002

Supervisor: Luke Kelly

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1. Introduction

Dumping is a price discrimination violation that is regulated by the World Trade Organisation (WTO). Though competition language is used in anti-dumping law, the application of anti-dumping law fails to take into account the same competition principles that it claims to be attempting to protect. Section VI of the General Agreement on Tariffs and Trade (GATT) 1994¹ also known as the anti-dumping agreement describes dumping as the act of selling goods in an export market at a lower price than the country of origin.² In domestic jurisdictions, competition law exists to ensure that firms with market power do not abuse their positions. However when international firms are involved, domestic laws are limited in their ability to enforce these laws. This is more so where countries are party to the GATT 1947 (WTO) agreement where countries agreed to open their markets and to offer preferential treatment to member countries as contained in section 1 of the GATT 1947 'general most favoured nation treatment' (MFN)³. To protect national interests, WTO member countries (members) agreed to incorporate trade remedies into the WTO agreement, one of which is the anti-dumping agreement (ADA). In this paper, to differentiate between the WTO anti-dumping regulation and the domestic anti-dumping regulation, the WTO anti-dumping regulation will be termed 'the anti-dumping agreement' and the South African anti-dumping regulation will be termed 'SA anti-dumping regulation' this is to prevent confusion when discussing the two Acts.

¹ Agreement on the implementation of article VI of the general agreement on tariffs and trade (GATT) 1994 (Anti-dumping)

² C Lumina 'Free trade or just trade? The World Trade Organisation, human rights and development (Part 1)' (2008) 12 *Law democracy and development* 20 p24

³ General agreement on tariffs and trade of 1947 section 1, which states that any advantage, favour, privilege or immunity... shall be accorded immediately and unconditionally to the like product originating in or destined for territories of all other contracting parties.

Anti-dumping regulation is comparable to the regulation of unilateral conduct by firms in competition law, specifically price discrimination conduct by dominant firms. Section 9(d)(iv) of the South African competition law⁴; section 102 of the Treaty on the Functioning of the European Union (TFEU) in Europe jurisdiction;⁵ and The Robinson-Patman Act⁶ in United States of America (U.S.) all deal with price discrimination offences. This paper will focus on anti-dumping and competition law as practised in South Africa even though cases will be drawn from the different jurisdictions for illustration purposes.

According to the WTO, dumping occurs when a product is 'introduced into the commerce of another country at less than its *normal value*⁷, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.'⁸ However before anti-dumping duties can be applied, 'material injury' to an industry in the importing country producing a 'like' product has to be shown. It also has to be shown that the injury to the industry is a direct result of the increase in the dumped imports.

Central to the dumping investigation, is the description of 'normal value' which in anti-dumping legislation does not take into account that price discrimination is a valid economic business strategy. In business strategy price discrimination involves segmenting the target market into different submarkets. If the submarkets have different elasticities of demand at a given price, the business can increase profit by charging different prices. The anti-dumping definition of 'normal value' therefore acts

⁴ Competition Act No 89 of 1998 s9.

⁵ Treaty on the Functioning of the European Union Sections 101 and 102

⁶ The Robinson-Patman Act codified at 15 U.S.C. § 13 *et seq.*

⁷ Highlight authors own.

⁸ Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 Subsection 2(1)

as a safeguard to domestic industries seeking protection as it does not make allowances for sound business practises. This is in direct contrast to the treatment of price discrimination and pricing below cost in competition law which are both treated as 'rule of reason' offences making allowances for the possibility that firms are engaging in these actions for competitive reasons⁹. Pricing below cost is clearly defined in the competition act as a firm selling below its 'marginal or average variable cost'¹⁰ which restricts the business practices that are actionable as it clearly defines the cost basis to be used in comparing the selling price and the cost price.

The primary premise in price discrimination and predation investigations is that the firm in question is able to use its dominant position to set prices independently. As a result, the firm is able to restrain competition from new entrants by abusing its position of dominance. It is this dominance that competition law seeks to monitor and regulate by ensuring that firms that have monopoly position or market power¹¹ do not abuse their position by attempting to 'price out' smaller competitors. Anti-dumping regulation however does not take into consideration the size of the competitor firm. The focus of anti-dumping investigations is on the pricing action rather than on the effect on competition that the pricing action will have. This is contradictory to the economic thought that price discrimination is based on. Economic theory states that unless a firm has sufficient market power, its continued pricing below cost would result in its own demise. However, with sufficient market power a firm is able to stifle smaller competitors who are unable to sustain the low prices for a prolonged period. Cognisant of the requirement for market power for a firm to be able to inhibit competition, competition law focuses on firms with market power in its attempt to regulate the behaviour of firms. Anti-dumping law however has no such test ensuring that firms

⁹ Competition Act No 89 of 1998 ss8 and 9.

¹⁰ Competition Act No 89 of 1998 subsec 8(d)(iv).

¹¹ According to the OECD, a firm is considered to have market power if it has at least 40 per cent of the industry market share. However jurisdictions differ in their market share demarcation for dominance.

that are not in a position to hinder competition are still able to be held culpable of 'dumping' in a foreign country.

In keeping with competition law, the anti-dumping agreement restricts the use of anti-dumping measures to where injury can be shown¹². The anti-dumping agreement further defines the term 'injury' as 'material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry'¹³. However, the wording related to the injury requirement in the anti-dumping agreement is focused on the effect on price rather than the effect on the industry in question. Section 3 (determination of injury) of the anti-dumping agreement requires investigating authorities to consider 'whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases'¹⁴. In essence, within anti-dumping regulation, even though the price discrimination can be shown to be competitive rather than 'unfair'¹⁵, dumping duties would still apply. This is in contrast to competition law which not only requires that price discrimination be shown but that a 'significant lessening of competition' needs to be demonstrated before it becomes illegal. This competition requirement ensures that firms do not attempt to gain protection against aggressive competition but rather that the law protects the very competitive process that allows firms to thrive.

¹² Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade of 1994, section 3

¹³ Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade of 1994, foot note 9.

¹⁴ Agreement on the implementation of article VI of the general agreement on tariffs and trade of 1994, subsec 3(2)

¹⁵ Of interest the WTO does not attempt to define what would constitute as 'unfair' trade practices. This is reflected in the statement, 'If a company exports a product at a price lower than the price it normally charges on its own home market, it is said to be "dumping" the product. Is this **unfair** competition? The WTO "Anti-dumping Agreement" does not pass judgement. Its focus is on how governments can or cannot react to dumping – it disciplines anti-dumping actions.' Available from https://search.wto.org/search?q=cache:0zpxrMZPYbwJ:www.wto.org/english/news_e/infocenter_e/brief_anti_e.doc+unfair&access=p&output=xml_no_dtd&ie=ISO-8859-1&client=english_frontend&site=English_website&proxystylesheet=english_frontend&oe=UTF-8 accessed on 20 September 2015

The concept of 'like product' is essential in the investigation and analysis of competition related inquiries. The establishment of which products are comparable to the product under analysis defines the scope of the investigation. Failure to narrowly define this range of products can result in a type I error (false positive)¹⁶, which leads to the possibility of restricting pro-competitive activities. The definition of 'like product' in the anti-dumping agreement can be criticised for being ambiguous and open to interpretation. This is in contrast to the definition of 'like product' in other World Trade Organisation (WTO) articles¹⁷ where greater clarity has been given to the description and test of likeness making it less open to interpretations. Competition law has also given weight to the notion of likeness, opting to utilise the concept of equivalence and 'like grade and quality' to distinguish the substitutability of the products in question. This is essential as it demarcates the product scope of the investigation and consequently limits the potential to misuse the system by rent seekers.

The requirements for anti-dumping investigations necessitate the coming together of industry participants to show that they are in agreement with the application for anti-dumping duties on the product. The anti-dumping agreement states that before an investigation is initiated,

'the application shall be considered to have been made 'by or on behalf of the domestic industry' if *it is supported* by those domestic producers whose collective output constitutes *more than 50 per cent* of the total production of the like

¹⁶ A type I error occurs when a correct null hypothesis is rejected leading to a false positive. This leads to the prohibition of what would have otherwise been pro-competitive.

¹⁷ The concept of like product is central to the treatment of the 'general most favoured-nation treatment' (article 1 of GATT 1947) and 'national treatment on internal taxation and regulation' (article III of GATT 1947). The test generally used for 'likeness' under GATT 1947 is '(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products.' See WTO analytical index available at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#article1 accessed on 24 August 2015

product *produced by that portion of the domestic industry expressing either support for or opposition to the application*. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.¹⁸

Though some industry participants have argued that this threshold might be too low, some have indicated that the investigation requirements might foster collusion of the domestic industry to ensure that the investigation is undertaken¹⁹. The ‘chicken wars’²⁰ have clearly highlighted this challenge, with the International Trade Administration Commission of South Africa (ITAC) imposing anti-dumping duties on chicken imports from Brazil and the United States of America (USA) whilst at the same time, the Competition Commission when requested for an opinion by the Parliamentary Portfolio Commission produced a report which highlighted the vertical integration which exists in the sector.²¹

It is this possibility of collusion that has led some practitioners to argue that anti-dumping should not exist separate to competition law but that rather, it should be guided by the principles of competition law to complement the investigation of the competition issues inherent in anti-dumping cases. ‘Moen indicates that whereas anti-dumping action is focused on protecting the import-competing industry, the objective of competition policy is to ‘safeguard competition, rather than individual competitors.’²² This is particularly important as the anti-dumping agreement is silent on the necessity to prevent the possibility of collusion even though it is in direct contradiction to competition principles which do not permit market collusion whether

¹⁸ Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade of 1994, subsection 5(4)

¹⁹ M Zanardi ‘Antidumping law as a collusive device’ (2004) 37 CLJ

²⁰ The term ‘chicken war’ has been used in the media to describe the attempt by the South African chicken industry to have dumping duties imposed on imports as a way of protecting the industry.

²¹ S Ramburuth ‘The impact of poultry tariffs on competition’ (2013)

²² G Brink ‘National interest in antidumping investigations’ (2009) 126 SALJ 316 p323

vertical or horizontal particularly in concentrated industries. The possibility of collusion is however not only limited to the local industry but it is also possible to use the threat of dumping investigations to compel foreign competitors to come into agreement with the local industry.²³

The narrow framework of anti-dumping legislation has led to a focus on the protection of the domestic industry at the expense of the downstream industries and consumers. When firms sell their products at low prices, consumers benefit from the lower prices and the imposition of anti-dumping duties results in consumers being adversely impacted by anti-dumping duties on imports. However supporters of anti-dumping regulation, argue that this benefit from low prices is not sustainable as the intention of 'dumping' action is to destroy local competition and once a firm has succeeded in doing this, the firm pushes the prices higher. This increase in prices would then lead to a reduction in consumer welfare in the long term. In effect, supporters of anti-dumping regulation argue that these foreign firms are attempting to monopolise the local industry and imposing dumping duties protects the industry against this threat.

This conflict between long term consumer interests and short term business interests has led to recommendations being put forward which include the possibility of a 'public interest clause' in the anti-dumping regulation.²⁴ This is envisioned to improve the welfare effects of anti-dumping duties as consumer and downstream industries will be considered before final duties can be implemented. These recommendations were contained in a draft amendment to the South Africa anti-dumping legislation of 2006 which included a national interest test. However this was not well received as it was considered to be ineffective in dealing with the issues that had been raised and also it

²³ See Zanardi for a further discussion of this relationship between market participants

²⁴ M Wellhausen 'The Community Interest Test in Antidumping Proceedings of the European Union' (2001) AUILR volume 16

was considered that there was not enough process and procedure put in place to monitor the application of the national interest test.²⁵

The act of 'dumping' is frowned upon because it is considered as 'unfair'; because of this, most practitioners agree that there should be legislation to discourage and prevent this from happening. Dumping is deemed to be unfair because the foreign firms are considered to be selling products in the importing country at unfairly low prices.²⁶ However, anti-dumping regulation in its current form is inadequate to deal with the issues of unfair trade practices as it is open to abuse by domestic firms. The inconsistencies between anti-dumping and competition law have led to calls for anti-dumping to either be done away with or to have greater competition law principles included. This is to ensure that competition is protected in order to further facilitate the growth in trade rather than allow competition to be 'chilled' by the threat of anti-dumping investigations. This discussion has become even more pertinent with the growth in global trade and the rapid removal of trade barriers across borders.

In describing the anti-dumping agreement, 'J. Michael Finger²⁷ once portrayed the anti-dumping regime as a "witches' brew of the worst of policy making: power politics, bad economics, and shameful public administration."²⁸ Alternatives to the anti-dumping remedy have been put forward, however the truth of the matter is that anti-dumping regulation is here to stay as there is no politically acceptable alternative to replace it with. Therefore the most efficient alternative is to amend the anti-dumping legislation

²⁵ Brink op cit (23) 316

²⁶ Understanding the WTO: Agreements available from https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm accessed on 12 September 2015

²⁷ J Michael finger is a former Lead Economist and Chief, Trade Policy Research Group at the World Bank. He has also conducted seminal works on the WTO system.

²⁸ J. Finger, the origins and evolution of antidumping regulation 12-13 (trade policy Div., Country Econ Dep't, the world bank, Working paper series No 783, 1991 cited in S. Cho Anticompetitive trade remedies: How antidumping measures obstruct market competition 87 N.C.L. Rev. 357 2008 -2009 p424

to accommodate and take into account the short comings in the regulations as previously discussed.

'Dumping is of two types: price discrimination dumping or sales below 'cost''²⁹. Though there are minor differences between the two, they are treated the same if dumping is found to have occurred. 'Dumping' as a form of price discrimination can be short term or long term. Supporters of anti-dumping regulation argue that short term price discrimination is more detrimental to competition in the importing country as it is done to force competition out of the market. Once that has been achieved, the prices are pushed up, thus having a detrimental effect on the importing industry. It is also recognised that this can only be effective if the firm practising the price discrimination is dominant enough to cause material injury to the local industry. If the firm is not dominant then its price discriminating action will have minimal impact on the domestic industry of the importing country. Where dumping is of the price discrimination type, there is no reason why it should not fall under competition law which already deals with price discrimination. However the direct application of competition principles to the regulation of 'dumping' would not be effective as the test and requirements for price discrimination under competition law are more stringent compared to the test under anti-dumping. Competition law requires that a price discriminating firm be dominant before its actions can be considered as conflicting with the law. On the other hand, anti-dumping regulation does not have such requirements and attempting to include it into the regulation would be insufficient and counterproductive as it would be difficult to prove dominance of foreign firms making it almost impossible to find for the domestic firm.³⁰

²⁹ AO Sykes and RN Cooper 'Anti-dumping and antitrust: What problems does each address? [with comments and discussion] (1998) Brookings Trade Forum pp1-53, 13

³⁰ M Taylor 'International Competition Law - A new dimension for the WTO?' 2006

Due to the conflict between the practice of competition law and anti-dumping, in this paper, I recommend that changes are made to anti-dumping legislation to bring it in line with competition law which would have the effect of securing the loopholes that promote anti-competitive behaviour by domestic firms. The recommendations include:

- The inclusion of competition law principles to compliment the anti-dumping investigations which include:
 - A market power threshold to prevent dominant domestic firms from abusing their market position and;
 - Strengthening of the test for 'likeness' to narrow the product scope.

In order to achieve this, the paper further recommends greater cooperation and coordination between the trade and competition authorities. This would ensure that competition principles are taken into consideration in the practice of anti-dumping investigations, thereby increasing credibility and certainty for market participants seeking to do business across borders.

These recommendations would make anti-dumping investigations more transparent as well as a more effective policy tool to protect the domestic market from unfair competition from international competitors. It is also crucial to ensure that policy changes that are implemented comply with the country's obligations under the WTO.

1.1. Background to trade remedies

The growth in global trade coupled with the reduction in tariffs across borders has made it necessary to have an international perspective on the regulation of market participation by firms to ensure that the growth in 'free trade',³¹- 'an idea pioneered by Adam Smith (1723-1790), David Ricardo (1772-1823) and other classical economists,'³²

³¹ The notion of 'free trade' is central to the existence of the WTO which seeks to remove trade barriers in order to encourage trade amongst member countries.

³² Lumina op cit (n2) 24

does not result in the destruction of local industries. 'Free trade is a market model in which trade of goods and services between countries flows unimpeded by government-imposed tariff and non-tariff barriers.'³³ The concept of free trade is the building block of the WTO. In the establishment of the WTO, the members sought to have an 'international organization dealing with the global rules of trade between nations. The main function of the WTO is to ensure that trade flows as *smoothly, predictably and freely* as possible.'³⁴

There are various forums under which the international operation of firms can be monitored for fair competition; however with 161 signatories and 22 other countries in the process of acceding to the WTO,³⁵ the WTO has become the primary platform under which trade issues are negotiated and international trade disputes are resolved. The WTO 'represents the confluence of, and sometimes the conflict between, three distinct areas of theory and practice (of) law, economics and politics.'³⁶ Some of the developments that transpired before the WTO system could come into effect include the recognition that countries are sovereign (legal development), countries may extract mutual gain from freer trade with each other (economic development) and the emergence of a leader; Britain first followed by the United States of America (political development). However as markets have become increasingly open it is evident that the level of influence that governments have over their economies has also steadily declined. This has had the effect of reducing the ability of governments to protect the development of domestic markets. To stem this tide, the members agreed to the implementation of trade remedies to the GATT system of rules and regulations which

³³ Lumina op cit (n2) 24

³⁴ The WTO in brief available from

https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm, accessed on 10 September 2015

³⁵ Understanding the WTO: The Organization available from

https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm accessed on 12 September 2015

³⁶ C VanGrasstek *The History and Future of the World Trade Organization* (2013) 3.

include anti-dumping regulations, countervailing measures as well as safeguard measures.

Trade remedies are exceptions to the WTO principles of free trade. The procedures required for the implementation of trade remedies are unique to the WTO system in that 'they give an active role to the business community. Governments seek trade remedies almost exclusively on the instigation of local business or because of business concerns.'³⁷ Though there are three forms of trade remedies that the WTO allows, the focus of this paper is on anti-dumping regulation as regulated under section VI of GATT which 'provides for the right of contracting parties to apply anti-dumping measures, i.e. measures against imports of a product at an export price below its 'normal value' (usually the price of the product in the domestic market of the exporting country) if such dumped imports cause injury to a domestic industry in the territory of the importing contracting party.'³⁸

The first anti-dumping legislation was enacted in Canada in 1904; and soon after, other countries followed similar routes with the Union of South Africa³⁹ following with an anti-dumping law substantially the same as Canada's in 1914.⁴⁰ What is important to note is the reasoning behind the implementation of anti-dumping legislation at the beginning. Sykes contends that when the first anti-dumping legislations were put into place, the emphasis was on protecting the domestic market even though the language used suggested that there was economic rationale behind the legislation. This is captured in statements by Cooper, who in response to question of why anti-dumping and anti-trust are treated differently, argues that, 'the answer, I believe is simple and

³⁷ Trade remedies - What business needs to know available at <http://www.tradeforum.org/Trade-Remedies---What-Business-Needs-to-Know/> accessed on 14 March 2015

³⁸ Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade of 1994

³⁹ Now known as the Republic of South Africa

⁴⁰ Sykes and Cooper op cit (n9) 16-17

straightforward: foreigners do not vote.’⁴¹In other words political considerations have kept anti-dumping legislation at the forefront of international and national discussions.

Within the WTO, anti-dumping legislation was first included in the GATT 1947.

Although the provisions were ‘relatively brief they represented an important start to a process of introducing detailed disciplines into the procedures used by member countries for the adoption of anti-dumping and countervailing action.’⁴² The anti-dumping legislation was further developed in subsequent rounds⁴³, with the Kennedy round introducing a code, the Turkey round improving on the code and the Uruguay round resulting in the anti-dumping agreement. The anti-dumping agreement from the Uruguay round was a negotiated agreement as all the countries had to agree on all the issues included in the GATT agreement before ceding to the WTO. One of the changes made to the anti-dumping legislation at this point was the requirement that the injury test be included in anti-dumping cases and that anti-dumping duties not exceed the amount of dumping determined to exist after an investigation of it.⁴⁴ This change came about as a compromise to get the anti-dumping legislation into the GATT agreement.

To date 110⁴⁵ cases have been reported to the WTO dispute settlement body with Section VI (agreement on the implementation of anti-dumping) being cited as the reason for the dispute. Both developed and developing countries have been users of anti-dumping measures. The guidelines from the WTO are very detailed in terms of defining the cost and prices to be used in assessing when and if dumping has occurred. There are substantive and procedural requirements relating to the notification,

⁴¹ Sykes and Cooper op cit (n9) 45

⁴² P Bentley and A Silberston *Anti-dumping and Countervailing action - Limits imposed by economic and legal theory* 1st ed (2007) 6.

⁴³ A trade round is a period of negotiations between members over specific issues. Since the inception of the GATT there have been eight trade rounds.

⁴⁴ Sykes and Cooper op cit (n9) 26

⁴⁵ Figures correct as at 03 October 2015. Figures Available from https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A6# accessed on 03 October 2015

investigation as well as the imposing of the duties contained in the anti-dumping agreement.

The substantive requirements in the anti-dumping agreement are covered in section 2 to section 4 of the agreement and they are:

Determination of dumping – Section 2

Determination of injury – Section 3

Determination of industry – Section 4

The procedural requirements relate to the administrative responsibilities when conducting investigations, imposing duties as well as the review procedures once duties have been imposed. These requirements are covered in section 5, section 7 to 9 and sections 11 and 12 as per below:

Initiation and conduct of investigations – Section 5

Imposition of provisional measures – Section 7

Price undertakings – Section 8

Imposition and collection of duties – Section 9

Duration, termination, and review of anti-dumping measures – Section 11

Public notice – Section 12

As a member of the WTO, South Africa's anti-dumping legislation has to contain all the above substantive and procedural requirements in order to comply with its obligations to the WTO.

Mr. Renato Ruggiero (former director general of the WTO from 1995 to 1999) at a conference on Anti-Trust noted the 'urgent need for analysis of links between competition policy and trade policy.'⁴⁶ At the same conference, he noted that the WTO has been working on introducing greater competition regulation into the negotiated agreement. Domestic competition laws are meant to protect the market from unfair practices with the national competition act focusing on 'economic activity within, or having an effect within, the republic'⁴⁷. On the other hand anti-dumping legislation is meant 'to protect the domestic industries from injury caused by unfair international price discrimination.'⁴⁸ According to section 3(2) of the anti-dumping agreement, dumping injury can take the form of price depression or prevent[ing] price increases which otherwise could have happened in the absence of the dumped goods⁴⁹. In essence, anti-dumping action can be considered as anti-price discrimination action against a foreign competitor, as dumping occurs when a firm sells its products in the importing country at a lower value than the normal value in the exporting country, potentially damaging the domestic industry. Price discrimination is also regulated within domestic jurisdiction under competition law; however the prohibition only applies when it is conducted by a dominant firm⁵⁰. Section D of article 8 further expounds the prohibition and states that, 'it is prohibited for a dominant firm to - D (iv) sell[ing] goods or services below their marginal or average variable cost'⁵¹. Within both legislations there is an acknowledgement of the need to protect competition in order to facilitate the growth and development of the local industry. However whereas anti-

⁴⁶ Mr. Renato Ruggiero available at https://www.wto.org/english/news_e/pres95_e/rome1.htm accessed on 24 April 2015 At the time of the Speech Mr Ruggiero was the Director General of the WTO

⁴⁷ Competition act of 1998 subsec 3(1)

⁴⁸ KW Bagwell et al. *Law and Economics of Contingent Protection in International Trade* 1ed (2010) 198

⁴⁹ Agreement on implementation of article VI of the General Agreement on Tariffs and Trade of 1994 Subsec 3(2)

⁵⁰ Competition act of 1998 subsection 8(d)(iv).

⁵¹ Competition act of 1998 subsection 8 (d)(iv).

dumping legislation does not consider the market position of the firm in question, domestic competition law is focused on firms that are dominant within their markets.

It is not mandatory to have anti-dumping legislation as it is not a requirement to impose anti-dumping duties.⁵² However should a country wish to impose anti-dumping duties the member country is required to do so in a manner which is consistent with section VI of GATT which states, 'an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994'.⁵³ Failure to adhere to these conditions could result in the offending country being taken to the dispute settlement body (DSB)⁵⁴ (*see note for further information regarding the dispute settlement system of the WTO*) of the WTO. Section 17 of the anti-dumping agreement states that 'except as otherwise provided herein, the Dispute Settlement Understanding (DSU) is applicable to consultations and the settlement of disputes under this Agreement.'⁵⁵ The DSB is the body responsible for facilitating the settlement of disputes between WTO members. At the DSB an independent panel decides whether the member has complied or not with the relevant regulation. Consequently, the national anti-dumping articles are very similar to the WTO guidelines.

The regulation of what are seemingly competition issues under WTO and domestic trade departments has come under criticism for possibly fostering collusive behaviour as well as disregarding consumer interests by focusing on protecting specific industries.

⁵² Agreement on implementation of article VI of the general agreement on tariffs and trade 1994 subsec 9(1)

⁵³ Agreement on implementation of article VI of the general agreement on tariffs and trade 1994 s1

⁵⁴ The WTO dispute settlement system attempts to find the most amicable way of resolving conflict. To facilitate this, the first step in declaring a dispute is consultations between the members. It is hoped that the consultations will resolve the issue but if that does not happen, then one of the parties can request for a panel to be established. The panel hears the dispute and makes a ruling based on the evidence presented. If either party is not satisfied, they can resort to the appellate body for a review of the decision. The decision of the appellate body is final. For further information on the function of the WTO DSB please consult www.wto.org

⁵⁵ Agreement on implementation of article VI of the general agreement on tariffs and trade of 1994 s 17

This interplay between competition and trade has led to suggestions that rather than the WTO regulating dumping and anti-dumping actions, competition networks need to be strengthened to allow them to effectively deal with the challenge of international competition.

Some have argued⁵⁶ that the WTO is not the appropriate platform to discuss and monitor competition related issues as it is primarily a trade body. The argument is that competition issues should rather be contained under competition regulation with a focus on building a strong international competition network. In light of this, there has been a call to further empower international competition networks which include the International Competition Network (ICN) which is an informal meeting place to discuss best practices in competition law, the Organisation for Economic Co-operation Development (OECD) whose mission 'is to promote policies that will improve the economic and social well-being of people around the world'⁵⁷ and United Nations Centre for Trade and Development (UNCTAD) whose mission is to 'ensure that partner countries enjoy the benefits of increased competition, open and contestable markets, private sector investment in key sectors and ultimately that consumers achieve improved welfare.'⁵⁸ It is argued that these organisations are less prone to the politicking that is ingrained in the WTO due to the negotiation custom of the WTO and consequently would be more effective in dealing with the challenges of international competition.

In spite of the complimentary nature of anti-dumping and competition law, most countries have two separate authorities dealing with competition law and anti-

⁵⁶ The U.S. has continued to resist the inclusion of further competition issues in the WTO were the European Union has been calling for not only the inclusion of competition but also the amendment to the anti-dumping instrument.

⁵⁷ Our mission The OECD, available from <http://www.oecd.org/about/> accessed on 21 April 2015

⁵⁸ Mission UNCTAD, available from <http://unctad.org/en/Pages/DITC/CompetitionLaw/Competition-Law-and-Policy.aspx?Ev=21,10> accessed on 21 April 2015

dumping action. South Africa is not an exception to this, with the Competition Commission dealing with competition issues including price discrimination and collusion⁵⁹, and anti-dumping regulation under ITAC dealing with unfair price discrimination from beyond the borders⁶⁰.

2. How is dumping regulated

2.1. SA anti-dumping legislation

South Africa was one of the first countries to use anti-dumping measures. However what existed as anti-dumping regulation in 1914 has subsequently changed to the current legislation which came into effect in 2003. Within the South African legislation, anti-dumping is regulated by the department of Trade and Industry (DTI) and the division responsible for the monitoring and conducting of investigations related to anti-dumping complaints is the International Trade and Administration Commission (ITAC). In 2003 the International Trade and Administration Act (ITAA of 2002) which established the ITAC came into effect. The ITAA sets out the functions of ITAC which include monitoring import and export activities.⁶¹ One of the key objectives set out in the ITAA of 2002 is the fostering of economic growth and development in order to raise incomes⁶², which potentially generates a conflict between the competition and economic objectives. In November 2003 the latest SA anti-dumping regulations were published under the ITAC by the minister of Trade and Industry at the time, Alec Erwin.⁶³ Chapter 3 of ITAA sets out the functions of the commission with one of the functions

⁵⁹ Competition Act of 1998

⁶⁰ Anti-dumping regulations notice 3197 of 2003

⁶¹ International Trade and Administration Act of 2002 Section 7

⁶² International Trade and Administration Act of 2002 Section 2

⁶³ Anti-dumping regulations Notice 3197 of 2003

being to oversee the implementation of customs duties, anti-dumping duties, countervailing duties and safeguard duties⁶⁴.

South Africa is part of a customs union; the Southern African Customs Union (SACU) with Botswana, Lesotho, Namibia and Swaziland⁶⁵. As dumping occurs as a result of goods entering into the borders of another country, South Africa's participation in SACU has necessitated the incorporation of the SACU members in its administration of anti-dumping investigations and monitoring. To this effect, there has been a gradual move towards bringing anti-dumping legislation under SACU administration to ensure that all members are fairly represented. Currently, ITAC states that any SACU industry can apply to ITAC if they want to initiate an investigation related to dumping into the community. The ITAA recognising the need to streamline the anti-dumping regulations with the SACU industry establishes for the sharing of information with other SACU members, as well as establishing relations with SACU institutions and SACU member countries. The ITAA as well as the SA anti-dumping regulations define industry with SACU in mind. Within the SA anti-dumping regulation, the domestic industry is defined as:

'...the domestic producers in the SACU as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.'⁶⁶

In effect, ITAC establishes SACU as the domestic market and becomes responsible not only for complaints instigated by South African industries but also industries in the SACU member countries. However, within SACU, South Africa is the main trade partner with most of the export within the community going to South Africa. South

⁶⁴ International Trade and Administration Act of 2002 Part B (16)

⁶⁵ SACU membership, available at <http://www.sacu.int/>, accessed on 10 March 2015

⁶⁶ Anti-dumping regulations notice 3197 of 2003 s1

Africa is also the main exporter within the region.⁶⁷ This implies that with most of the business within the region centred around South Africa and coming from South African companies, the notion of domestic industry is still largely centred on South Africa.

As a member of the World Trade Organisation (WTO), South Africa's anti-dumping measures have to be in line with the guidelines provided by the WTO. Section 9 of the anti-dumping regulation states that:

'The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.'⁶⁸

This places the onus on the member state to not only decide whether or not to impose duties but also how much to impose as a duty within the confines of the margin of dumping.

As anti-dumping proceedings are instigated on the assumption that a competitive domestic industry is facing a foreign monopolist or an international cartel, the focus on the investigation is proving that the price that the foreign firm is charging is anti-competitive by either significantly price undercutting⁶⁹ the domestic market or where the effect of the import pricing is of the effect of price depression of the domestic

⁶⁷ Merchandise trade statistics 2012, available at http://www.sacu.int/publications/trade_statistics/2012/merchandise_trade_statistics12.pdf, accessed on 10 March 2015

⁶⁸ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 subsec 9(1)

⁶⁹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 subsec 3(2)

market. This was tested before the appellate body of the DSB in the China Grain Oriented Flat-rolled Electrical Steel (GOES) case between China and the United States.

2.2. China GOES 2013

A significant case within the WTO that helped to shape the terms contained within the anti-dumping regulation was brought before the DSB on 15 September 2010 when the United States of America requested consultations with China with respect to measures imposing countervailing duties and anti-dumping duties on grain oriented flat-rolled electrical steel ('GOES') from the United States of America as set forth in the Ministry of Commerce of the People's Republic of China ('MOFCOM') Notice No. 21 [2010], including its annexes⁷⁰. In their request, the United States of America argued that China had not properly followed the anti-dumping requirements of proving the cause and effect of the material injury to the domestic industry from the imports coming into the country. The issue at hand was whether it was necessary to show a cause and effect or if it was sufficient to just show that the industry was suffering material injury.

According to the anti-dumping agreement, the domestic industry has to show that the pricing of the import industry has the effect of causing or threatens injury to an established domestic industry or materially retards the establishment of a domestic industry. The anti-dumping agreement further expounds on the test of material injury with section 3 setting out the determination of injury. Subsection 3(1) states that the test for material injury has to be based on positive information and there has to be an objective examination of:

⁷⁰ China GOES - WTO dispute settlement available from https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds414_e.htm, accessed on 3 May 2015

‘both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.’⁷¹

This is further explained in subsections 3(2) and 3(5) which state the requirements for the investigative process. The anti-dumping agreement however does not prescribe the specifics on the methodology to be followed in the investigations; however, the anti-dumping agreement does make clear the procedural requirements mandatory before definitive duties can be imposed. Where subsection 3(1) requires there to be injury before investigations can commence, subsection 3(2) requires the domestic industry to show that there has been a significant increase in dumped imports with the effect of causing injury to the domestic market. Subsection 3(5) then requires the investigating authorities to show that the increase in the dumped imports has caused the injury. Causality has to be demonstrated based on the examination of all the relevant factors including, ‘any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.’⁷² Section 3 as a whole therefore requires an investigating authority to test out and determine the question of material injury to the domestic market as well as to show causality between the dumped imports and the injury to the domestic industry before imposing any dumping duties.

In their request for consultations with China on GOES, the United States of America alleged that China when imposing the anti-dumping duties on GOES from the United States of America had not followed the procedural and the evidentiary requirements of the anti-dumping agreement. Specifically, ‘the United States challenged China’s

⁷¹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 subsec 3(1)

⁷² Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 subsec 3(5)

findings of price effects under subsections 3(1) and 3(2) of the anti-dumping agreement and the causation analysis under subsections 3(1) and 3(5) of the anti-dumping agreement'⁷³. In June 2012 the panel found that China had acted inconsistently with section 3(1) and section 3(5) of the anti-dumping agreement. China decided to appeal to the Appellate Body (AB) on the basis that the panel's findings on section 3(2) and section 3(5) of the anti-dumping agreement were based on an incorrect interpretation of the phrase 'the effect of' contained in section 3(1) of the anti-dumping agreement 'to mean that an investigating authority must demonstrate that adverse price effects were caused by dumped and/ or subsidized imports.'⁷⁴ In their submissions, China also criticised the fact that in their decision, the panel had concluded that it was not sufficient to satisfy the requirements of section 3(2) and section 3(5) by simply showing that there was price depression in the domestic market but that rather, a causality effect had to be shown.

In their response to the claims by both the United States of America and China, the Appellate Body noted that section 3(1) of the anti-dumping agreement 'is an overarching provision that sets forth a member's fundamental, substantive obligation with respect to the injury determination, and informs the more detailed obligations in succeeding paragraphs.'⁷⁵ Furthermore, the term 'positive evidence' concerns the quality of the information used to come to a decision, the information needs to be 'affirmative, objective, verifiable, and credible.'⁷⁶, and that the investigations needed to be conducted in a manner that was fair without showing any favour to the 'interests of

⁷³ China countervailing and Anti-dumping duties on Grain oriented Flat Rolled electrical Steel from the United States (WT/DS414/AB/R) 2012 Para 4

⁷⁴ China countervailing and Anti-dumping duties on Grain oriented Flat Rolled electrical Steel from the United States (WT/DS414/AB/R) 2012 Para 8

⁷⁵ Appellate body report, Thailand-H-beams, para.106 cited para. 126 China countervailing and Anti-dumping duties on Grain oriented Flat Rolled electrical Steel from the United States (WT/DS414/AB/R) 2012

⁷⁶ China countervailing and Anti-dumping duties on Grain oriented Flat Rolled electrical Steel from the United States (WT/DS414/AB/R) 2012 para 126

any interested party, or group of interested parties, in the investigation.⁷⁷ The Appellate Body also emphasised the need to show causality between the price depression and the increase in the dumped imports. The Appellate Body further stated that it would not be enough just to show a declining trend in domestic prices or for that effect to show that prices have not risen when they could have, rather an investigating authority has to assess 'domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices'⁷⁸

In their concluding remarks, the Appellate Body noted that it was 'not sufficient for an authority to confine its consideration to what is happening to domestic prices alone for purposes of the inquiry stipulated in Article 3(2)⁷⁹ but it was necessary to consider what was happening to the domestic prices in conjunction with the imports to determine if there was a cause and effect between the two. This requirement for causality between the price effect and dumped imports in the domestic market means that investigating authorities are required to be more rigorous in their analysis of dumping investigations before applying any dumping duties.

The China GOES case established the importance of following the procedural requirements in investigating dumping complaints. The report of the Appellate Body further expressed the necessity of meeting the causality test contained in section 3 of the anti-dumping agreement. However the question of what constituted material injury was not addressed, leaving the text of the anti-dumping agreement as the primary guide of what constituted material injury. In other words, if an importing country could

⁷⁷ Appellate Body report, US- hot rolled Steel, Para.193 cited para 126 China countervailing and Anti-dumping duties on Grain oriented Flat Rolled electrical Steel from the United States (WT/DS414/ AB/R) 2012

⁷⁸ China countervailing and Anti-dumping duties on Grain oriented Flat Rolled electrical Steel from the United States (WT/DS414/ AB/R) 2012 Para 138

⁷⁹ China countervailing and Anti-dumping duties on Grain oriented Flat Rolled electrical Steel from the United States (WT/DS414/ AB/R) 2012 Para 138

show the causality between imports and price depression of the like product in the domestic market, it would constitute dumping without giving regard to the efficiencies in the exporting country. This focus on the domestic industry suggests that domestic industries can obtain protection from more efficient foreign competitors whilst continuing to operate in an inefficient manner. The 'chicken wars' within South Africa have been an illustration of this challenge.

2.2.1. Chicken wars – anti dumping or protection

Within South Africa a dumping case that has been of interest not just to the domestic market in question but also to the downstream market and interested community groups including the Competition Commission is related to dumping duties on imported chicken firstly from the United States of America and more recently from Brazil. In 1999 Rainbow Farms supported by the South African Poultry Association (SAPA) applied to the Board on Tariffs and Trade (BTT)⁸⁰ to have dumping duties imposed on chicken imports from the United States of America alleging that the United States of America was dumping chicken into the South African market. The period under investigation was from August 1998 to July 1999 and in July 2000, the Board on Tariffs and Trade imposed preliminary duties on the chicken leg portions from the United States. The investigation was finalised in December of 2000, with the Board on Tariffs and Trade deciding that the United States of America were indeed dumping chicken quarters into the market and also that the South African poultry market had experienced and was in threat of material harm due to the dumping of chicken pieces from the United States of America.⁸¹

In their argument the South African Poultry industry alleged that the United States of America was dumping chicken pieces into the South African market based on the fact that the prices of the chicken pieces were lower than the net price of producing a

⁸⁰ The Board on Tariffs and Trade (BTT) is a precursor to ITAC which came into existence in 2003

⁸¹ K Kulkarni *Anti-Dumping Law as a trade barrier: A case of South African poultry imports from USA* (2005) 5.

chicken in the United States. Kulkarni in his analysis of the United States of America chicken market argued that the United States of America chicken market at the time of the investigation was the biggest producer of chicken having the best climate for chicken production⁸². He also points out that were as the South African market preferred the dark meat parts (leg quarters), the United States market preferred the breast meat section making it the portion in high demand and consequently fetching a higher price in the United States of America. On this basis, the chicken producers in the United States of America were prepared to sell the dark meat portions at a lower price as they were able to recoup the cost balance from the breast meat sections. However in the South African market, there is a higher preference for dark meat and it fetches a higher price than what it would in the United States of America making South Africa a suitable export market for the United States of America chicken producers.

In their response to the Board on Tariffs and Trade, to account for the price differential between dark meat sold in South Africa and dark meat sold in the United States of America, the United States of America chicken producers stated that they used the 'net realisable value'⁸³ as a cost basis. In other words, rather than apportioning cost to different portions of the chicken, the United States chicken industry considered the cost of the whole chicken and applied the same methodology in apportioning the value to the different pieces. Effectively, the United States of America chicken producers considered the cost of producing the whole chicken and also the net amount realised from the sale of the chicken rather than apportioning cost to different parts of the chicken. On supplying this information to the Board on Tariffs and Trade, this method of accounting for cost was rejected and instead the Board on Tariffs and Trade 'determined that the appropriate way to reallocate costs was by weight...A cost was

⁸² Kulkarni op cit (082).

⁸³ The Collins dictionary defines the NRV as the net value of an asset if it were to be sold, taking into account the cost of making the sale and of bringing the asset into a saleable state.

assigned to each cut of the bird, regardless of the type of meat (dark or white).'⁸⁴ Because of this difference in accounting for cost, the Board on Tariffs and Trade concluded that the United States chicken exporters were importing chicken into South Africa at a price lower than the cost of production in the United States of America, hence satisfying the first requirement of the anti-dumping agreement, which is selling an imported product below its normal value in the country of export.

On the basis that the volume of chicken leg quarters from the United States of America had increased, the 'Board found that the South African poultry industry had experienced material injury (*in the form of depressed prices*) and that they were threatened with further injury if the United States was allowed to continue to export leg quarters into the South African market'.⁸⁵ Consequently the recommendation was put forward to impose anti-dumping duties on chicken from the United States of America.

The United States of America chicken dumping duties was the beginning of a long stream of other anti-dumping duties on chicken imports from other countries. In 2003 the South African Poultry Association approached ITAC to request for increased duties on frozen poultry offal from Brazil. In the application, the applicants claimed that the 'SACU market is being flooded with imports at an annualised level of 20 per cent of domestic production, harming the industry'.⁸⁶ In the application, there is clear mention of the increase in competition from imports from Brazil, however it is also clear that the increase in competition is not due to dumping; that is pricing below cost, but rather the fact that the South African chicken producers are inefficient in comparison to their international counterparts. In the discussion it is mentioned that 'Brazil has been identified as a country which due to low price input cost, and currency devaluation is a

⁸⁴ Ellis, 2000 quoted in Anti-Dumping Law as a trade barrier: A case of South African poultry imports from USA (2005)

⁸⁵ Board on Tarrifs and Trade 2000 quoted in Anti-Dumping Law as a trade barrier: A case of South African poultry imports from USA (2005) p13

⁸⁶ Report no.36 ITAC Increase in the rate of duty of Frozen poultry Offal p3

big threat'⁸⁷ to the domestic industry. After presentations from interested parties, the commission decided to impose duties on 'poultry offal classifiable under tariff heading subheading 0207.14.20 from free of duty to 27 per cent ad valorem'⁸⁸. However the application for an increase in duty on whole frozen poultry and poultry (bone-in) leg quarters was rejected. This increase in duty meant that all frozen chicken from Brazil would be charged import duty whereas previously frozen chicken offal were imported free of duty.

In March 2013 the SAPA once again requested for an increase on duty on frozen chicken imports. The application was made specifically on 'carcasses, whole bird, boneless cuts, offal, and bone-in portions.'⁸⁹ In their application the SAPA stated that the producers in the SACU region were in a 'distressed financial state'⁹⁰, they asserted that the cause of the financial distress was the 'large and rapid increase in the volume of imports of extremely low priced poultry meat'⁹¹. This they said had led to the closing down of small and medium sized firms. The SAPA also mentioned that due to the low priced imports; investments were being negatively impacted 'adversely affecting both commercial and emerging broiler producers, as well as SACU production capacity and SACU food security'⁹²

As part of the investigative process, interested parties were consulted in line with the SA anti-dumping regulations which define the interested parties as:

- a) Producers within SACU;
- b) Exporters;

⁸⁷ Report no.36 ITAC Increase in the rate of duty of Frozen poultry Offal p4

⁸⁸ Report no.36 ITAC Increase in the rate of duty of Frozen poultry Offal p6

⁸⁹ Report no. 442 Increase in the rates of customs duty on frozen meat of fowls of the species gallus domesticus: whole bird, boneless cuts, Bone- in portions, carcasses and offals.

⁹⁰Report no.442 op cit (n90) 5

⁹¹ Report no.442 op cit (n90) 5

⁹² Report no.442 op cit (n90) 5

- c) Foreign producers;
- d) Importers;
- e) Trade or business associations whose members are SACU or foreign producers, exporters or importers; and/ or
- f) The governments of the countries of origin of export...⁹³

This definition is however not all inclusive as the ITAC has the authority to seek and accept input from other parties, as the ITAC is not precluded from accepting other parties as interested parties at its discretion.⁹⁴

The parties that were consulted included the department of trade and Industry (The DTI), Association of Meat Importers and Exporters (AMIE), retailers and the Department of Agriculture Forestry and fisheries (DAFF), amongst others. AMIE in their comments to the commission noted that the prices of imported chicken were in actual fact higher than domestic selling prices which meant that they were not depressing the prices of locally produced chicken. However the ITAC in their response noted that it was important to 'give consideration to a country being able to produce a strategic protein source but at affordable prices... [And] A balance between the viability of domestic producers of a strategic industry with the affordability of food for the lower income group is critical for food security'⁹⁵

After the investigation, the commission recommended an increase of duty on chicken imports. The biggest increase was on whole bird cuts with an increase of over 200 per cent in import duty.

⁹³ The international Trade Administration Commission: Anti-dumping regulations 2003 s1

⁹⁴ The international Trade Administration Commission: Anti-dumping regulations 2003 Part A (1)

⁹⁵ Report no.442 op cit (n90) 15

Tariff subheading	product	Existing duty	Recommended Duty
0207.12.90	Whole bird	27%	82% bound rate ⁹⁶
0207.14.10	Boneless cuts	5%	12%
0207.14.90	Bone-in portions	18% (220c/kg)	37%
0207.14.20	Offal	27%	30%
0207.12.20	Carcasses	27%	31%

Source: Report no.442⁹⁷

SACU chicken industry

As part of the investigation into the dumping allegations, the ITAC did an analysis of the chicken industry. According to the ITAC, the top five producers account for approximately 50 per cent⁹⁸ of the SACU industry and these producers are:

- Rainbow Farms Ltd
- Astral Operations Ltd
- Sovereign Food Investments Ltd
- AFGRI Poultry Ltd; and
- Supreme Poultry Ltd (Country Bird Holdings)

The South African market is approximated to constitute up to 90 per cent of the SACU production. At the time of the report, the chicken industry accounted for close to 23 per cent of all agricultural production, representing R22.9 billion for chicken meat output

⁹⁶ The bound rate is the rate that the country agreed to with its trade partners under the WTO system. A country is able to increase its duty rate to the bound rate without infringing on its WTO agreement.

⁹⁷ Report no.442 op cit (n90) 4

⁹⁸ Figures correct at the time of report

and R6.7 billion for eggs output. According to Shane, with six producers making up close to 65 per cent of the industry, the South African chicken industry is an oligopoly.⁹⁹

The ITAC's report also showed that the SACU chicken industry faces high costs of production, with feed costs which include maize and soya accounting for 65 per cent to 70 per cent¹⁰⁰ of the total cost of production. In his book Shane highlights further inefficiencies in the chicken industry which make them uncompetitive; these include a poorly trained workforce, poor disease management, high transportation cost and further compounding the problem, high shipping and packaging cost.¹⁰¹

Whereas the United States of America market prefers the white meat portions of chicken, the SACU market prefers the 'bone-in portions which are sold as individually quick frozen (IQF) products known as 'braai packs'¹⁰². The slaughter period for chicken is between 28 to 35 days, which is in contrast with the developed markets like United States of America where the slaughter period is up to 42 days to accommodate the further growth necessary for the breast meat to fully develop to the right size for the market.

The ITAC report also stated that, 'consumption of poultry meat in South Africa grew at a faster rate than domestic production'¹⁰³ in the period under investigation. This adds weight to the argument that the South African poultry industry was not suffering injury as a result of the dumped imports but rather inefficiencies in their production processes. These inefficiencies make the poultry industry uncompetitive relative to international competitors like the United States of America and Brazil making the industry a target

⁹⁹ Shane 2002 quoted in Anti-Dumping Law as a trade barrier: A case of South African poultry imports from USA (2005) p5

¹⁰⁰ Report no.442 op cit (n90) 11

¹⁰¹ Shane 2002 quoted in Anti-Dumping Law as a trade barrier: A case of South African poultry imports from USA (2005)

¹⁰² Report no.442 op cit (n90) 7

¹⁰³ Report no.442 op cit (n90) 8

for international firms as they can receive higher prices by exporting to South Africa than they would in their domestic markets.

2.3. Draft amendments to the SA anti-dumping regulation

In 2006, draft amendments to the anti-dumping regulations were published. The introductory notes to the draft amendment to the SA anti-dumping regulation state that, the proposed changes are 'informed by the Commission's past and current experiences in administering this trade remedy instrument'.¹⁰⁴ From that vantage point the commission made recommendations for changes to the SA anti-dumping regulation and of interest were the changes to the:

- requirements to initiate investigations,
- calculation of material injury,
- provision for the consideration of public interest,
- as well as a change in the verification procedures which according to the commission was to reflect 'that it is not always feasible for the commission to verify all information submitted by interested parties, given the commission's limited resources.'¹⁰⁵

Brink in a commentary on the proposed amendments summarises that the proposed changes would have the effect of making it much harder to lodge complaints with ITAC.¹⁰⁶ This challenge is reflected in the proposed requirements for the determination of injury which requires a higher threshold of firms submitting comments before an investigation can commence. In the current anti-dumping regulations, there is an

¹⁰⁴ Draft Amended Anti-dumping Regulations: For public comments, 2932 of 2006, s1

¹⁰⁵ Draft Amended Anti-dumping Regulations: For public comments, 2932 of 2006, Part C (18)

¹⁰⁶ G Brink 'Proposed amendments to the anti-dumping regulations: are the amendments in order? (2006) Tralac 16

effective requirement of 25 per cent of the industry¹⁰⁷, the proposed amendments add that if an industry has more than one firm with more than 35 per cent of the market share, then all the firms with more 35 per cent are required to make a submission of injury, should all such firms not provide information then the ITAC will not initiate an investigation.¹⁰⁸ In the explanatory notes to the changes, the ITAC state that this change addresses industries where there might just be two firms and one firm submits injury information making it difficult to assess whether the injury is due to dumping or to industry competition.

However, the requirement for a higher threshold of firms submitting an opinion can be considered as further entrenching the need for collusion in industries seeking protection from more competitive imports. The introduction of dumping duties on imported products benefits the industry at large and not just one firm. This provides an incentive for firms to collude in order to have an application for the initiation of anti-dumping investigation accepted by the ITAC. Due to the possible cost in applying for the anti-dumping duties as well as the possibility of the 'free riding'¹⁰⁹ problem it would not be efficient nor very beneficial for one firm in a concentrated industry to take on all the charges as success in getting the required anti-dumping duties imposed on the imports would benefit all the firms in the industry. This therefore incentivises firms to come to agreement when making anti-dumping applications which potentially causes problems of collusion amongst firms.

¹⁰⁷ Subsection 7(3)(a) of ITAC Anti-dumping regulations requires at least 25 per cent of the domestic industry to support the application and section (7)(3)(b) adds that of the producers that express an opinion, 50 per cent need to support the application. However for both section (a) and (b) to be satisfied, at least 25 per cent of the industry has to show support for the application.

¹⁰⁸ Draft Amended Anti-dumping Regulations: For public comments, 2932 of 2006, Subsections 15(3) and 15(4)

¹⁰⁹ Free riding occurs when some people/ firms benefit from resources without paying for them. This is more likely when it is not possible to prevent anyone from partaking of the resource.

The amendments also make further restrictions on the firms that can initiate anti-dumping investigations by adding that firms that perform assembly operations would not be considered as part of SACU industry. In the current regulations the firms that are able to apply for the initiation of dumping investigations are producers:

- Related to the importer, exporter or the foreign producer; or
- Itself an importer of the product under investigation¹¹⁰

However with the amendment, firms that operate assembly operations would be directly included in the SACU industry definition of the SA anti-dumping regulations. According to the draft amendments, a firm would be performing assembly operations where the value added by its operations within SACU is less than 25 per cent of the direct and indirect costs of production only.¹¹¹ Other costs including administrative, general, packaging, selling and profit¹¹² would not count towards the value added. In essence the amendment seeks to protect the domestic industry by ensuring that firms related to the industry in question have access to the system of redress through the anti-dumping regulations.

The other key change contained in the draft amendment pertains to the inclusion of public interest in the SA anti-dumping regulations. According to the draft anti-dumping regulation, section 20 'provides for the consideration of public interest in Commission investigation or reviews'.¹¹³ According to the draft amendments the investigation would include consideration of a number of factors which include the availability of 'commercially substitutable products in commercial quantities'¹¹⁴ as well as the impact on competition that the anti-dumping duties will have on:

¹¹⁰ The international Trade Administration Commission: Anti-dumping regulations 2003 subsec 7(2)

¹¹¹ Draft Amended Anti-dumping Regulations: For public comments, 2932 of 2006 subsec 8(4)

¹¹² Draft Amended Anti-dumping Regulations: For public comments, 2932 of 2006 subsec 8(4)

¹¹³ Draft Amended Anti-dumping Regulations: For public comments, 2932 of 2006 Part C (17)

¹¹⁴ Draft Amended Anti-dumping Regulations: For public comments, 2932 of 2006 subsection 20(2)(a)

- Domestic goods or services
- Domestic producers
- Domestic downstream market and
- Consumer access to goods at competitive prices

In the instance that the ITAC determines that the anti-dumping duties will have a negative impact on public welfare, then the commission will recommend that the lesser duties be applied or 'anti-dumping duties not be imposed, amended or continued'¹¹⁵

The provision on public interest means that a broader perspective is taken when dumping investigations are being undertaken. Brink however amongst others argue that the inclusion of the public interest clause is not necessary as the requirement in the anti-dumping regulation for lesser duty contained in section 9(1) which states that where dumping duties are imposed, 'the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry'¹¹⁶ already serves as protection for consumer interest.

3. Competition law and the SA competition regulation

'Competition law' may be perceived as a policy instrument premised on microeconomic theory in which the government deliberately intervenes in the economy to enhance market efficiency by correcting market failures.¹¹⁷ Competition law is meant to protect the competitive process by ensuring that market participants do not abuse their dominant position and by preventing collusive practises in horizontal and vertical markets. These tendencies are considered to prevent the proper functioning of a free market and they are also reflective of the existence of an imperfect market. It is with this

¹¹⁵ Draft Amended Anti-dumping Regulations: For public comments, 2932 of 2006 subsection (20)(2)(d)(ii)

¹¹⁶ Agreement on the implementation of article VI of the general agreement on tariffs and trade 1994 subsec 9(1)

¹¹⁷ Taylor M International Competition Law: A new dimension for the WTO? (2008 – digitally printed) 15

in mind that governments have seen it fit to have regulation in place to monitor and regulate competition between firms. It is important to note that competition law is not meant to protect the competitor but rather to protect competition. According to Taylor¹¹⁸, the protection of competition is achieved by utilising two forms of regulation, that is, behavioural and structural regulation. 'Behavioural regulation' seeks to prevent market participants from engaging in behaviour which seeks to increase market power by engaging in anti-competitive practises and 'structural regulation' seeks to prevent firms from merging in a 'manner that unduly increases their market power'.¹¹⁹ Taylor further expounds that competition law uses a blend of structural and behavioural regulation which include anti-monopoly, concerted conduct and merger laws to regulate competition between firms.¹²⁰

Within South Africa, competition issues are regulated under the Competition Act of 1998 (competition act)¹²¹. The competition act establishes the organs responsible for monitoring and adjudication of competition related matters. These organs are the Competition Commission, 'responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers'¹²²; the Competition Tribunal (Tribunal), 'responsible to adjudicate such matters'¹²³; and the Competition Appeal Court. According to the competition act, price depression and price discrimination activity undertaken by a dominant firm are regulated under section 9 which is titled 'price discrimination by a dominant firm prohibited'¹²⁴. Price discrimination is defined as applying, 'dissimilar conditions to equivalent transactions

¹¹⁸ Taylor op cit (n31) 27

¹¹⁹ Taylor op cit (n31) 27

¹²⁰ Taylor op cit (n31) 16

¹²¹ The competition Act of 1998

¹²² The competition Act of 1998 *The Act*

¹²³ The competition Act of 1998 *The Act*

¹²⁴ The competition Act of 1998 Section 9

with other trading parties, thereby placing them at a competitive disadvantage'.¹²⁵ On the other hand price predation is regulated under subsection 8(d)(iv) of the competition act and 'is achieved by the predator's setting prices sufficiently low to reduce competitors' ability or incentives to compete effectively or to exclude them from the market'¹²⁶. Predation is particularly harmful when practised by a dominant firm in the short run with the prospect of increasing prices in the long run.

3.1. Price Discrimination

Price discrimination is the act of differentiating between buyers and then charging them different prices accordingly. In economic terms, there is nothing wrong with price discrimination and it can actually have the effect of increasing consumer welfare if a supplier is able to effectively segregate between the different buyers and charge them different prices accordingly. Posner quoted in Geradin states that, 'price discrimination is a term the economists use to describe the practice of selling the same product to different customers at different prices even though *the cost of sale is the same* to each of them. More precisely, it is selling at a price or prices such that the ratio of price to marginal costs is different in different sales...'¹²⁷

Where collusion is not dependent on firm size, price discrimination is only prohibited when it is conducted by a dominant firm. Accordingly, price discrimination is dealt with under section 9(1) of the competition act which states that price discrimination by a dominant firm is prohibited if it (a) is likely to have the effect of lessening competition and (b) relates to the sale, in equivalent transactions. Price discrimination by a dominant firm is not a *per se* prohibition as subsection (9)(2) provides for a defence for subsection

¹²⁵ P Papandropoulos 'How should price discrimination be dealt with by competition authorities?' (2007) 3 *Droit&économie* 13

¹²⁶ Predatory pricing analysis ICN unilateral workbook (2012) (4) para 4

¹²⁷ R. Posner, *Antitrust Law* 2ed, at 79-80, quoted in Geradin, Layne -Farrar and Petit *EU Competition Law and Economics* 1ed (2012) p294

(9)(1) offences. According to subsection 9(2) a firm is able to discriminate in prices if it can show that the difference in price:

- a. makes allowances for differences in cost or likely cost resulting from difference in location, quantities or method of delivery to different purchasers.
- b. is a way to meet a price or benefit offered by a competitor or;
- c. is in response to a change in market conditions for the goods or services concerned.¹²⁸

In the South African context, a firm is considered to be dominant if:

- (a) It has at least 45 per cent of that market;
- (b) It has at least 35 per cent, but less than 45 per cent, of that market, unless it can show that it does not have market power; or
- (c) It has less than 35 per cent of that market, but has market power.¹²⁹

In effect the competition act establishes any firm with over 45 per cent market share as automatically having market power; however this is not always the case. Flynn and Stratford state that the test for market power which has been laid down is a position that:

‘...enables it [a firm] to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers’¹³⁰

In *Harmony Gold v Mittal SA*¹³¹, it was reiterated that for a firm to be able to charge an excessive price, the firm would need to have sufficient market power to behave independently with no realistic prospects of entry – in other words the market should

¹²⁸ Competition Act of South Africa of 1998 subsection 9(2)

¹²⁹ Competition Act of South Africa of 1998 section 7

¹³⁰ J Flynn and J Stratford *Competition: Understanding the 1998 Act* (1999) 78

¹³¹ *Harmony Gold v Mittal* south Africa 2006 13/CR/Feb04

be both 'uncontested and incontestable.'¹³² Where perfect competition exists in the market, a firm is not able to charge a price that is independent of the market as consumers would simply default to the cheaper firms, at the same time; there is no incentive for firms to charge a lower price as they can achieve the same sales at a higher price. Therefore firms can only divert from the market price if the market is imperfect and the firm in question is 'of overwhelming size relative to the market in which they are located and which are, in addition, markets characterised by unusually high entry barriers.'¹³³

Once it has been shown that a firm is discriminating on price, the complainant needs to show that there has been significant lessening of competition. However, the requirement to show a significant lessening of competition as per section 9(1)(a) makes it difficult to satisfy the conditions for a price discrimination charge. This challenge was encountered in *Sasol v Nationwide Poles*,¹³⁴ as Nationwide Poles sought to show that price discrimination practiced by Sasol was having the effect of harming their ability to compete. Nationwide Poles failed to prove harm to the industry but rather was able to show harm to their own business which is not sufficient as the focus is on the industry not individual firms. In a presentation to the ICN, Trudy Makhaya noted that 'Small business (are) intrinsically unable to show generalised harm given [their] limited role in any market'¹³⁵, however as Sasol was unable to show pro-competitive arguments for the price discrimination, the Tribunal found for Nationwide Poles. Sasol went on to contest the decision by the Tribunal at the Competition Appeal Court where the Appeal Court found that Nationwide Poles had failed to show harm to the industry. The challenge in

¹³² *Harmony Gold v Mittal south Africa supra* (n132) at 34 para 96

¹³³ *Harmony Gold v Mittal south Africa 2006* (n132) at 34 para 96

¹³⁴ *Sasol vs Nationwide poles* (2005) 49 72/CR/Dec03

¹³⁵ *Nationwide Poles and Sasol Limited – Price Discrimination Case Study Presentation to the ICN* p20 available from <http://www.internationalcompetitionnetwork.org/uploads/library/doc721.pdf> accessed on 27 September 2015

assessing the significant lessening of competition is that competition legislation is meant to 'protect competition, not competitors'¹³⁶ and yet as the tribunal in this instance (*Sasol v Nationwide Poles*) responded that, 'no competitors, no competition.'¹³⁷ The competitive process is protected by protecting individual competitors.

In order to evaluate the effect of competition of the price discrimination act, an analysis needs to be done of the market. Once the market has been defined, the market position of the firm in question is considered as it is recognised that dominance is required to significantly hinder competition. To subsequently test for the significant lessening of competition, an analysis can be done of the number of firms that have left (failed businesses) the market in the relevant period of the price discrimination charge. However the challenge with this method is proving beyond reasonable doubt that the failed firms have not done so due to inefficiency in other areas. Hence the test of substantial lessening of competition makes this hurdle tremendously high to apply in most instances. This is further compounded when considering the effect on competition from a foreign firm whose market is both domestic and international, therefore expanding the market under consideration.

3.2. Predation or Price below cost

Within the South African legislation, predation is regulated under section 8(d)(iv) of the competition act which states that a dominant firm is prohibited from charging prices that are below the firm's marginal or average variable cost (AVC).¹³⁸ Contravening section 8(d)(iv) is considered as a rule of reason contravention therefore a firm can show that the act of pricing below the average cost was due to 'technological, efficiency or other pro-competitive gains'.¹³⁹ Subsection 8(c) of the Competition Act is considered as

¹³⁶ *Sasol v Nationwide poles* (2005) 49 72/CR/Dec03 21 para 85

¹³⁷ *Sasol v Nationwide poles* op cit (n137) 21 para 86

¹³⁸ Competition Act of 1998 subsection 8(d)(iv)

¹³⁹ Competition Act of 1998 subsection 8(d)

a 'catch all' for exclusionary acts practiced by a dominant firm. In *Competition Commission v Media 24*¹⁴⁰, the Competition Commission highlighted that section 8(d)(iv) was considered an 'express predation' contravention, where section 8(c) was considered a 'general exclusionary' contravention. A key differential between a complaint under subsection 8(c) and subsection 8(d)(iv) is that 'the complainant in an 8(d) matter is not required to prove the conduct "impedes or prevents a firm entering into, or expanding within, a market" in order to establish that the conduct is indeed exclusionary. All that is required is to prove the existence of the elements of the practice in question.'¹⁴¹ In this case to meet the requirements for predation under section 8(d)(iv), the complainant needs to show that:

- the price charged by the firm is below its marginal or average variable cost (AVC)

However where a complainant is unable to satisfy the conditions under subsection 8(d)(iv), they can still show predatory intent under subsection 8(c) if the complainant firm 'adduces additional evidence of predation beyond mere evidence of costs'.¹⁴² The additional evidence under subsection 8(c) includes:

- Intent; that is, was the action taken by the firm 'part of a plan for eliminating a competitor perhaps as efficient as the dominant undertaking'¹⁴³
- Whether the complainant firm is an equally efficient competitor.
- Evidence of recoupment

¹⁴⁰ The competition commission of South Africa v Media 24 CT Case number 013938/CR154Oct11, unreported, available from <http://www.comptrib.co.za/assets/Uploads/Reasons-for-Decision-Media24-Section-8-Case-Signature-Documentfinal.pdf> accessed on 15 September 2015

¹⁴¹ D Lewis *Thieves at the dinner table* (2012) 157

¹⁴² The competition commission of South Africa v Media 24 op cit (n141) 60

¹⁴³ The competition commission of South Africa v Media 24 op cit (n141) 60

Evidence of the above would be an indicator of the presence of predation. Recognising the challenges in proving that the price charged by a firm is below its average cost, subsection 8(c) allows for alternative method of calculating cost which include average avoidable cost' (AAC). The AAC method has been used in other jurisdictions and is considered a "but for" concept. The important difference with AVC, is that AAC includes an element of fixed costs...thus making the fixed/variable quandary more manageable.'¹⁴⁴This adjustment however does not remove the challenges in obtaining and calculating the cost of the firm as noted by Padilla and O'Donoghue that 'further practical experience with cost based rules is that they are often complex to apply in practice, in particular for multiproduct firms... A recoupment analysis helps provide a cross-check, based on market structure or conduct, on whether the inference of predation is credible.'¹⁴⁵

In the case of South African law, the recoupment test is not considered as a necessity as the foundation for a predation case is dominance. 'Evidence of recoupment thus serves as a useful circumstantial evidence of the existence of predation, and is a useful controlling factor to avoid the type II errors that may be associated with the 'pricing above AVC or AAC but below ATC test.'¹⁴⁶ A type II error is a 'false negative' which arises from 'under-prosecution'.¹⁴⁷

On the matter of intent, the analysis can be direct or indirect and attempts to look at the motive behind business decisions. The examination of intent can however not stand alone as it is fraught with challenges as noted in *Competition Commission v Media 24* where the analysis of the literature on intent showed challenges that can be encountered

¹⁴⁴ The competition commission of South Africa v Media 24 op cit (n141) 20

¹⁴⁵ Padilla and O' Donoghue cited in The competition commission of South Africa v Media 24 CT Case number 013938/CR154Oct11, unreported, available from <http://www.comptrib.co.za/assets/Uploads/Reasons-for-Decision-Media24-Section-8-Case-Signature-Documentfinal.pdf> accessed on 15 September 2015 p118

¹⁴⁶ The competition commission of South Africa v Media 24 op cit (n141) 118

¹⁴⁷ Lewis op cit (n142) 155

when focusing on intent. One of the challenges is that the concept of 'intent' is ambiguous on the basis that a firm in competition is inherently trying to gain more business from their competitors which is part of the business strategy, and not anti-competitive. On this basis, it is recommended that the analysis of intent be 'recognise[d] as a source of circumstantial evidence, but that needs to be assessed against other sources of evidence.'¹⁴⁸

All these challenges were encountered when the Competition Commission took Media 24 to the Tribunal for a charge of predation against a competitor in the Welkom region. In the speech announcing the outcome of the case between the Competition Commission and Media 24, the Tribunal noted that 'this is the first time in the sixteen years in which the new Competition Act has been in operation that a firm has been found guilty of predatory pricing.'¹⁴⁹ The statement by the Competition Commission reflects the challenges inherent when prosecuting predation related contraventions.

3.3. Collusive action

Most experts agree that there is need for some level of cooperation between businesses, however the same cooperation is abhorrent to competition as it reduces the level of rivalry between firms. As a result it is necessary to regulate the interchange between firms as Adam Smith so succinctly put it, 'people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in conspiracy against the public, or in some contrivance to raise prices.'¹⁵⁰ The South African Competition Act includes a section regulating the conduct of firms. Chapter 2, sections 4 and 5 of the Competition Act deal with the conduct of firms in horizontal and vertical relationships.

¹⁴⁸ The competition commission of South Africa v Media op cit (n141) 63

¹⁴⁹ Media 24 press release available from <http://www.comptrib.co.za/publications/press-releases/media24-press-release/> accessed on 19 September 2015

¹⁵⁰ Adam Smith cited in Taylor M 'International Competition Law - A new dimension for the WTO?' 2006 p19

A 'horizontal relationship' refers to a relationship between competitors and a vertical relationship refers to a relationship between a firm and its suppliers, its customers or both.¹⁵¹ Having a vertical or horizontal relationship between firms is not prohibited, however it is when these relationships lead to agreements that are restrictive in nature that the competition act seeks to prohibit them. Subsection 4(1)(a) of the Competition Act prohibits 'agreement between', 'concerted practice' or 'decision between an association of firms' that have a horizontal relationship if it has the effect of significantly lessening competition, unless a party to the agreement can prove that the 'technological', 'efficiency' or other 'pro-competitive gains' outweighs the effect of significantly lessening competition.¹⁵² Subsection 4(1)(b) prohibits (a) price fixing, (b) dividing markets and (c) collusive tendering. However there is no defence against subsection 4(b) and 'the complainant is not required to prove a negative impact on competition and the respondent is not entitled to invoke a pro-competitive defence.'¹⁵³

In his book, Lewis argues that though difficult to detect, cartels are also difficult for the accomplices to enforce and because of this, it is possible to construct a profile of a likely cartel. Markets with a homogenous product are more likely to collude than firms in an industry where there is branding and product differentiation. Lewis also states that economic evidence on its own is not sufficient to prove the existence of a cartel, it is still necessary to 'prove a meeting of the minds'.¹⁵⁴

Where dumping is concerned, there is high probability that collusive action exists in the interactions amongst the firms. Zanardi has shown that this collusion can be both in the domestic market as well as in the exporting country. It is argued that one of the challenges of anti- dumping is that the implementation of an investigation requires

¹⁵¹ Competition Act of South Africa of 1998 subsections 1(xiii) and 1(xxxiii)(cii)

¹⁵² Competition act of South Africa of 1998 subsection 4 (1)(a)

¹⁵³ Lewis op cit (n142) 208

¹⁵⁴ Lewis op cit (n142) 210

firms within the industry in question to come to an agreement on the impact that the increase in 'dumping' is having on their operation through the requirement that at least 25 per cent of the domestic producers support the application.¹⁵⁵ In effect, it encourages collusion between firms in the industry as firms have to come to an agreement before an anti-dumping investigation can be initiated. Though the threshold of an effective 25 per cent support might seem low, when taken from an industry with a few players for instance an oligopoly, then agreement between firms becomes more likely. In *United States v International Harvester*, it was noted that due to the interdependence that exists between the firms, firms will often act in similar fashion, however this alone is not indicative of collusive behaviour.¹⁵⁶ It was also observed that 'an agreement arises from the actions of and the discussions among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest... Its essence is that the parties have reached some kind of consensus.'¹⁵⁷ Russell Miller in the *Australian Competition law and policy* also stated that 'evidence of the way the understanding was reached between the parties may be inferred from circumstantial evidence'¹⁵⁸ making it easier to prove collusion between firms.

Concerted action

Reyburn notes that, 'it is often difficult to interpret the expressions "agreement", "concerted practice" and "a decision by an association of firms".'¹⁵⁹ However, what is important to note is that the three terms all attempt to differentiate between independent conduct from action that is concerted or collusive in nature. Case law has

¹⁵⁵ Anti-dumping regulations Notice 3197 of 2003 subsection 7(3)

¹⁵⁶ *United States v International harvester* quoted in Reyburn *Competition law of South Africa*, 2000 p 5-11

¹⁵⁷ *Videx wire products (pty)Ltd v Competition commission of South Africa* 124/CACOct12 6 (para 13)

¹⁵⁸ Miller R '*Australian Competition law and policy 2012*' quoted in *Videx wire products (pty)Ltd v Competition commission of South Africa* 124/CACOct12 6 (para 13)

¹⁵⁹ L Reyburn *Competition law of South Africa* (2000) 5-11

defined concerted practice as, 'a form of coordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition, practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market.'¹⁶⁰ Firms are not prohibited from responding to market conditions or from engaging with one another; however the emphasis is that firms have to act independently in light of the information that is available. The law 'strictly preclude[s] any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.'¹⁶¹ Within this, there are different occasions when firms can cooperate without falling foul of the competition authorities. These instances include when there is tacit collusion for example price leadership when one firm publicly announces a change in price and other firms follow suit. This is more likely to happen when there is a market leader and the firms are dealing in a homogenous product.

Agreement

The term 'agreement' contained in section 4 is defined as, 'includes a contract, arrangement or understanding, whether or not legally enforceable'¹⁶² Reyburn argues that the way in which the term 'agreement' is defined in the act is very extensive particularly as it also includes actions that 'cannot be defined as a "contract arrangement or understanding"'.¹⁶³ On the basis of the decision from the Appeals Court

¹⁶⁰ Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities. Para 4 available from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61973CJ0040> accessed on 17 May 2015

¹⁶¹ Fox *The competition law of the European Union* (2009) 44

¹⁶² Competition Act of South Africa of 1998 subsection 1(ii)

¹⁶³ Reyburn op cit (n160) 5-16

in *Netstar (pty) Ltd v Competition Commission*¹⁶⁴, it can be seen that in the South African legislation, consensus is the basis of an agreement and this can be tacit or verbal. The emphasis is agreements which have the effect of limiting the ability of a firm to act independently due to being bound 'either contractually or by virtue of a moral suasion or commercial interest'.¹⁶⁵ Due to the extensive nature of the definition, a firm that participates in the establishing of an agreement would be considered to be part of the agreement unless the firm has publicly distanced itself from the agreement. Ultimately, the term agreement speaks towards the raising of an expectation of action and this was elaborated on in the United Kingdom competition court when it was stated that, 'when each of two or more parties intentionally arouses in the other an expectation that he will act in a certain way, it seems to me that he incurs at least a moral obligation to do so'¹⁶⁶

Association of firms

Section 4 of the competition act also relates to decisions that are made by an 'association of firms', when the firms involved have a horizontal relationship. An association refers to a group of firms with similar interests and objectives. On this basis, firms come together to support their shared initiative, for example the South African Poultry Association (SAPA) whose vision is to create a 'viable and sustainable industry'.¹⁶⁷ To achieve this, 'SAPA acts as a medium and catalyst for any matter the industry wishes to collectively address. It acts as the face of the industry, addressing and maintaining a presence in society without which opposing groups could play havoc with the industry's interests - without opposition.'¹⁶⁸ It is this ability for joint action that the

¹⁶⁴ *Netstar (pty) Ltd v Competition Commission* 97/CAC/May 10 15/02/2011

¹⁶⁵ *Netstar (pty) Ltd v Competition Commission* op cit (n165) 15 par 25

¹⁶⁶ *JJ Wilmer in Re Supply of ready mixed concrete* (1992) QB 213 cited in *Reyburn Competition law of South Africa*, 2000 p 5-22

¹⁶⁷ SAPA vision available from <http://www.sapoultry.co.za/home/> accessed on 26 May 2015

¹⁶⁸ SAPA vision available from <http://www.sapoultry.co.za/home/> accessed on 26 May 2015

competition act seeks to regulate. It is not only agreements that are noted as decisions but recommendations made by the association would also be considered as agreements by the association. This is further elaborated by the Tribunal which noted that the 'concept of a decision includes the rules of the association in question, decisions binding upon the members and recommendations, and in fact anything which accurately reflects the association's desire to co-ordinate its members conduct in accordance with the statute'¹⁶⁹. The extensive nature of this definition suggests that firms which are part of an association have to ensure that their objections to decisions that they do not agree to are noted to make sure that they do not fall foul of the law for participating in the association.

3.4. Chicken Industry

In an effort to understand the 'status of poultry tariffs in South Africa and the possible impact of the proposed tariff increase for poultry imports'¹⁷⁰, the Portfolio Committee on Agriculture, Forestry and Fisheries, invited SAPA, the Competition Commission and the Association of Meat Importers and Exporters (AMIE) in September 2013 to make submissions to them. The Competition Commission produced a report analysing the chicken industry in the SACU region focusing on competition issues and the impact that the tariffs were having on competition in the sector. In the report, the Competition Commission noted that in 2009 they had investigated the poultry industry for possible competition violations of the Competition Act which included:

- Possible market allocations - subsection 4(1)(b)(ii)
- Exclusive supply agreements - subsection 8(d)(ii)
- Product tying - subsection 8(d)(iii)

¹⁶⁹ Venter v law society of the cape of good hope 24/CR/Mar12 cited in Reyburn Competition law of South Africa, 2000 p 5-27

¹⁷⁰ Status of poultry tariffs in South Africa and the possible impact of the proposed tariff increase for poultry imports available from <https://pmg.org.za/committee-meeting/16346> accessed on 17 March 2015

- Information exchange – section 4 (restrictive practices)

The Competition Commission concluded that the poultry industry was ‘vertically integrated with high barriers to entry’¹⁷¹ and that anti-dumping duties were a competitive restraint in the industry. In their submission, they noted that the imposition of tariffs would have the effect of further stifling competition within the industry leading to higher prices for consumers.

In defence of the industry, SAPA submitted that the poultry industry was vital to South Africa, providing jobs as well as supporting jobs in other vertical industries including agriculture. Further to this, the industry was suffering harm from ‘dumped’ imports which was negatively impacting the industry. In spite of all the evidence to the contrary, SAPA asserted that the SA poultry industry was an efficient producer of chicken being hampered by imports and factors beyond its control, which included increases in electricity prices and grain feed which are some of the primary costs for producing chicken. Regardless of this, the Competition Commission maintained that the industry was vertically integrated with high barriers to entry and that any new entrants would have to be integrated as well in order to succeed in the industry. In a comment relating to SAPA, the Competition Commission stated that, ‘often industry associations performed the function of the secretariat of the cartel, coordinating an anti-competitive outcome’¹⁷², the prevalence of mergers in the industry was credited for the high concentration in the industry which further reduced competition. Mr Rumburuth¹⁷³ made a comment that, ‘it was very unlikely that any firm would become

¹⁷¹ The impact of poultry tariffs on competition – submission to parliamentary committee, 10 September 2013

¹⁷² Status of poultry tariffs in South Africa and the possible impact of the proposed tariff increase for poultry imports available from <https://pmg.org.za/committee-meeting/16346> accessed on 17 March 2015 p6

¹⁷³ Mr Rumburuth acting in his position as Competition Commission

a competitive exporter if that firm was not subject to the discipline of competition locally.¹⁷⁴

The discussion before the Portfolio Committee reflected the importance of coordination between the different agencies like the Competition Commission and ITAC. The possibility of industries and associations to exploit their position is reduced when coordination and cooperation happens amongst all the organs that are directly impacted by the policies to be implemented.

3.5. Public interest

In considering competition issues in South Africa, it is important to note the role that public interest plays in the competition legislation. The SA competition act of 1998 considers the role of public interest as just as important as industry competition. This is written into the purpose of the act in subsection 2(b) and subsection 2(c) which states:

The purpose of this Act is to promote and maintain competition in the republic in order –

b) provide consumers with competitive prices and product choices;

*c) to promote employment and advance the social and economic welfare of South Africans.*¹⁷⁵

The lawmakers in putting together the Competition Act considered the history of South Africa and included policies which favoured the previously disadvantaged as defined by the act¹⁷⁶. Some have questioned the necessity of the inclusion of industrial policy within the framework of the Competition Act, however in spite of these criticisms industrial policy is clearly entrenched in the Competition Act. There is an awareness of

¹⁷⁴ Status of poultry tariffs in South Africa and the possible impact of the proposed tariff increase for poultry imports available from <https://pmg.org.za/committee-meeting/16346> accessed on 17 March 2015 p8

¹⁷⁵ Competition Act of South Africa of 1998 section 2

¹⁷⁶ Competition act subsection 3(2) - defines a historically disadvantaged person

the need to recognise the specific challenges facing industries as well as consumers; this awareness has been reflected in the decisions by the Competition Tribunal.

This conflict between competition law and industrial policy was reflected in the application of anti-dumping duties to chicken imports from the United States and Brazil. In the application for dumping duties, SAPA indicated that the chicken industry contributes to job creation and that the increase in dumped imports would result in the loss of jobs. This was taken into consideration by the ITAC and the decision to impose anti-dumping duties reflected this need to protect jobs as stated in the ITAC report which stated that in considering the application for duties, the ITAC had 'considered the levels of production, employment and investment in the domestic poultry industry'¹⁷⁷. However ITAC also noted that the recommended tariff increase would 'place the South African poultry producers on a similar competitive footing as their counterparts abroad... and would not have an undue cost-raising impact on consumers.'¹⁷⁸ This is aligned to the lesser duty rule contained in the anti-dumping regulation which some argue is an attempt at provisioning for national interest in anti-dumping investigation.

4. Conflict between competition and anti-dumping legislation

Noonan notes that though 'trade and competition policies have a common objective: economic efficiency... these policies have sometimes impinged on each other.'¹⁷⁹

Noonan further notes that there exists more 'disharmony than harmony' between the two policies. The contention is that competition law tends to be 'more transparent, procedurally fairer and less discriminatory against foreign firms than trade remedy

¹⁷⁷ Report no.442 op cit (n90) 4

¹⁷⁸ Report no.442 op cit (n90) 4

¹⁷⁹ OECD, interim report on convergence of competition Policy (Paris: OECD GD(94/64), 1994 cited in Noonan C The emerging principles of International competition law 2008 139

laws'.¹⁸⁰ It is this disharmony between trade and competition policy that has led to the continued survival of both policies in domestic jurisdictions.

The disharmonies include the treatment and definition of key terms contained in price discrimination, predation and anti-dumping regulation. These include the notion of injury, market power and more importantly the treatment of cost in the analysis of the operations of the firm in question.

4.1. International price discrimination

The proponents¹⁸¹ of anti-dumping regulation have maintained that anti-dumping regulation is necessary as it seeks to protect the domestic market from 'unfair competition' from foreign companies. The same price discriminating action is regulated under competition law with some differences which legal practitioners¹⁸² have indicated would make it difficult to regulate foreign price discrimination by utilising domestic competition law. The challenges that are cited include the requirement of dominance within competition law which is not required in anti-dumping legislation; the test for injury which is necessary for both competition law and anti-dumping regulation and finally the question of extraterritoriality which competition law does not fully address.

Within the United States legislation, price discrimination is dealt with in subsection 13 also known as the Robinson- Patman act¹⁸³ which places the regulation of price discrimination within the ambit of monopoly regulation. This is consistent with

¹⁸⁰ C Noonan *The emerging principles of International competition law* (2008) 140

¹⁸¹ For a further discussion on price discrimination and anti - dumping see Kovacic Price Differentiation in anti-trust and Trade Instruments in Law and Economics of contingent protection in International trade Bagwell et al 2010

¹⁸² See Victor Antidumping and Antitrust: Can the inconsistencies be resolved Journal of International law and politics 339 1992-1993, Sykes Anti-dumping and Antitrust: what problems does each address? Brookings Trade Forum, 1998, Fox Competition law and the Agenda for the WTO: Forging the links of competition and Trade Pacific Rim and Policy Journal 1 (1995)

¹⁸³ The Robinson-Patman Act of 1936 (or Anti-Price Discrimination Act, Pub. L. No. 74-692, 49 Stat. 1526 (codified at 15 U.S.C. § 13)

economic theory which requires dominance for a firm to successfully practise price discrimination. The requirements for dominance and significant lessening of competition make price discrimination conviction more stringent than the requirements for an anti-dumping conviction.

4.2. International predatory pricing

One of the challenges that economists face in accepting the validity of the price predation argument put forward for the support of anti-dumping remedies is the question of the business sense in 'selling goods at a price below cost' which is the definition used under anti-dumping regulation. The argument is that no firm will sell at below cost for a sustained period as they would go out of business. Therefore selling below cost can only be done for short periods with the intention of pricing out competition in order to achieve a monopoly. The action of pricing below cost is defined as predation and in the United States predatory pricing is treated under two different antitrust laws, Sherman Act together with the Robinson-Patman Act.¹⁸⁴ It is worth noting that predatory pricing 'always involves a calculated trade-off between short term losses and long term gains.'¹⁸⁵

Anti-dumping legislation considers a product as having been dumped if it is sold at a 'price below per unit cost of production'¹⁸⁶, which in itself is contrary to microeconomic theory which teaches 'that firms will maximise profits by selling output as long as the price they receive is more than the average variable cost of production. If the price is

¹⁸⁴ Predatory pricing is often alleged as a means of attempted monopolization proscribed under Section 2 of the Sherman Act, 15 U.S.C. § 2. It is also the theory employed in primary-line (seller-level) cases brought pursuant to the Robinson Patman Act, 15 U.S.C. § 13 et seq. available from <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01292.html#Footnote3> accessed on 9 October 2015.

¹⁸⁵ Taylor op cit (n31) 277

¹⁸⁶ Agreement on the implementation of article VI of GATT 1994 subsection 2(2)(1)

less than the average variable cost of production, the firm will find it optimal to shut down and simply incur losses on the fixed costs.¹⁸⁷

Within the United States, the Federal Trade Commission (FTC) is the agency responsible for consumer protection as well as the prevention of anti-competitive behaviour in the United States market. The FTC notes that the courts are largely sceptical of claims of predatory pricing. There is a difference between 'predatory behaviour' and 'fierce competition' and Taylor notes that when deciding predatory pricing cases, courts have difficulty in distinguishing between the two.¹⁸⁸ It is this fine line that exists between predatory pricing and fierce competition that has led to a low success rate in predatory pricing convictions. The South African competition commission has succeeded in only one predation case since the inception of the new competition act in 1998.¹⁸⁹

'the domestic difficulties in bringing successful predatory pricing actions under competition law are exacerbated at the international level due to cross border evidential difficulties...'¹⁹⁰ which makes anti-dumping a more lucrative way of seeking relief from 'unfair' competition from foreign firms.

The foundational requirement for a predation enquiry is dominance as pricing below cost is considered as an abuse of dominance infringement in the South African and United States legislation. Therefore before a firm can be convicted of predation, it has to be shown that the firm in question is dominant in its relevant market. Meeting this requirement for dominance would make it difficult to convict international predation

¹⁸⁷ Prusa T.J Comments on "Antidumping: Overview of the Agreement" in KW Bagwell et al. *Law and Economics of Contingent Protection in International Trade* 1ed (2010) 259

¹⁸⁸ Taylor op cit (n31) 278

¹⁸⁹ Media 24 press release available from <http://www.comptrib.co.za/publications/press-releases/media24-press-release/> accessed on 19 September 2015

¹⁹⁰ Taylor op cit (n31) 279

cases as domestic firms seeking relief against predation would have to prove that the firm practising the predation was dominant in its home market.

In its current form, anti-dumping does not have such requirements. All that is required is to show that a firm is selling at a price below its cost. Applying competition principles to this would mean 'such firms could engage in dumping by international price discrimination or pricing below cost without fear of sanction.'¹⁹¹

The requirement to show intent in predation cases also makes international predation an unsuitable substitute for anti-dumping regulation. This challenge is reflected in the limited success rate for predation cases.

Market power

The test for dominance is a prerequisite for price discrimination and predation in competition law; this is because there is recognition that only a firm with market power has the capacity and ability to prevent competitors from challenging its actions.

However anti-dumping regulation does not have this requirement making it easier for foreign firms to be found guilty of having dumped in the domestic market. The Competition Act has set guidelines in the treatment of dominance. A firm with at least 45 per cent market share in the industry in question is automatically considered to be dominant, whilst firms with between 35 per cent and 45 per cent can show that they are not dominant whilst firms with less than 35 per cent can be shown to be dominant¹⁹².

Once dominance has been established, competition law seeks to regulate the behaviour of the dominant firm to ensure that the firm does not abuse its position by significantly lessening competition through anti-competitive behaviour.¹⁹³

¹⁹¹ Taylor op cit (n31) 277

¹⁹² The competition act of 1998 section 7

¹⁹³ The competition act of 1998 section 8 (abuse of dominance prohibited) and section 9 (price discrimination by dominant firm prohibited)

Economists recognise that price discrimination is a necessary part of business operations, and the requirement of dominance ensures that regulation is not utilised to stifle competition within the industry but rather to promote it. Within the United States competition law, the way the law has been interpreted by the courts makes it evident that the existence of a monopoly is not illegal but instead the attempt to maintain the monopoly position by using unfair business practices.¹⁹⁴

However, in the regulation of dumping, a firm does not have to be dominant in its respective market to be convicted of dumping. This means that a firm requesting for anti-dumping duties only has to show that the foreign firm is selling goods at a price below the price which it is selling the same or like product in its respective domestic market (normal value).

This disparity between the application of competition law and anti-dumping legislation, once again shows a marked favour for companies who lay their petitions on the basis of 'unfair' competition utilising the anti-dumping instrument rather than competition law. This is because anti-dumping regulation does not require the firm to be dominant whereas competition law requires dominance to be proven first.

Injury to the firm versus injury to the industry

The concept of material injury is central to anti-dumping investigations. An anti-dumping duty can only be implemented if an industry can show that they have suffered material injury as a direct result of dumping by a foreign firm or industry.¹⁹⁵ Similar language appears in competition law, with a key difference that competition law seeks to protect the competitive process which enhances consumer welfare, rather than individual firms or industries. This is captured in the statement that competition

¹⁹⁴ Single firm conduct available from <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct> accessed on 17 July 2015

¹⁹⁵ Agreement on the implementation of article VI of GATT 1994 section 3

law is meant to 'protect competition, not competitors'¹⁹⁶ and yet as the tribunal has also noted that, 'no competitors, no competition'.¹⁹⁷ Therefore an opportunity arises to find a mid-point between the implementation of dumping legislation and the practise of competition law.

In a statement to the ad hoc sub - committee on anti-trust and anti-dumping, it was noted that 'section 2(a) (of the *Robinson Patman Act*)¹⁹⁸ must be read in conformity with the public policy of preserving competition, but it is not concerned with mere shifts of business between competitors. It is concerned with substantial impairment of the vigor or health of the contest for business, regardless of which competitor wins or loses'.¹⁹⁹ The same sentiment appears in South African competition legislation where the emphasis and the tone of the legislation clearly indicate that the role of competition law is to protection the competitive process rather than competitors.²⁰⁰ To achieve this, competition law requires the test of 'significant lessening of competition' to show that competition is being impeded (section 9(1) of the competition act of 1998) whereas anti-dumping legislation is less restrictive.

Where significant lessening of competition in competition law requires that the competition be shown to be materially affected, the requirement for support from at least 25 per cent of the domestic production volume reflects the deference to the firm rather than a regard for the industry. This once again displays the preference to protect the competitors rather than the competitive processes which is ingrained in the anti-dumping regulation. The competitor in anti-dumping regulation can take the form of an industry that is seeking protection.

¹⁹⁶ Sasol vs Nationwide poles op cit (n137) 21 para 85

¹⁹⁷ Sasol vs Nationwide poles op cit (n137) 21 para 86

¹⁹⁸ 15 U.S. Code § 13 - Discrimination in price, services, or facilities - Price discrimination by firms where the effect is to substantially lessen competition

¹⁹⁹ A Victor et al 'Report of the Ad Hoc sub committee on Anti-trust and Anti-dumping' Antitrust law Journal vol 43 No. 3 1974 p683

²⁰⁰ See Sasol vs Nationwide poles (2005) 49 72/CR/Dec03, *Harmony v Mittal* 2007 13/CR/FEB04

It is this possibility to gain protection for an industry that opens up the system to the possibility of collusion through rent seeking activities utilising the anti-dumping regulation.

Average Variable Cost versus Normal value

Predation and anti-dumping are shaped on the basis that an industry or competitor is suffering harm because another firm is selling products at a lower price than what is expected under the market conditions. The form that this selling price takes differs depending on which legislation one defers to. Within the anti-dumping legislation, the selling price considered is the normal value which is defined as selling price in the domestic market. This is in contrast to the definition in predation which considers the marginal or variable cost of the firm selling the products.

Anti-dumping regulation therefore fails to take into account circumstances that might be pertinent to the price setting mechanism utilised by the importing firm. This was illustrated in the case of the chicken imports from the United States where the chicken producers in the United States highlighted that their pricing strategy was a reflection of the ability to segment the market because they understood the difference in preferences firstly within the United States meat market and secondly between the United States chicken market and the South African chicken market. This ability to segment the market allowed them to charge different prices for the different parts of the chicken within the United States, relying on the consumer's willingness to pay more for their preferred cuts of meat. This meant that they were able to recoup the maximum value out of the chicken and could therefore utilise the net realisable value as a cost base. They were then able to sell dark meat in the South African market at a price that could be construed as lower than their cost base in the United States market as they were already recouping most of their cost in the United States market. In effect this form of aggressive competition was then deemed to be dumping leading to the imposition of anti-dumping duties which in effect protected the market.

In the analysis of predation however, the concept of cost is dealt with in a more detailed format. The requirement to consider average or marginal cost means the regulation does not leave room for misrepresentation of costs. However this does not make the cost analysis any easier to apply as noted in *Competition Commission v Media 24* where it was observed that ‘practical experience with cost based rules is that they are often complex to apply in practice’.²⁰¹ This challenge in applying cost based analysis stems from the need to obtain information from the firm being challenged which might not be easily accessible. This difficulty means the direct application of cost based analysis in anti-dumping investigation would make seeking redress under anti-dumping regulation even more of a challenge.

4.3. Possibility of ‘rent seeking’

Rent seeking is defined as a firm’s attempt to find economic advantage from others without giving anything back which can be achieved by lobbying governments for preferential trade policies. David Lewis in his presentation on competition and corruption at the OECD²⁰² said ‘rent seeking’ can be good and it can be bad, and it is for competition law to regularly assess the industries and utilise the resources available to them including market enquiries to prevent the increase of ‘bad rents’.

Anti-dumping legislation seems to encourage bad rents as reflected in the chicken case as discussed in previous sections. Another notable example is the anti-dumping duties that were levied on Bridon International UK (Bridon), after SCAW South Africa (SCAW) levied charges of dumping against ‘stranded wire, rope and cables of iron steel originating in or imported from various countries including the UK’²⁰³. According to

²⁰¹ The competition commission of South Africa v Media 24 op cit (141) 118

²⁰² D Lewis competition and Corruption OECD 2004 available at <http://www.slideshare.net/OECD-DAF/oeed-gfc2014-davidlewis> accessed on 13 June 2015

²⁰³ N Madolo *International economic law: the voices of Africa* 2012 p20

Hauer, even though the investigations by the Board on Tariffs and Trade (BTT)²⁰⁴ found dumping to exist in only one product (fishing rope), the recommendation was to impose duties on a number of products which included cables. At an interim review in 2006, ITAC found that the dumping on fishing ropes had stopped, however the dumping duty of 42 per cent was not removed which opened up the possibility of SCAW requesting a sunset review when the five year dumping period was coming to an end. After the investigation, ITAC recommended that the dumping duties be removed as 'steel fishing ropes produced by Bridon UK were stored in South Africa, they were kept in bonded warehouses and sold to foreign vessels. They did not enter the SACU or South Africa for "home consumption"'.²⁰⁵ Consequently no Value Added Tax (VAT) or customs duties were payable on them. In response to this, SCAW went on to take the ITAC to the High Court to prevent them from putting the recommendation through to the minister²⁰⁶ which would mean having the anti-dumping duty withdrawn. The high court granted the appeal to SCAW on the 'possibility (that) re-introducing dumped fishing rope in the market contained a significant risk of damage for the local industry'.²⁰⁷ ITAC appealed this decision at the constitutional court where the decision by the High Court was set aside as the judge reasoned that:

- 'If ITAC has botched its investigative processes the High Court is entitled to extend the legislatively fixed lifespan of the anti-dumping duty.
- The fact that the recommendation is a "jurisdictional fact" does not entitle an aggrieved party to an interdict that gives new life to an anti-dumping duty whose duration would otherwise end.

²⁰⁴ Board on Tariffs and Trade is the predecessor to the International Trade and Administration Committee (ITAC)

²⁰⁵ SCAW South Africa v International Trade and Administration Commission 2010 CCT 59/09; [2010] ZACC 6

²⁰⁶ ITAC makes recommendations to the minister who has the final say.

²⁰⁷ LH Hanauer Anti-dumping: From trade remedy to regulatory protectionism in the Voices of Africa 2012 p21

- It was inappropriate for the High Court to grant an interim order which invaded the terrain of the national executive function without appropriate justification.’²⁰⁸

The decision by the constitutional court was important in that it reinforced that ‘the principle of separation of powers, on the one hand, recognises the functional independence of branches of government’²⁰⁹, whilst noting ‘no constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation’. This ensures that ITAC can properly do its work without fear of interference from other government departments. It also re-enforced the authority and independence of ITAC from firms seeking to get a favourable response for applications made.

The SCAW case reflects the challenges of the application of anti-dumping duties in concentrated markets. In the first application by SCAW for anti-dumping duties on Bridon, it is instrumental to note that the only company mentioned in the application is SCAW, suggesting that they might have been the only firm in that specific industry, therefore in a position where they could seek protection by means of the anti-dumping regulation. Hauner notes that at the time of the application for anti-dumping duties, the operations were housed in SCAW international and SCAW South Africa, with SCAW South Africa having Anglo America as the majority Shareholder. This further suggests that at the time of application, SCAW could have been a monopoly in the specific market that it was seeking protection for from a similarly dominant international competitor (Bridon) and using the regulation as a way of rent seeking.

In the end, the SCAW case reflects how anti-dumping regulation can be abused by market participants and why it is essential to have competition law principles embedded in the anti-dumping regulation for a holistic application of the law.

²⁰⁸ SCAW South Africa v International Trade and Administration Commission op cit(206) para 108 to 110

²⁰⁹ SCAW South Africa v International Trade and Administration Commission op cit (n206) para 90

4.4. Case study: Matsushita v. Zenith

The ever present conflict between competition law and anti-dumping remedies was brought into sharp relief in two cases one which involved the Japanese trade in semiconductors which was brought before the WTO panel in 1988,²¹⁰ and the other, *Matsushita v. Zenith*²¹¹ which played out in the United States legal system. In both cases the question arose on which law would prevail between anti-dumping and competition law.

In 1974 Zenith filed a charge against Japanese Television importers into the United States of America. Zenith alleged 'violations of section 1 and 2 of the Sherman act, along with claims under the Wilson Tariff Act and the anti-dumping Act of 1916'²¹². The question before the courts was whether the law had been violated in the Japanese manufacturers importing at low prices into the United States and whether intent of injuring the United States market could be shown to have existed in the actions of the Japanese importers. As with most cases of predation and price discrimination, the challenge to prove intent as well as injury could not be met. However, on the basis of the same information supplied to the competition authorities, Zenith was able to get anti-dumping duties imposed against the Japanese importers. This once again confirming the ease with which companies are able to seek relief by applying for anti-dumping duties compared to competition law.

The history of the Japanese television story started centuries before the Zenith case came to trial. The Japanese story started with the development of the television industry, as the industry developed, the Japanese market was divided between the domestic and the international market. The argument was that the Japanese market was

²¹⁰ Japan – Trade in Semi- conductors Report of the Panel adopted on 4 May 1988 (L/6309 – 35S/116)

²¹¹ *Matsushita v. Zenith Ratio Corp.*, 475 U.S. 574 (1986)

²¹² F. Harry 'An Anti-trust remedy for international price predation: lessons from *Zenith v. Matsushita*' 1995 4 Pac.Rim L & Policy J. 211 1995 (219)

producing more televisions than the domestic market could sustain. As a result there was a meticulous effort in developing an international market for the 'excess' televisions. However to ensure that the domestic prices did not fall below a certain level, 'the Japanese television manufacturers cartel'²¹³ was developed.

The Japanese Television cartel

The television cartel was part of a bigger scheme of price fixing which included other major household appliance manufacturers the purpose of which was 'to control wholesale and retail prices of home electric appliances and to prevent shipment of products to discounters'.²¹⁴ Beyond fixing the price, the cartel also attempted to restrict output in order to maintain the price levels. As television production continued to grow in Japan, there was a gradual shift towards the export market and the United States was one of the locations that the Japanese started to export televisions. In 1963, the Japanese television manufacturers entered into an "export cartel agreement". Part of the agreement involved setting up a minimum export price in the United States, it is important to note that this action was supported by the Japanese government through the Ministry of International Trade and Industry (MITI).

According to First, the Japanese manufacturers set up an elaborate system of the cartel which included different meetings according to the rank of the representatives that would meet at the regular intervals; a group for middle managers (the tenth day group), senior managers group (the palace group) and the presidents of the companies (the okura group), and the cartel 'discussions included minimum prices, margins for wholesalers and retailers, and the level of rebates.'²¹⁵ Nine years after the first

²¹³ Harry op cit (n213) 213

²¹⁴ Harry op cit (n213) 214

²¹⁵ Harry op cit (n213) 214

investigation, Japan's Fair Trade Commission (JFTC) began a new²¹⁶ investigation into the industry which led to a charge on six of the major television manufacturers with a violation of section 3 of the anti-monopoly law (a horizontal restraint of trade) arising out of their activities in the domestic market.²¹⁷

The television market continued to grow in Japan with increased developments in the technology utilised in the manufacturing of televisions, a process which was further assisted by the MITI through the provision of financial assistance. In order to facilitate the cartel behaviour in the United States of America, a 'five company rule' was adopted by the Japanese manufacturing firms. The 'five company' limited the firms that the Japanese firms could have export arrangements with in the United States for export purposes, with each Japanese firm being limited to five firms. This arrangement was adopted as part of the rules of the Japan Machinery Exporters Association (JMEA), and the arrangement was filed with MITI.

In 1968, the U.S. electronic industries association filed a complaint against the Japanese manufacturers alleging that the Japanese manufacturers were selling televisions in the United States for "less than fair value" and therefore violating the antidumping Act of 1921. In 1970 the National Union Electric Company (NUE) 'filed suit seeking damages under the antitrust laws and the antidumping Act of 1916',²¹⁸ and in 1971 the Tariff Commission 'decided that the U.S. industry was being injured as a result of television imports from Japan being sold at less than fair value'²¹⁹ leading to the imposition of dumping duties on imports of televisions from Japan.

²¹⁶ The first investigation was in 1957 and led to a recommendation decision ordering the council to end its price fixing arrangement.

²¹⁷ Harry op cit (n213) 216

²¹⁸ Harry op cit (n213) 218

²¹⁹ Harry op cit (n213) 214

Three months after Matsushita acquired Motorola's Quasar television division, 'Zenith filed a private antitrust suit against the major Japanese television producers. In the suit, Zenith alleged violations of section 1 and 2 of the Sherman Act, along with claims under the Wilson Tariff Act and the Antidumping Act of 1916,'²²⁰ Zenith's suit was consolidated with NUC's. Though the other firms did not join Zenith's suit, they went on to file complaints with the 'International Trade Commission (ITC) alleging unfair methods of competition by Japanese television manufacturers in violation of section 337(b) of the tariff Act of 1930.'²²¹ One more suit was laid against the Japanese manufacturers, this time by the committee to preserve American Color Television (COMPACT), which alleged that the Japanese were importing televisions in to the U.S. in such increased quantities to 'be a substantial cause of injury to the domestic industry'²²² and this was filed under section 201 of the trade reform act of 1974.

At this point, there were six suits against the Japanese manufacturers, with two being laid under competition regulation and four under different trade regulations which include anti-dumping. Though the suits were laid in different platforms, they all alleged the same prohibition; selling below cost by a competitor with the result of obstructing the market. However the requirements to be met for a satisfactory charge were different leading to some of the charges failing to succeed.

The competition law charge under the Sherman act proved to be the most stringent in requirements. Zenith as the complainant had to prove that the Japanese firms' price action was predatory in nature and also that there was a cartel in operation. As a result they had to meet the test of predation which is pricing below cost and also show the intent of the Japanese firms. Zenith also had to show the existence of a cartel to support

²²⁰ Harry op cit (n213) 219

²²¹ Harry op cit (n213) 220

²²² Harry op cit (n213) 220

the predation charge. In their decision, the supreme court of appeal reasoned that predation could not exist as,

'Predatory pricing conspiracies are, by nature, speculative. They require the conspirators to sustain substantial losses in order to recover uncertain gains. The alleged conspiracy is therefore implausible. Moreover, the record discloses that the alleged conspiracy has not succeeded in over two decades of operation. This is strong evidence that the conspiracy does not in fact exist. The possibility that petitioners have obtained supracompetitive profits in the Japanese market does not alter this assessment.'²²³

The possibility of 'chill(ing) the very conduct the antitrust laws are designed to protect'²²⁴ motivated the court in ruling that there was every possibility that the complainants were doing so out of distress from aggressive competition rather than anti-competitive behavior by the Japanese firms. The trade division however took a different view. First notes that the United States industry had greater success under trade law and they were able to get anti-dumping penalties imposed on electrical products from Japan, including semi-conductors.

The Japanese and United States electrical manufacturers' case illustrated the divergent views that exist between competition law and trade law. What is evident is that competition law offers greater certainty in terms of the application of the law which does not exist in the application of anti-dumping law. This encourages firms to utilise the anti-dumping instrument as a way of containing international competition. However it is also evident that competition law is not entirely capable of dealing with matters of international anti-competitive behaviour. The Japanese electrical manufacturers clearly functioned as a domestic cartel which was not only documented

²²³ Matsushita v. Zenith Ratio Corp. op cit (n212)

²²⁴ Harry op cit (n213) 223

but supported by the government through the MITI.²²⁵ The Japanese industry was protected by the government and encouraged to export to external markets. The existence of the domestic cartel and the closed market ensured that the Japanese manufacturers were able to enjoy high prices in the domestic market. Through the international cartel arrangement characterised by 'price checks' and market segregation through the application of the 'five company rule' the Japanese manufactures were then able to charge lower prices in the United States market which is anti-competitive. Yet competition regulation was not sufficient to stop this anti-competitive behaviour which the trade regulators were then able to deal with.

5. Recommendations

There have been many recommendations on how anti-dumping regulation can be modified but others have been more radical calling for the removal of anti-dumping legislation²²⁶. However, critics have had to acknowledge that the removal of the anti-dumping regulation is not feasible as there are political ramifications to this and also they acknowledge that at the moment there is no credible alternative to the problem of cross boarder price discrimination and predation. Alternatives have been suggested with most of them centering around competition law disciplines, but even that does not offer a full solution but rather reduces the conflict that exists between anti-dumping and competition law.

5.1. International competition law

The most radical of the recommendations has been the proposition to remove anti-dumping legislation and replace it with an international competition framework. This call has been a response to the uncertainty embedded in anti-dumping investigations.

²²⁵ See discussion in First and Japan – trade in semi-conductors Report of the panel adopted on 4 May 1988 (L/6309 -35s/116)

²²⁶ See Sykes and Ying Bi who advocate for the removal of anti-dumping regulation.

Note cited in a report by Victor, comments that anti-dumping in contrast to competition law, ' although enacted to restrain *unfair* competitive influences, proceedings under the anti-dumping laws often produce effects which unduly restrict another source of competition – foreign competition – whether or not it is unfair' ²²⁷, Note continues and asserts that the reason for this restrictive impact on foreign competition could be that anti-dumping regulation is a 'curious hybrid of traditional tariff ideas and price discrimination theories of anti-trust'²²⁸. It is this link between anti-dumping and price discrimination which has led to increasing calls for an international competition framework.

An international competition framework would however require consensus and this has delayed the implementation of such a network. Some WTO members have attempted to bring competition under the jurisdiction of the WTO; however this has come under severe criticism from member countries like the United States of America who have continued to resist what they see as a potential threat to their sovereignty. In a compromise, the WTO set up a working group to investigate the possibility of including competition issues in the WTO agreement. The divergent views of the member countries have however meant that no consensus can be reached. A significant development from the working group however was the recognition of 'the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade.'²²⁹ Fox contends that the issue of anti-dumping is about market access, and international competition would ensure that unfair competition would be legislated without impinging on the market access of foreign firms. This would enhance

²²⁷ Note, cited in A Victor et al Report of the Ad Hoc sub committee on Anti-trust and Anti-dumping Antitrust law Journal vol 43 No. 3 1974 p682

²²⁸ Note op cit (n228) 682

²²⁹ Report (1998) of the Working Group on the interaction Between Trade and Competition Policy to the General Council, WT?WGT CP/2, 8 December 1998 cited in Fox Competition law and the Millenium round Journal of International Economic law (1999) 670

the work of the WTO which seeks to promote free trade and as an aftermath free competition as the two regulations, 'trade and competition are two sides of one coin.'²³⁰

International competition law would therefore provide the transparency and due process necessary for firms to have confidence that they would be treated fairly in dumping investigations. However the challenge of getting consensus from countries necessitates the provision of an alternative as practitioners attempt to get consensus.

5.2. Coordination and Co-operation between agencies

As a form of compromise to international competition law, coordination and cooperation has also been proposed.²³¹ Recognising the challenge of obtaining consensus in amending anti-dumping laws, opponents have suggested increased cooperation between member states. This move is seen as a more viable way of encouraging trade and at the same time ensuring that firms doing business across borders observe the competition laws of the importing country. The United States of America has been at the forefront of this and has sought to have cooperation agreements with other countries to assist in investigating competition charges laid against foreign competitors. 'In April 1999 the United states and Australia signed the first bilateral agreement specifically designed to facilitate the exchange of evidence in antitrust investigations (subject to Australian Parliament)'²³².

The European Union (EU) exemplifies what the advocates for cooperation would seek to have with regards to investigations relating to unfair competition from foreign firms.

²³⁰ Fox' Competition law and the Millenium round' Journal of International Economic law (1999) 666

²³¹ See Adamantopoulos and De Notaris the Future of the WTO and the reform of the anti-dumping agreement: A legal perspective, A Victor et al Report of the Ad Hoc sub committee on Anti-trust and Anti-dumping Antitrust law Journal vol 43 No. 3 1974

²³² Ch 2, in B. Hawk, ed, 1997, Fordham Corp L Inst, International Antitrust Law &Policy (1998), describing the US/EU co-operation agreement of 1991 and anticipating the positive comity agreement of 1998... All three agreements are printed at 4 CCH Trade Rep 13,500 et seq. cited in Fox Competition law and the Millenium round Journal of International Economic law (1999)

Within the EU, the European Commission (Commission) functions as the executive body responsible for setting legislation and representing the interests of the EU to the rest of the world. However, each country within the EU has its own established competition authority which has the jurisdiction to investigate and make decisions on competition related issues. The Commission then established the European Competition Network (ECN); the network is responsible for facilitating 'discussion and cooperation of European competition authorities in cases where Articles 101 and 102 of the Treaty of the Functioning of the European Union are applied.'²³³ The Commission emphasise that the *ECN does not create a legally enforceable requirement* but allows for the sharing of information and states that 'all competition authorities within the Network are independent from one another. [And] Cooperation between NCAs and with the Commission takes place on the basis of equality, respect and solidarity.'²³⁴ The member countries also recognise that their standards might be different but work on a system of mutual respect and where a case concerns more than one country, the countries seek to agree on the best positioned member to investigate the matter. This structure of the EU competition law ensures that 'an entity which has suffered injury due to a violation of the EC Competition Law is able to bring its case to the relevant member country's court and recover actual damages according to the member country's national remedies for antitrust violations.'²³⁵ This means that within the EU community, anti-dumping does not apply but rather competition law is applied in instances where there are cross boarder competition issues amongst member countries. The supporters of an international competition network in essence recommend a system that is similar to the ECN, which would facilitate information sharing, discussion and cooperation.

²³³ The European Competition Network available from http://ec.europa.eu/competition/ecn/more_details.html accessed on 24 September 2015

²³⁴ Joint statement of the council and the commission on the functioning of the network of competition authorities available from http://ec.europa.eu/competition/ecn/joint_statement_en.pdf accessed on 24 September 2015 para 7

²³⁵ Jones and Matsushita Competition policy in the global trading system International Competition series vol. 5 2002 p104-105

An alternative to the EU form of cooperation is the use of plurilateral²³⁶ agreements. Advocates for free trade have long argued that the growth of free trade areas reduces the need for anti-dumping and other trade related regulations. This development can be seen in the proliferation of free trade agreements which incorporate customs as well as competition bodies to regulate competition within the free trade arrangement. Though this arrangement offers better prospects, it is still not one that the supporters of the WTO would want as it encourages agreements outside the WTO hence diminishing the significance of the WTO's unilateral agreement.²³⁷

5.3. Adding competition principles to anti-dumping agreements

Competition principles are integral to anti-dumping agreements. Supporters of anti-dumping as an instrument have long argued that anti-dumping is essential to protect domestic industries from unfair competition from foreign firms. Therefore it seems in order that anti-dumping agreements encompass more competition principles. This can be achieved by tightening the requirements for anti-dumping investigations as well as cooperation between the trade and competition authorities. 'The enforcement of competition law in trade cases is "of particular importance since it limits the risk that domestic producers may use the threat of initiating action under domestic trade law or otherwise lobbying protection in order to induce foreign exporters to enter into unlawful restrictive agreements."²³⁸ Changes that would enhance the competitive aspects of anti-dumping investigations include the addition of a market test.

²³⁶ Plurilateral arrangements are agreements between two or more countries. In the context of the WTO a plurilateral agreement is between some member countries not all. The WTO operates as a multilateral agreement that is all member countries agree to the one contract.

²³⁷ Jagdish Bhagwati has written extensively on the negative impact of plurilateral arrangements on the WTO. He argues that the more discussions happen outside the WTO the less relevance the WTO will have which contradicts the very mandate of the WTO. Jagdish also argues that plurilateral agreements can have the effect of exploiting weaker members who would otherwise be protected by the rules of the WTO.

²³⁸ Andamantopoulos and De Notaris 'The Future of the WTO and the reform of the anti-dumping agreement: A legal perspective' 24 Fordham Int'l. J.30 2000-2001 p34

Dominance

Dominance is fundamental in the regulation of price discrimination and predation in competition law. Importance is placed in proving that the firm that is practicing the price discrimination has sufficient market power to materially injure the industry in question. Within South African competition law this is done by looking at the market share of the firm accused of abusing its dominant position.

Victor²³⁹ recommends that the same requirement should be included in anti-dumping regulation. Anti-dumping has been used as a way to protect competitors especially in concentrated markets. This has the effect of encouraging collusion amongst the industry participants to force the foreign importers to either withdraw or increase their prices. Imposing a test of dominance would ensure that the anti-dumping investigation would only proceed when it is against a firm that is at least dominant in its home market and is of a size to hamper the domestic industry.

In order to achieve this, the trade bodies would need to work closely with the competition authorities to investigate the complaining industry as well as to coordinate with the foreign competition body to ensure that the firm in question is neither dominant nor part of a cartel. Victor et al recommend that in conjunction with 'advocating an antitrust analysis in anti-dumping cases, the antitrust division has suggested that a higher level of market penetration (should) be required in cases involving concentrated domestic industries'.²⁴⁰ This idea is shared by others including Zanardi who see the lack of market threshold as a hindrance and argue that 'the costs of coordination are clearly related to the number of producers in the market'.²⁴¹ In essence the fewer the number of firms in the industry the lower the costs of coordination become, making it easier and more profitable for collusion to happen.

²³⁹ Victor op cit (n200) 683

²⁴⁰ Victor op cit (n200) 690

²⁴¹ Zanardi op cit (n20) 103

The inclusion of the market concentration test would therefore prevent firms in a concentrated home industry from abusing their position by instigating anti-dumping investigations when the problem lies in an inefficient domestic industry.

Product scope

According to the anti-dumping agreement, 'the term "like product" is a product that is identical (... alike in all respects to the product under consideration).'²⁴² This is deemed to be imprecise and open for misinterpretation by trade law practitioners. The conflict between the chicken importers from the United States and the South African poultry industry reflects how an imprecise classification of products as 'like' can lead to an 'unfair' treatment of a foreign firm²⁴³. In contrast in the predation case between Zenith and the Japanese television exporters, the court decided that due to the differences in technical requirements for televisions sold in Japan and televisions sold in the United States the two products could not be treated as 'like' products or directly competitive products.²⁴⁴ This challenge removes the assurance that business requires to effectively operate. The concept of 'likeness' therefore becomes a reflection of the regulators views on the necessity of protecting the domestic industries.

WTO case law has established an assessment for 'likeness' to ensure uniformity in the application of the law. The assessment:

'comprise four categories of 'characteristics' that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as

²⁴² Andamantopoulos and De Notaris op cit (n239) 36

²⁴³ The South African poultry case against the U.S. importers hinged on whether chicken breast was the same as the thighs and other parts (dark meat) of a chicken, in this instance ITAC decided that all chicken pieces were the same.

²⁴⁴ See B. Keller Zenith Radio Corp. v. Matsushita Electrical Industrial Co.: Interpreting the Antidumping Act of 1916 6 Hastings Int'l & Comp. L. Rev. 133 1982-1983 for a full discussion on the role of the test for 'likeness' in the predation case.

*alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.'*²⁴⁵

Adamantopoulos adds that the assessment utilised for the 'likeness' test 'should be precise enough not to leave wide margins of discretion to the administering authorities'.²⁴⁶

Material Injury

'The anti-dumping law injury requirement embodies a relatively low threshold'²⁴⁷ and in order to add credibility to anti-dumping regulation it is essential to reconsider the way the notion of 'injury' is treated in anti-dumping investigations. The recommendations to give greater consideration to the injury test include allowing greater participation by interest groups to allow for a more inclusive analysis of the impact of the 'dumping' action. However this in itself does not resolve the conflict in the lenient manner that injury is addressed in dumping investigations. The ad hoc subcommittee makes a recommendation that 'it would be sound policy to apply the effect - on- competition approach of the antitrust laws before finding an "injury" in a dumping case'.²⁴⁸ This would strengthen the competitive approach in the anti-dumping investigation through the increased emphasis on the effect on competition. This would also prevent industries that are inherently inefficient from seeking protection using the anti-dumping instrument. An industry would have to demonstrate that the pricing action of the foreign firm is having the effect of hampering competition due to the pricing being 'unfair' (that is pricing below average cost) rather than aggressive competition from a foreign firm.

²⁴⁵ WTO ANALYTICAL INDEX: GATT 1994: General Agreement on Tariffs and Trade 1994 available from https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_03_e.htm, accessed on 2 August 2015

²⁴⁶ Adamantopoulos and De Notaris op cit (n239) 39

²⁴⁷ P. Ehrenhaft 'Is interface of antidumping and antitrust law possible?' 34 Geo. Wash. Int'L. Rev. 363 p14

²⁴⁸ Victor op cit (n200) 694

6. Conclusion

The need to protect domestic markets led to the creation of the anti-dumping remedies within the WTO. With increased market openness through the reduction of tariffs as well as the removal of non-tariff barriers, domestic markets faced increased foreign competition. Left with little in the way of protection against possible 'unfair' competition, countries like the United States argued for anti-dumping legislation. They argued that in order to protect their markets against 'unfair' competition from foreign firms, it was necessary to have anti-dumping remedies as a stop gap measure. Anti-dumping was therefore initiated fundamentally as a form of domestic protection against foreign competition. However, as a negotiated remedy, the language used in anti-dumping regulation does little to address the issue that it was meant to protect as it was necessary to have consensus amongst all the member countries before it could be ratified.

'[W]ith the ingrained international recognition of dumping as an 'unfair' trade practice in the WTO, the political will to eliminate the remedy does not exist among major antidumping law users, such as the United States and European Union.'²⁴⁹ This lack of political will indicate that anti-dumping regardless of its flaws is going to continue to exist as a WTO remedy to 'unfair' competition from foreign firms. However nations do have the opportunity of amending their country anti-dumping laws to enhance their competitiveness.

The question of whether anti-dumping regulation succeeds in preventing 'unfair' competition is central to the discussion on the value and necessity of anti-dumping regulation. The economic fundamentals around anti-dumping are doubtful as it is difficult to see how a foreign competitor would be able to 'materially injure' domestic competition utilising price discrimination or predation. In most legislations including

²⁴⁹ Ehrenhaft op cit (248) 1

South Africa, price discrimination and predation are considered as abuse of dominance infringements. This stems from an understanding that only a firm of a particular size would be able to adversely impede competition through price discrimination and similar activities. The competition act therefore prohibits dominant firms from 'selling goods or services below their marginal or average variable cost', however there is an understanding that not all selling below costs is detrimental to the industry or is intended to harm competitors. It is with this in mind that the competition Act makes provision for a defence of reason against a price discrimination and predation charge.

It is also recognised that 'a monopoly is a canker that eats into a free enterprise economy ... legislature showed (s) an awareness that power may be abused.'²⁵⁰ As a result, another key aspect to the protection of competition is the prevention of concentrated industries such as oligopolies from coming together in a way that hampers competition. The regulation of the cooperation and coordination amongst firms is defined in cartel regulation. There is an understanding that when firms come together, it can have the effect of obstructing competition which has the effect of reducing consumer welfare. A high priority for the European Commission is fighting cartels, 'this is because of the serious harm cartels cause to consumers and businesses. And the huge damage cartels inflict on the economy as a whole in terms of removing incentives to compete on prices or to innovate.'²⁵¹ Due to the threat to competition that cartels pose, the South African competition law considers this type of behaviour as per se illegal.

The question of jurisdiction is central to the legislation of export cartels, and the South African legislation showed an ability to deal with this type of cartel in *American Natural Soda Ash Corp v Botswana Ash (Pty) Ltd*²⁵². The legislators reiterated that the

²⁵⁰ Lewis (n142) 60

²⁵¹ Statement by EU Commissioner for Competition Margrethe Vestager, available from http://europa.eu/rapid/press-release_STATEMENT-15-5260_en.htm, accessed on 8 August 2015

²⁵² *American Natural Soda Ash Corp and Another v Botswana Ash (Pty) Ltd and Others* (64CAC/AUG/06) [2007] ZACAC 1 (5 January 2007)

Competition Act 'applies to all economic activity within or having an effect within, the Republic,'²⁵³ which infers that the Competition Act is equipped to deal with any anti-competitive act that has an effect on the South African market. South Africa is not the only country that has found it necessary to include similar provision in its legislation. The United States enacted the Foreign Trade Antitrust Improvements Act of 1982 (FTIA),²⁵⁴ which gives the United States jurisdiction to hear cases where a foreign act has an impact on the United States. In *Minn-Chem, Inc. v Agrium Inc.*²⁵⁵, the court of appeals noted that '[f]oreigners who want to earn money from the sale of goods and services in American markets should expect to have to comply with U.S law.'²⁵⁶ The ability to adjudicate on cases where foreign firms are involved means that countries have the ability to safeguard domestic industries without resorting to anti-dumping regulation. However where firms do not have local representation, imposing penalties offers limited relief to the injured firms.

The requirements to initiate a dumping investigation are undemanding on the local industry, requiring that an application 'be made by or on behalf of the domestic industry'.²⁵⁷ The low threshold of 25 per cent support from the total domestic production of the like product makes the legislation vulnerable to abuse particularly from concentrated industries where a few firms can make up more than 50 per cent of the total output. This has been recognised as fostering collusion in the domestic market as well as being used as a negotiating tactic by domestic firms to force foreign firms to work with them. This analysis has been researched on extensively by Zanardi as reflected in his article on 'Antidumping law as a collusive device';²⁵⁸ who argues that

²⁵³ Competition Act of 1998 subsection 3(1)

²⁵⁴ Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C ss6a

²⁵⁵ *Minn-Chem, Inc. v Agrium Inc.*, 683 F. 3d 845 - Court of Appeals, 7th Circuit 2012

²⁵⁶ *Minn-Chem, Inc. v Agrium Inc.* op cit (n258) 7

²⁵⁷ Agreement on implementation of article VI of the general agreement on tariffs and trade 1994 subsection 5(4)

²⁵⁸ Zanardi op cit (n20)

the collusive elements in anti-dumping law are more pronounced when the industry in focus is a concentrated industry with a few firms with market power. The possibility of collusion in anti-dumping law emphasises the need for greater regulation in the implementation of anti-dumping law.

The concept of 'material injury' is central to anti-dumping investigation, with an emphasis on ensuring that only instances where the injury is of a material nature will attract dumping margins. The anti-dumping act defines a margin of *de minimis* (negligible) as one where the margin of dumping is 'less than 2 per cent, expressed as a percentage of the export price'²⁵⁹, however this safeguard would only assist in strengthening the investigations if the anti-dumping law defined more firmly terms including 'normal value'. In the absence of this safety measure, the anti-dumping investigation would hardly find that the margin of dumping was negligible, at the same time, the 'chilling effect' of anti-dumping occurs from the moment of a dumping investigation notification.

The limitations in the anti-dumping law have led to various recommendations on how to strengthen the trade remedy, with the most drastic recommendation being to remove it. However the political nature of anti-dumping has meant that the removal of anti-dumping legislation is not going to be on the agenda any time soon. This opens up the debate to other alternatives and the most acceptable by the WTO members is an amendment to the current anti-dumping legislation by including competition principles into the legislation.

Firstly with recognition of the interface between price discrimination and anti-dumping, through the inclusion of price discrimination principles into anti-dumping regulation which would strengthen the regulation by ensuring that there is less room to

²⁵⁹ Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 subsection 5(8)

manipulate the system. The competition principles that can be incorporated include a market size test of the domestic industries before an investigation can be initiated; redefining the term 'normal value' to ensure that only instances of pricing below average marginal cost are regulated; and ensuring that the term 'like product' is redefined narrowly to ensure that the product scope in investigations is restricted to products that are being dumped.

The necessity of including these changes is reflected in the request for consultations with South Africa by Brazil²⁶⁰ over the imposition of anti-dumping duties. In the request, Brazil noted that South Africa 'incorrectly considered, inter alia: (i) the volume and price of products outside the scope of the product under investigation; (ii) import data provided by petitioner, which grossly overstated official import statistics for the products; (iii) the existence of a negative effect of dumped imports on domestic prices, when the data indicated otherwise;...' ²⁶¹ which is in contravention to subsection 3(1) and 3(2) of the anti-dumping agreement. Brazil also indicated that in the injury determination, South Africa failed to 'consider other known factors causing injury to the domestic industry...' ²⁶² in contravention of subsection 3(5) of the anti-dumping agreement. This challenge from Brazil demonstrates the necessity of correctly applying the technical aspects of anti-dumping investigations but also the ease with which the anti-dumping instrument can be manipulated to satisfy interest groups.

Competition principles would address the challenges found in the application of anti-dumping regulation however this can only be achieved with increased coordination and cooperation between the trade and competition authorities. This will ensure that competition is protected and consumer welfare is enhanced through freer trade.

²⁶⁰ South Africa – anti-dumping duties on frozen meat of fowls from Brazil – Request for consultations by Brazil (2012) WT/DS439/1/G/L/990/G/ADP/D92/1

²⁶¹ South Africa – anti-dumping duties on frozen meat of fowls from Brazil op cit (n261) 2

²⁶² South Africa – anti-dumping duties on frozen meat of fowls from Brazil op cit (n261) 2

7. Glossary of terms

AAC	Average Avoidable Cost
ADA	Anti-dumping Agreement (WTO)
AMIE	Association of Meat Importers and Exporters (SA)
AP	Appellate Body (WTO)
ATC	Average Total Cost
AVC	Average Variable Cost
BTT	Board on Tariffs and Trade (SA)
COMPACT	committee to preserve American Color Television
DAFF	Department of Agriculture Forestry and Fisheries (SA)
DSB	Dispute Settlement Body (WTO)
DTI	The Department of Trade and Industry (SA)
ECN	European Competition Network
EU	European Union
FTC	Federal Trade Commission (USA)
FTIA	Foreign Trade Antitrust Improvements Act (USA)
GATT 1947	General Agreement on Tariffs and Trade 1947 (WTO)
GOES 2013	Grain Oriented Flat-rolled Electrical Steel
ICN	International Competition Network
IQF	Individually Quick Frozen
ITAA	International Trade and Administration Act of 2002 (SA)
ITAC	International Trade Administration Commission of South Africa
ITC	International Trade Commission (USA)
JFTC	Japan Fair Trade Commission
JMEA	Japan Machinery Exporters Association
MFN	Most Favoured Nation (WTO)
MITI	Ministry of International trade and Industry (Japan)

MOFCOM	Ministry of Commerce of the People's Republic of China
NCA	National Competition Authority (EU)
NUE	National Union Electric Company
OECD	Organisation for Economic Co-operation Development
SA	South Africa
SACU	Southern African Customs Union
SAPA	South African Poultry Association
SCAW	SCAW South Africa
SLN	substantially lessening competition
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UNCTAD	United Nations Centre for Trade and Development
VAT	Value Added Tax
WTO	World Trade Organisation

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International

Agreement establishing the WTO ('Marrakesh Agreement').

Agreement on the implementation of article VI of the general agreement on tariffs and trade (GATT) 1994 (the Anti-dumping agreement).

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