ANTI-DUMPING IN AN ERA OF RENEWED NATIONAL TRADE POLICY: NIGERIA AS A CASE STUDY

by

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Dedication

Most Importantly, I dedicate this thesis to Allah the Almighty for taking me this far!

To my darling husband, Olanrewaju Folami, then family, friends, loved ones and organisations that supported my academic journey.

TABLE OF CONTENT

ABSTRACT

The recent rising tension within the multilateral community, including concerns over the effectiveness of the World Trade Organization (WTO) and the increasing importance of Global South countries have brought about a rising politicization of national industrial policies geared towards trade protectionism, nationalism and unilateral restrictive measures. As a result, there has been a rapid resort to unfair trade policies and practices that continue to deprive the Member States of a level playing ground, while international trade cooperation crumbles. Many Global South industries, such as the Nigerian industries, have mostly been impacted by the lack of a fair playing ground within the multilateral trading system, compared to the Global North countries. In particular, the trade-distorted practices have made it almost impossible for the less-opportune and vulnerable Global South countries, such as Nigeria to overcome its premature de-industrialization (facilitated by premature exposure to the trade liberalization scheme), as well as attain the balance trade payment envisaged in her trade alliances. It has also widened the power imbalance between developed and developing countries, as well as the structural inequalities that exist within the WTO system. Therefore, it remains doubtful of how successful the WTO system has been in reducing the unfair trade policies and practices among the WTO Members. Also, it is doubtful the extent to which Nigeria's industrial policies and trade defense structure have been effective in addressing its incapacitated industrial state in light of shortcomings such as lack of functional trade defense structure, skewed trade relations, debt crisis, corruption, inadequate infrastructure, poor policy choice, lack of political will, porous border, unskilled customs officials, inefficient institutions, lack of stakeholders' engagement, political and economic imperialism, and systematic global economic inequality amongst others, compared to other selected Global South countries and Western nations.

Against this background, this thesis aims to examine the role and effectiveness of the WTO system in reducing the unfair trade policies and practices among the WTO Members. It also examines the efficacy of the Nigerian industrial policies and Anti-dumping structure in a world that continually changes. In so doing, I adopt the TWAIL lens as a theoretical tool to evaluate the strengths and weaknesses of the WTO Anti-dumping system. I also use the TWAIL lens to analyse the current crisis impeding the effectiveness of the WTO system within the context of the Anti-dumping regime in a changing world, and its impact on developing countries to chart a new course for ensuring the efficiency of the WTO framework. Moreover, I use the TWAIL approach to unpack the inadequacy of the Nigerian trade defense and its inconsistencies with multilateral and regional commitments, within the context of the country's Anti-dumping system, from a historical and contemporary perspective. To this end, to ensure Nigeria attains a level playing field for her local industries, this thesis also explores the Anti-dumping practices of selected Global South countries such as Brazil, India and South Africa that have successfully utilized the measure to mitigate the declines in their manufacturing output, as well as that of the Canadian Anti-dumping regime (as a Global North country and traditional trade remedy user) to shed light on the divergences in the application of the measures in the Global South-Global North nations. I analysed these selected countries' trade defense infrastructure to demonstrate their relevance or otherwise as a road map for Nigeria to draw on suitable lessons concerning how to reform Nigeria's trade defense system and infrastructure to be efficient and usable.

LIST OF ABBREVIATIONS USED

AD – Anti-dumping

ADA – Anti-Dumping Agreement

ADR – Anti-dumping Regulation

AfCFTA – African Continental Free Trade Area

ANNAMCO – Anambra Motor Manufacturing Company

AU – African Union

BTI – Board on Trade and Industries

BTT – Board on Tariffs and Trade

CAMEX – Chamber of Foreign Trade

CBSA – Canada Border Services Agency

CDA – Custom Duties (Dumped and Subsidized Goods) Act

CITT – Canadian International Trade Tribunal

CITTR – Canadian International Trade Tribunal Regulations

CEGAT – Customs, Excise & Gold (Control) Appellate Tribunal

CEMA – Customs and Excise Management Act

DBS – Dispute Settlement Body

DDI – Directorate of Dumping Investigation

DECOM – Department of Trade Defense

DG – Director General

DGAD – Directorate General of Anti-dumping and allied Duties

DGTR – Directorate General of Trade Remedies

ECOWAS – Economic Community of West Africa State

ELTS – ECOWAS Trade Liberalization Scheme

EPA –Economic Partnership Agreement

EU – European Union

GATT – General Agreement on Tariffs and Trade

GDP – Gross Domestic Product

GECEX – Commercial Strategy Council of Ministers

GTDC – Trade Technical Group

GTIP – Public Interest Analysis Technical Group

IMF – International Monetary Funds

ITA – International Trade Administration

ITAC - International trade Administration Commission

ITO – International Trade Organization
IVM – Innoson Vehicle Manufacturing Company
MFN – Most Favoured Nation
MICT – Ministry of Industry, Trade and Tourism
NAFDAC – National Agency for Food Drug Administration and Control
NEEDS – National Economic Empowerment Development Strategy
NGO – Non-governmental Organisation
NIALS – Nigerian Institute of Advanced Legal Studies
NIS – Nigeria Industry Standards
NSC – Nigeria Customs Service
NT – National Treatment Obligation
NOTN – Nigerian Office for Trade Negotiations
OAU – Organisation of African Unity
PAIA – Promotion of Access to Information Act
PAJA – Promotion of Administrative Justice Act
PAN – Peugeot Automobile Nigeria Limited
SACU – Southern African Customs Union
SAP – Structural Adjustment Programme
SARS – South African Revenue Services
SDCOM – Undersecretariat of Trade Defense and Public Interest
SDT – Special Differential Treatment
SECEX – Secretariat of Foreign Trade
SECINT – Special Secretary for Foreign Trade and International Affairs
SIMA – Special Import Measures Act
SIMR – Special Import Measures Regulations
SON – Standard Organisation of Nigeria
SPA – Seven Point Agenda
TRALAC – Trade Law Centre
TWAIL – Third World Approaches to International Law
UR – Uruguay Round
USMCA – United States-Mexico-Canada Agreement
VWON – Volkswagen of Nigeria Limited
WTO – World Trade Organisation

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CHAPTER 1

INTRODUCTION

1.1 Introduction

This thesis analyses the Anti-dumping practices of the Global South in an era of renewed national trade policy, using Nigeria as a case study.[1] Anti-dumping measures in the Global South community came to fore soon after the entry into force of the World Trade Organization ("WTO") legal regime,[2] the multilateral trade system that oversees the Article VI of the General Agreement on Tariffs and Trade 1994 (Article VI of GATT 1994)[3] and the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (otherwise called Anti-Dumping Agreement),[4] respectively. These multilateral rules were part of the prices paid under the rule-based multilateral trading system to sustain the continued existence of an open trading system and ensure political support for international trade.[5] Also, they were necessary trade measures needed to counter unfair trading practices that might emanate from the trade liberalization scheme of the multilateral trading regime.[6] Thus, Anti-dumping

[1] The world economic is broadly divided into two, which are the Global South and the Global North. This divide is broadly considered a socio-economic and political divide. In this paper, Global South (also called as 'Third World' 'Developing' and 'Periphery') – in spite of the differences in sizes, industrialization and economic reality – would be broadly ascribed to economically repressed and less industrialised countries with deep histories of colonialism or imperialism or marginalisation in the international community. These countries can be found in Africa, part of Asia and Latin America. Even though some of these state (such as China, Brazil, South Africa, India etc) are now relatively large capital exporters, majority of their populations continues to be subjected to deplorable experience that are still comparable to any other Third World States. While the Global North (also called 'West', 'Developed' and 'Core' countries) represent the fully industrialised and economically endowed countries such as the Western European countries, North America, Australia, New Zealand, Japan amongst others. For the analysis of the economic world divide, see Lemuel Ekedegwa Odeh, "A Comparative Analysis of Global North and Global South Economies", (2010) 12:3 J Sustainable Dev Afr 1520-5509, online: <https://jsd-africa.com/Jsda/V12No3_Summer2010_A/PDF/A%20Comparative%20Analysis%20of%20Global%20North%20and%20Global%20South%20Economies%20(Odeh).pdf> (accessed 1 January 2024)

[2] The World Trade Organization (WTO) is established by the Marrakesh Agreement establishing the World Trade Organization, 15 April 1994, 1867, UNTS 154 33 ILM 1144, 1994, which was signed in April 1994 but came into force on 1 January 1995.

[3] General Agreement on Trade and Tariff 1994, 15 April, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994) (herein referred to as "GATT 1994")

[4] Agreement on the Implementation of Article VI of GATT 1994, 1868 UNTS 201 (known as Anti-Dumping Agreement) (herein referred to as 'ADA')

[5] The absence of the Anti-dumping measures in the early phase of globalization of trade in the 19th century informed the erosion of industrial competitiveness of third world state and that of Great Britain. It eventually informed the resort to trade restrictiveness in the late 20th century. See Thomas Howell & Dewey Ballantine, "Dumping: Still a Problem in International Trade", in National Research Council , Board on Science, Technology and Economic Policy & Charles Wessner, eds, *International Friction and Cooperation in High-Technology Development and Trade: Papers and Proceedings* (Washington, DC: The National Academic Press, 1997), online: <https://doi.org/10.17226/5902> (accessed 10 January 2024)

[6] Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 5th ed (Cambridge, UK: Cambridge University Press, 2022) Chapter 11; Kanika Gupta & Vinita

measures are safety-valve measures for neutralizing some adverse effects of an open-trade system.

The trade liberalization scheme of the rule-based multilateral trading regime trading system can be traced back to the trade practices of the West lead by Britain and United States (US) free-trade leadership between the late 18th to 20th century. During this period, many of the Global South nations lacked the political and economic sovereignty as they were either under the colonial enterprise of European States or gunboat diplomacy of Americans.[7] With the Western intervention in their affairs, the Global South States were compelled to adopt free trade policies which provided the moral and legal basis for the economic exploitation of the Global South countries, as well as the influx of industrialised products from Western capitalist into their markets during this period.[8] In turn, the competitiveness of the budding hand-craft products of the Global South nations were eroded, which strengthened the foundation for economic inequality between the Global South and Global North in today's world.[9] The connection between trade and civilizing mission were a crucial aspect of the Western imperialism which has condemned most countries in the developing world to perpetual poverty and primary production economy till date.[10] Moreso, the American and European States's free trade practices of this century produced and shaped the framework of the postwar international

Choudhury, "Anti-Dumping & Developing Countries" (2011) 10 Kor U L Rev 117-134; Jean-Daniel Tey, "Antidumping Regional Regimes and the Multilateral Trading System: Do Regional Antidumping Regimes Make A Difference?", (2012) World Trade Organization Economic Research and Statistics Division, Working Paper ERSD-2012-22, 8, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2174355> (accessed 10 January 2024); Ihsan Eken, "Anti-Dumping Regulation of the World Market at the Present Stage", (2020) 21:1 J Management Polc'y 92, 94, online: <http://digitalcommons.www.na-businesspress.com/JMPP/JMPP21-1/5_Ekken_21_1_.pdf> (accessed 10 January 2024).

[7] See generally Antony Anghie, "Francisco de Victoria and the Colonial Origins of international Law", (1996) 5 Soc & Legal Stud 321 [Anghie, "Colonial origin of International Law"]; Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission*, (Oxford: Hart, 2010) Chapter 1; M Sornarajah, *The International Law on Foreign Investments*, 2nd edn, (Cambridge: Cambridge University Press, 2004).

[8] Peter Lindert & Jefferey Williamson, "Does Globalization Make the World More Unequal" in Michael Bordo et al, eds, *Globalization in Historical Perspective*, (Chicago: University of Chicago Press, 2003) 227, 233-236, online: <www.nber.org/chapters/c9590> (accessed 10 January 2024); Douglas Irwin & Kevin O'Rourke, "Coping with Shocks and Shifts: The Multilateral Trading System in Historical Perspective", (2011) National Bureau of Economic Research, Working Paper 17598, 10-18, online: <www.nber.org/system/files/working_papers/w17598/w17598.pdf. (accessed 10 January 2024).

[9] *Ibid*. See generally Alessandrini, *supra* note 7.

[10] Alessandrini, *supra* note 7 at Chapter 1. See also Irwin & O'Rouke, *supra* note 8; Chiedu Osakwe, "Developing Countries and GATT/WTO Rules: Dynamic Transformations in Trade Policy Behaviour and Performance", (2011) 20:2 Minnesota J Intl L 365; Gunnar Niels & Adrain ten Kate, "Antidumping Policy in Developing Countries: Safety Valve or Obstacle to Free Trade?", (20006) 22 Eur J Pol Economy 618-638 Neil & Kate, ""Antidumping Policy in Developing Countries: Safety Valve or Obstacle to Free Trade?"]

trading regime on trade liberalization and trade remedy contained in the General Agreement on Trade and Tariff (GATT) 1947 system.

The first multilateral rule on anti-dumping measures was adopted and contained in Article VI GATT 1947 system. However, prior to GATT 1947, few developed countries had introduced anti-dumping legislation in their jurisdiction[11] - although to be used as protective measure against market-distorted practices, it was used to create trade barriers.[12] The international trade rules of the GATT 1947 were primarily devised by the US and United Kingdom (UK) through postwar international negotiation of the 1940s to eliminate barriers to international trade, but ended up creating capital imperialism which discriminate against the interest of the developing countries. For instance, multilateral trade rule in the GATT system employed contradictory free-trade principles to justify liberalisation of industrial goods and raw materials, and the exemptions to these rules as they applied to developing nations.[13] Also, legitimacy was given to original Members to maintain a liberal trade policy and impose temporary protection on foreign imports to protect specific industries - in form of Anti-dumping measures. Moreover, the provisions on anti-dumping measures were inundated with ambiguities and implementation concerns.[14] Hence, developed States, in particular, UK and US heavily deployed these ambiguities as trade barriers to circumvent the trade liberalization objectives of the rule-based multilateral trading regime.[15] The inefficiencies of the GATT 1947 gave rise to several negotiations rounds on trade issues, whose outcome informed the establishment of the WTO in 1995.

During the successive rounds of trade liberalization, many of the Global South State gained political independence from their ex-colonial powers but were still vulnerable to economic imperatives and Western capitalists due to decades of economic exploitation and capitalist

[11] The traditional users of the Anti-dumping mechanism are Cannada, US, Europe and Australia. See Aradhna Aggarwal, "Macro Economic Determinants of Antidumping: A Comparative Analysis of Developed and Developing Countries", (2004) 32:6 World Dev 1043-1057, online: <https://10.1016/j.worlddev.2004.01.003> (accessed 10 January 2023) [Aggarwal, "A Comparative Analysis of Developed and Developing Countries"]; Niels & Kate, *supra* note 10, 618-638; Bruce Blonigen & Thomas Prusa, "Dumping and Antidumping Duties" (2015) National Bureau Economic Research Working Paper 21573 at 8, online: < https://www.nber.org/system/files/working_papers/w21573/w21573.pdf> (accessed 16 January 2024)

[12] Nassib Abou-Khalil, *Comparative Study on Canadian and EC Anti-dumping Legislation and the Compatibility of Anti-dumping Law with Free Trade Areas*, (LL.M Thesis: University of Ottawa, 2004) 1 [unpublished thesis].

[13] Alessandrini, *supra* note 7, 23-24.

[14] See J H Jackson & EA Velmulst, eds, *Antidumping Law and Practice*, (Michigan: The University of Michigan Press, 1989); and Tracy Murray & Donald Rousslang, "A Method for Estimating Injury Caused by Unfair Trade Practices", (1989) 9 Intl Rev L & Eco 149-164

[15] See generally Abou-Khalil, *supra* note 12.

imperialism embedded into international trade rules.[16] In pursuit of national development and industrialisation priorities, many of the Third World economies pursued distorted economic policies that negatively impacted their economies and informed the oil and debt crisis they experienced in the 1980s.[17] These crises made the Third World more vulnerable to Western intervention which made them susceptible to neo-liberal thinking, backed by the lending politics of the Bretton Woods Institutions (International Monetary Funds (IMF) and World Bank). As such, debt rescheduling of Global South States were made contingent upon adoption of neo-liberal policies.[18] This informed the barrage of domestic reform and liberalization behaviour that occurred in the developing world from mid-1980s.[19] The neo-liberal thinking was also incorporated into the WTO rules – developing economies embraced the WTO rules based on their unquestionable belief in the universal beneficial role of trade liberalisation. Nonetheless, the preparedness and readiness of the Global South nations in the adoption of the neo-liberal system, and the materialisation of its benefits has so far been disproportional.

The neo-liberal scheme exposed the premature domestic markets of the Global South to injurious dumping,[20] which emanated from capitalist and imperialism practices of the advanced nations.[21] Dumping Also, they were at the receiving end of the Anti-dumping measures by the

[16] See Maxwell Chibundu, "Africa's Economic Reconstruction: On Leapfrogging, Linkages, and the Law", (2003) 16:2 Third World Legal Stud 17

[17] See Alessandrini, *supra* note 7 at Chapter 3 (p 71-101); Jerome Sgard, *The Debt Crisis of the 1980s: Law and Political Economy,* (Edward Elgar, December 2023); Ruth Gordon & Jon Sylvester, "Deconstructing Development", (2004) Villanova University Charles Widger School of Law Working Paper Series at p 19-31, online: < https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1004&context=wps > (accessed 23 August 2024); Admos Chimhowu et al, "The 'New' National Development Planning and Global Development Goals: Processes and Partnerships", (2019) 120 World Dev 76, 77-79, online: < https://doi.org/10.1016/j.worlddev.2019.03.013> (accessed 23 August 2024).

[18] See generally Olu Ajakaiye & Afeikhena Jerome, "Economic Development: The experience of Sub-Saharan Africa" in Bruce Currie-Alder et al, eds, *International Development: Idea, Experience & Prospects* (Oxford, United Kingdom: OUP, 2014) Chapter 43; Mehdi Shafaeddin, "Trade Liberalization and Economic Reform in Developing Countries: Structural Change or De-Industrialization?" in in Alberto Paloni & Maurizio Zanardi, eds, *The IMF, World Bank and Policy Reform*, (New York: Routledge, 2006) 155-177; Jane Harrigan et al, "The Politics of IMF and World Bank Lending: Will it Backfire in the Middle East and North Africa" in Alberto Paloni & Maurizio Zanardi, eds, *The IMF, World Bank and Policy Reform*, (New York: Routledge, 2006); Osakwe, *supra* note 10;

[19] See generally Alessandrini, *supra* note 7; J E Stiglitz & A Charlton, *Fair Trade for All: How Trade Can Promote Development*, (Oxford: Oxford University Press, 2005).

[20] 'Dumping' occurs when foreign producers sell their products in an importing country at a lesser price than it is being traded in the domestic market of their countries. It is an unfair trade practice that may be injurious or non-injurious to the domestic producers of the importing country. It is injurious if foreign producer or supplier seeks to eliminate competition or undermine the industrial capacity of the local manufacturers in the importing country. But where the practice suggests otherwise, it is deemed non-injurious. See Article VI of the GATT 1994 and Article 2.1 of the Anti-dumping Agreement. More detail will be provided on injurious 'dumping' later in this Chapter.

[21] Chibundu, *supra* note 16, 28-29

industrialised economies.[22] Whilst Global South countries like Brazil, India and South Africa have been successful in deploying Anti-dumping measure to resuscitate the industrialization of their local industries against market-distorted practice. The economically and politically weak countries, such as Nigeria still face great obstacles in establishing and implementing Anti-dumping measures. [23] The country's ability to fully utilize the WTO rules on Anti-dumping in countering the distorting-trade practices of industrialized States is restricted by limited expertise, resources or infrastructure.[24] The discrimination of the Global South nations within the multilateral trading system continues to undermine the competitiveness of their exports. It has also increased the apparent structural imbalance that exist in the WTO system.

1.1.1 *Why Nigeria?*

Nigeria liberalised her economy under the structural adjustment programme (SAP) of 1986. The neo-liberal approach of the SAP led to the privatization of state economic institutions. It also opened up its premature economy to unhealthy competition from foreign capitalist in industrialised economies.[25] The exposure was in addition to the country's industrial capacity being already undermined through decades of economic exploitation by a colonial power, military unrest and civil war amongst others.[26] The SAP reform made the Nigerian market susceptible to influx of finished products from industrialised nations to the extent that her economy became import dependent on foreign suppliers.[27] As a result, Nigeria's indigenous industries were positioned as victims of dumped import. The country has since then been

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[22] Aggarwal, "A Comparative Analysis of Developed and Developing Countries", *supra* note 11.
[23] See Edwin Vermulst, "Adopting and Implementing Anti-Dumping Laws – Some Suggestions for Developing Countries", (1971) 31:2 J World Trade 5-23
[24] *Ibid*; Adaora Osondu-Oti, "China's Market Expansion and Impacts on Nigeria's Textile Industry", (2021) 2:1 J of Contemporary Intl Relations & Diplomacy 19; Odinaka Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two", *International Centre for Investigative Reporting* (22 March 2022), online: <www.icirnigeria.org/nigerias-giant-industries-are-silently-disappearing-part-two/> (accessed 5 January 2024) [Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two"]; Odinaka Anudu, "Nigeria's Giant Industries are Silently Disappearing", *International Centre for Investigative Reporting* (21 December 2021), online: <www.icirnigeria.org/nigerias-giant-industries-are-silently-disappearing/> (accessed 5 January 2024) [Anudu, "Nigeria's Giant Industries are Silently Disappearing"]
[25] Taiwo Ojoye, "Nigeria, Dumping Grounds for Fake Products", *PUNCH* (12 March 2017), online: < https://punchng.com/nigeria-dumping-ground-for-fake-imports/> (accessed 25 December 2023)
Olumide Victor Ekande, "The Dynamics of Forced Neoliberalism in Nigeria Since the 1980", (2014) 1:1 J Retracing Afr 1, 13, online: <https://encompass.eku.edu/cgi/viewcontent.cgi?article=1010&context=jora> (accessed 15 January 2024).
[26] *Ibid*.
[27] *Ibid*; WTO, *Trade Policy Review Body: Report By the Secretariat on Nigeria*, WTO Doc WT/TPR/S/356 (9 May 2017), online <www.wto.org/english/tratop_e/tpr_e/s356_e.pdf> (accessed 13 January 2024) (herein referred as WTO 2017 Report on Nigeria); Emeka C Iloh et al, "World Trade Organization's Trade Liberalization Policy on Agriculture and Food Security in West Africa" (2020); Jeremiah, "CBN's Efforts to Revive the Textile Industry" *Leadership* (2019), online: <https://leadership.ng/cbns-efforts-to-revive-the-textile-industry/> (accessed 10 January 2024).

bedeviled with increasing imported goods that continuously hamper the welfare of her indigenous industries, in particular, the automobile, textiles and steel industries.[28] These three local industries became a dumping site for advanced capitalist countries. The availability of low-cost and substandard imported goods thwarted the efforts of local producers which contributed to production shut-downs, and increased unemployment in the country.[29] The inability of the country to address the problem of dumped import has been ascribed to different factors such as political and economic imperialism, systematic global economic inequality, skewed trade relations, debt crisis, corruption, inadequate infrastructures, poor policy choices, lack of political will, porous borders, unskilled customs officials, inefficient institutions, and lack of stakeholders' engagement etc.[30] Therefore, Nigeria has experienced varying degrees of economic stagnation throughout the WTO history, as the benefits of multilateral trade liberalization fails to materialise as far as Nigeria is concerned. [31] In summary, the continuous menace of dumped imports has altered the political economy balance between Nigeria and her

[28] See National Bureau of Statistics, "Foreign Trade in Goods Statistics: Q3 2022" (2022) NBC, online: <https://nigerianstat.gov.ng/elibrary/read/1241262> (accessed 21 January 2024) [NBS 2022 Report on Foreign Trade]; Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two, *supra* note 22; Anudu, "Nigeria's Giant Industries are Silently Disappearing", *supra* note 22; Anumita Roychowdhury et al, "Clunkered Combating Dumping of Used Vehicles: A Roadmap for Africa and South Asia", (2018) Centre for Science and Environment, online: < https://www.researchgate.net/profile/Vivek-Chattopadhyaya/publication/327861813_CLUNKERED_COMBATING_DUMPING_OF_USED_VEHICLES_A_ROADMAP_FOR_AFRICA_AND_SOUTH_ASIA/links/5baa1983a6fdccd3cb70ef9b/CLUNKERED-COMBATING-DUMPING-OF-USED-VEHICLES-A-ROADMAP-FOR-AFRICA-AND-SOUTH-ASIA.pdf> (accessed 18 January 2024); Festival Godwin Boateng & Jacqueline Klopp, "Beyond Bans: A Political Economy of Used Vehicle Dependency in Africa", (2022) 15:1 J Transport and Land Use 651-670, online: < https://www.jtlu.org/index.php/jtlu/article/view/2202/1662> (accessed 18 January 2024); Goddy Uwa Osimen & Ezekiel Eiton Micah, "Nigeria-China Economic Relations: Matters Arising", (2022) 10:3 Global J Pol Sci & Admin 42, 49, online: <www.researchgate.net/profile/Goddy-Osimen/publication/363634201_Nigeria-China_Economic_Relations_Matters_Arising/links/632626ce70cc936cd3161647/Nigeria-China-Economic-Relations-Matters-Arising.pdf> (accessed 26 January 2024); News Agency of Nigeria, "Automobile Council Advocates Ban on Imported Used Cars Above 20 Years", *People Gazette* (20 December 2023), online: < https://gazettengr.com/automotive-council-advocates-ban-on-imported-used-cars-above-20-years/> (accessed 18 January 2024).

[29] Ekande, *supra* note 25 at 15; Comfort Oseghale, "Between Nigeria's $1.2bn Smuggled Textiles and China's $2bn Investment", *Ships & Ports* (7 January 2019), online: <https://shipsandports.com.ng/between-nigerias-1-2bn-smuggled-textiles-and-chinas-2bn-investment> (accessed 26 January 2024)

[30] Violet Aigbokhaevbo, "Antidumping and the Nigerian Regulatory Malaise", (2022) 1:2 Lead City University L J 378, 385-388, online: <www.researchgate.net/publication/360720181_Antidumping_and_the_Nigerian_Regulatory_Malaise > (accessed 23 august 2024); Ekande, *supra* note 25; WTO 2017 Report on Nigeria, *supra* note 27; Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two", *supra* note 24; Anudu, "Nigeria's Giant Industries are Silently Disappearing", *supra* note 24.

[31] Uchechukwu Innocent Duru et al, "Trade Liberalization and Economic Growth: An Assessment of Nigerian Experience", (2020) 8:3 Asian Dev Pol'y Rev 194, 196 online: < https://www.researchgate.net/publication/344339476_Trade_Liberalization_and_Economic_Growth_An_Assessment_of_Nigerian_Experience> (accessed 18 January 2024); Alessandrini, *supra* note 7, 2.

trading partners. It has also incapacitated Nigeria's industrial ability to participate on the world economic scene.

Against this backdrop, Nigeria is a practical and opportune case study for this research as it lacks the requisite regulations and implementation infrastructures on Anti-dumping measures that are consistent with its obligations and commitments under the multilateral and regional trading system. As a WTO Developing Member, Nigeria's trade policy for the past six decades has been laced with protectionism and features increasing restrictive measures geared toward protection of infant industries contrary to the recognised trade defense measure under the multilateral trading rule.[32] The restrictive policies are usually pursued in disregard of the multilateralism principle of the international trade system. Notwithstanding, the protectionism approach has been rendered impotent by large-scale smuggling activities and has generated uncertainties in her trading environment.[33] Despite the economy degradation, Nigeria has neither initiated nor conducted any investigatory process on the various dumping allegation raised by stakeholders in Nigeria.[34] Also, Nigeria's trade remedy legislation, in particular, the *Custom Duties (Dumped and Subsidized Goods) Act, 1958* ('CDA')[35] is obsolete and has been deemed inadequate and inconsistent with the multilateral rules on Anti-dumping. [36] Thus, Nigeria lacks the required Anti-dumping regulations needed to regulate unfair trade practices in the country. Accordingly, Nigeria as a case study provides great insight into the implementation of Anti-dumping measures in an era of renewed national trade policy.

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[32] Olu Fasan, "Nigeria's Import Restrictions: A Bad Policy that Harms Trade Relation", *LSE Blog* (27 August 2015), online: <https://blogs.lse.ac.uk/africaatlse/2015/08/17/nigerias-import-restrictions-a-bad-policy-that-harms-trade-relations/> (accessed 13 January 2024) [Fasan, "Nigeria's Import Restrictions: A Bad Policy that Harms Trade Relation"]: Folarin Alayande, "Understanding Shifts in Nigeria's Trade Policy: From Realism to Protectionism", (2020) 1 Afr Dev L 149-162, online: <www.jstor.org/stable/10.2307/26936568> (accessed 21 January 2024);

[33] See World Trade Organization (WTO), "Case Study 32: Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *WTO Centre* (8 July 2020), online: < https://wtocenter.vn/chuyen-de/15799-case-study-32-import-prohibition-as-a-trade-policy-instrument-the-nigerian-experience> (accessed 8 July 2024) [WTO Centre Case Study 32]; G Castillo, "TEP Study on Trade Policy Reforms in Sub-Saharan Africa: The Case of Nigeria", (Washington, DC: World Bank, 1993); Peterson Ozili, "Source of Economic Policy Uncertainty in Nigeria: Implications for Africa", (2022) 108 Contemporary Stud Eco & Financial Analysis 37-50.

[34] WTO 2017 Report on Nigeria, *supra* note 25.

[35] Cap C48 Laws of the Federation of Nigeria, 2004.

[36] See WTO 2017 Report on Nigeria, *supra* note 27, where the country acknowledges in its notification to the WTO Committees on Anti-Dumping Practices; and subsidies and Countervailing Measures, on the country's inability to take any anti-dumping measures till date. See also, Anugbum Onuoha, "Appraising the Current Frame Work for Regulating Dumping into Nigeria: Need for Legislative Reforms and Intervention", (2020) 8:5 Glo J Pol & L Research 64, 66, online: < https://www.eajournals.org/wp-content/uploads/Appraising-the-Current-Legal-Framework-for-Regulating-Dumping-into-Nigeria.pdf> (accessed 21 January 2024).

In contrast, other Global South Countries like Brazil, India and South Africa have initiated Anti-dumping actions on variety of products to bolster their industrialization.[37] These countries have established Anti-dumping regimes and their experience reveals that a WTO-compliant Anti-dumping policy can be used to revive a de-industrialized local sector.[38] Their Anti-dumping model reflects the perfect examples of how countries can use Anti-dumping measures to offset the advantage realised through market-distorted practice by exporting producers.[39] Consequently, the application of Anti-dumping measure has helped contribute to their liberalization process and emergent as emerging industrialised economies.[40] Furthermore, the Canadian state, as an industrialised economy, has utilized the trade remedies on several occasion to preserve its manufacturing sector.[41] Thus, the Canadian Anti-dumping experience – as one of the traditional user of the measures[42] - would help shed light on the divergences in the application of the Anti-dumping measures between Global South and Global North. As such, lessons can be drawn from these countries to provide a rich insight on developing rule-making and implementation on Anti-dumping mechanism for Nigeria. It will also provide clarification on how state actors and non-state actors can collaborate to ensure foreign producers compete on a level playing field with Nigeria's local manufacturers.

The following sections present the background to the thesis. Section 1.2 begins with the context of study, which set out the importance of multilateralism-compliant Anti-dumping regime in the current economic clime an era of shifting policy. Section 1.3 sets out the research questions.

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[37] These three Global South Countries are active Anti-dumping user and initiated Anti-dumping action from January 1, 1995 to 2022 on variety of imported products thus – (i) India has initiated a total of 1146; (ii) Brazil has initiated a total of 442; (iii) while South Africa has initiated a total of 254, respectively. These measures have slightly helped increased their economic income. See WTO, "Anti-dumping Initiations by Reporting Member 01/01/1995 – 30/06/2023", (2023) TRATOP, online: < https://www.wto.org/english/tratop_e/adp_e/ad_initiationsbyrepmem.pdf> (accessed 21 January 2024); "Anti-dumping Investigations are Strongly Initiated by Many Countries", *Vietnam National Trade Repository* (23 October 2023), online: < https://vntr.moit.gov.vn/news/anti-dumping-investigations-are-strongly-initiated-by-many-countries> (accessed 21 January 2024); WTO, "Report on G20 Trade Measures: Mid-May to Mid-October 2023", TRDev 18 December 2023 30-31, online: <www.wto.org/english/news_e/news23_e/trdev_18dec23_wto_report_e.pdf> (accessed 21 January 2024); Ardhna Aggarwal, "Trade Effects of Anti-dumping in India: Who Benefits?", (2011) 25:1 Intl Trade J 112-153, online: < https://www.tandfonline.com/doi/epdf/10.1080/08853908.2011.532047?needAccess=true> (accessed 22 January 2024) [Aggarwal, "Trade Effect of Anti-dumping in India"]

[38] Gupta & Choudhury, *supra* note 6, 124-125

[39] World Trade Organization (WTO), "Case Study 38: The Reform of South Africa's Anti-Dumping Regime", *WTO Centre* (8 July 2020), online: < https://wtocenter.vn/chuyen-de/15805-case-study-38-the-reform-of-south-africas-anti-dumping-regime> (accessed 17 January 2024)

[40] *Ibid*; J M Finger & J Noques, *Safeguards and Antidumping in Latin America Trade Liberalization*, (New York: Palgrave Macmillan, 2005); Aggarwal, "Trade Effects of Anti-dumping in India", *supra* note 37.

[41] *Ibid*.

[42] See Eric (I) Freedman, "Canadian Anti-Dumping Provisions: Has the Use of the Public Interest Clause Helped Curb Protectionism" (2016) 16 Asper Rev Int'l Bus & Trade L 27; Marguerite E. Ritchie, "Experimenting with Canadian Business: Anti-Dumping Protection in Canada" (1979) 3:4 Can Bus LJ 375.

Section 1.4 discuss the methodology and theoretical lens adopted in this thesis. While Section 1.5 spells out the scope and limitation of research. It also delineates the structure of the thesis.

1.2 Background of Study

1.2.1 An Era of Renewed Industrial Policy

The transformation of the trade policy regimes in most countries from inward protectionist to liberal trade regime prompted the proliferations of implemented trade changes across Global South nations. However, only few emerging economies from the Global South world have successfully engaged neo-liberal policy to drive their domestic economy growth and competitiveness on the world market. The rapid and significant role of these emerging economies have spurred a shift in global economic power that has contributed to the tensions within the multilateral trade system. In response, the Western powers have increasingly resorted to unilateralist approaches, and weaponize their trade links as they view and describe trade openness as a source of potential weakness.[43] Besides, the US concerted campaign against the international trading system (such as the continued objection of the appointment to the WTO's Appellate Body, where parties in disputes can lodge an appeal against trade adjudication) has weakened the institution's regulatory credibility in this current era.[44] In addition to the unease over the weakening influence of the WTO, the benefits of trade liberalisation have failed to materialise for majority of the Global South States. Many of the Global South countries have been unable to build on the universality promise of neo-liberal policy to transition their dwindling economies to high economy income.[45] Many of these countries were pressed to industrialise prematurely, which placed them at the mercy of

[43] See Duru et al, *supra* note 31, 195-200; Inu Manak, "A Return to Reciprocity in US Trade Policy", *Hinrich Foundation* (16 January 2024), online: < www.hinrichfoundation.com/research/article/trade-policy/a-return-to-reciprocity-in-us-trade-policy/?utm_campaign=article-manak-return-to-reciprocity-us-trade-policy&utm_medium=email&_hsmi=290123431&_hsenc=p2ANqtz-_-sYO2N9pbdXSeICowEbr22DqU-B2p7Pv-b1bJlNvWN64AOfWUgGgZrYL9fI-hRQ3nEpsjx5Y6Pm8oDfAio8ObTHDLQQ&utm_content=20240116-weekly-research-&utm_source=hinrich-thought-leadership> (accessed 25 February 2024); Nicolas Albertoni & Carol Wise, "International Trade Norms in the Age of Covid-19 Nationalism on the rise", (2021) 14 Fudan J Human & Soc Sci 41-66, online: <https://doi.org/10.1007/s40647-020-00288-1> (accessed 8 January 2024); Karl Aiginger & Dani Rodrik, "Rebirth of Industrial Policy and an Agenda for the Twenty-First Century", (2020) 20 J Ind Competition & Trade 189-207, online: <https://link.springer.com/article/10.1007/s10842-019-00322-3> (accessed 7 January 2024)

[44] Manak, *supra* note 43.

[45] Edalio Maldonado, "Managing Free Trade under the WTO in an Era of Rising National Tensions", (2023) Old Dominion University Model United Nations Society & ODU Graduate Program in Intl Studio, ODUMUNC 2024 Issue Brief 2-4, online: < https://ww1.odu.edu/content/dam/odu/col-dept/al/docs/2nd-wto.pdf> (accessed 28 December 2023).

competing with countries that have more advance industrial capabilities.[46] In particular, it is the reflection of the current economic realities of the Nigerian state.

Accordingly, international trade rule of the 21st century has encountered varying economic and geopolitical challenges that are disruptive to world trade. These challenges include the 2008-2009 financial crisis, global income inequalities, global trade imbalances, increasing competition from emerging economies, China's fast-growing presence in world market, US-China trade rivalry, Covid-19 pandemic; invasion of Ukraine to trade sanction against Russia amongst others. All of these have seemingly accelerated the obvious shift in national industrial policies and hastened the impending end of the post-Cold War institutionalised trading model that has recorded trade and globalization success.[47] These disruptive events have amplified the tensions among WTO Members and has elicited a shifting landscape in industrial policies towards protectionism, economic nationalism, unilateralism, anti-globalism.[48] Hence, there has been an increased fragmentation of the global economy into trade blocs based on shared values. It has also prompted the proliferation of interventionist measure and politicization of industrial policies by WTO Member States in disregard of their commitment under the WTO system.[49] For instance, the US approach to trade in the Trump and Biden Administrations has been a

[46] *Ibid*; Alessandrini, *supra* note 7 at Chapter 3.

[47] See generally Shawn Donnan & Enda Curran, "The Global Economy Enters An Era of Upheaval", *Bloomberg News* (18 September 2024), online: < www.bloomberg.com/graphics/2023-geopolitical-investments-economic-shift/> (accessed 26 February 2024) [Bloomberg News 2023]; WTO, "World Trade Report 2023: Re-globalization for a Secure, Inclusive and Sustainable Future", (2023) WTO Doc WT/WTR/23, online: < https://www.wto.org/english/res_e/booksp_e/wtr23_e/wtr23_e.pdf> (accessed 21 January 2024) [WTO Report 2023]; Maldonado, *supra* note 39 at 9-11; Bossche & Zdouc, *supra* note 6; Carlos Goes & Eddy Bekkers, " The Impact of Geopolitical Conflicts on Trade, Growth, and Innovation", (2022) Economic Research and Statistics Division of World Trade Organization, Working Papers ERSD-2022-9, online: <https://doi.org/10.30875/25189808-2022-9> (accessed 7 December 2023); Carlos Primo Braga et al, "Confronting Deglobalisation in the Multilateral Trading System", (2022) 14:1 Trade, L & Dev 1-38, online: <www.tradelawdevelopment.com/index.php/tld/article/view/215/237> (accessed 7 December 2023); Trevor Sutton & Mike Williams, "A New Horizons in U.S. Trade Policy", *CAP 20* (14 March 2023), online: <www.americanprogress.org/article/a-new-horizon-in-u-s-trade-policy/> (accessed 7 December 2023); Simon Evenett, "Policy Analysis: Did Covid-19 Trigger a 'New Normal' in Trade Policy?", Intl Inst Soc Dev (30 October 2023), online: <www.iisd.org/articles/policy-analysis/covid-19-trade-policy> (accessed 7 December 2023); Lucian Cernat, "Trade Policy Reflections Beyond the Covid 19 Outbreak", (2020) 2 Chief Economist Note Series, DG Trade European Commission, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3777675> (accessed 7 December 2023).

[48] See Bloomberg News 2023, *supra* note 42; Bossche & Zdouc, *supra* note 6 at 4; Leonardo Borlini, "Economic Interventionism and International Trade Law in the Covid Era", (2023) 24:1 German LJ 1-6, online: < https://doi.org/10.1017/glj.2023.13> (accessed 8 December 2023); Giorgio Sacerdoti, & Leonardo Borlini, "Systematic Changes in the Politicization of the international Trade Relations and the Decline of the Multilateral Trading System", (2023) 24 German LJ 17, 24-27; Sutton & Williams, *supra* note 41; "President Donald Trump is Trashing Deals in Favor of Tariffs. That May Backfire on America", THE ECONOMIST (June 8, 2019), online: <www.economist.com/finance-and-economics/2019/06/08/president-donald-trump-is-trashing-deals-in-favour-of-tariffs > (accessed 6 January 2024).

[49] Bloomberg News 2023, *supra* note 47; WTO Report 2023, *supra* note 47; Albertoni & Wise, *supra* note 5 at 41-66; Sacerdoti & Borlini, *supra* note 47,17-44; Braga et al, *supra* note 47.

resort to policy measures that are outside the ambit of multilaterally agreed rules, including implementation of unilateral trade protections on ground of national security and protecting the US indigenous market.[50] In particular, the Biden Administration placed emphasise on "buy America", a protectionism policy that requires federally-funded contract to use only domestic materials or products or services as a means of keeping foreign competition away from strategic American industries.[51] The 'Buy America' practice is part of the false belief of the American government that putting 'America First' would restore the country's dominance on the world market.[52] This trade approach is prejudicial to developing countries' trade interests.[53] The practices have increased the criticism levelled against the multilateral trading system and has prompted proposals for reviews and reforms of the WTO system to envision the future of world economic regime geared towards redressing the structural inequalities among its Members.[54] Thus, the current global economic climate has made it impossible for countries like Nigeria to pursue and implement proactive industrial policies that are essential to its economic growth and productivity.

For developing world, the question is focused on the role the current trend of trade policy plays in overcoming the premature de-industrialization of Third World nations, especially in raising Nigeria's industrial capability to compete on the world market.[55] For instance, it remains doubtful the extent to which the trend in Nigeria's industrial policy is fully committed to remedying the trade-distorted attack on its domestic markets. Nigeria has never experienced proper industrialization, and it is the hope of many that it gets to attain real industrial growth and export.[56] Thus, there is need for the Nigerian government to emphasise production and service alongside the manufacturing sector. It also needs to focus on eradicating poverty and transitioning to a high-income country through strategic trade and foreign policies.

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[50] Bloomberg News 2023, *supra* note 47; Manak, *supra* note 43.
[51] Alon Levy, "Why Buy America is Bad Law", *Niskanen Center* (16 June 2021), online: <www.niskanencenter.org/why-buy-america-is-bad-law/> (accessed 23 August 2024); Lori Robertson, "Biden's 'Buy America' Spin", *FactCheck* (17 May 2024), online: <accessed 23 August 2024), online: <www.factcheck.org/2024/05/bidens-buy-america-spin/> (accessed 23 August 2024).
[52] Manak, *supra* note 43.
[53] For instance, the trade war between US and China that has spiralled into impositions of retaliatory tariffs between the countries. See WTO Report 2023, *supra* note 47, 27-28.
[54] *Ibid*, 6; WTO, Trade Policy Review Body: Report of the TPRB from the Director-General on Trade-Related Developments - MidOctober 2021 to mid-May 2022", WTO Doc. WT/TPR/OV/W/16O; Sacerdoti & Borlini, *supra* note 9 at 18-33.
[55] Aiginger & Rodrik, *supra* note 43 at 190-191; Sacerdoti & Borlini, *supra* note 47 at 25. See WTO Report 2023, *supra* note 47.
[56] *Ibid*.

1.2.2 Dumping and Colonialism

Article VI of GATT 1994 and Article 2.1 of the Anti-dumping Agreement (ADA) referred to dumped import as an introduction of a product into the domestic market of another country at less than its 'normal value'.[57] A value is normal when it represents a similar value in the ordinary course of trade for like products that are intended for consumption in the exporting country.[58] This definition implies that consumers in importing country pay a lesser price for like products than consumers in the country of origin. Although a lower price may be beneficial to the consumers in the importing country, it may also be harmful to the domestic industry.[59] Thus, it is generally classified as international price discrimination between national markets.[60] In ordinary terms, it is the act of selling an imported product at a price lower than the amount it is being traded at in the export country, which in turn has inflicted or threatened to inflict a material injury on the importing country's domestic industry.

Dumping as a trade-distorted practice has a long history in the colonialization and oppression of Third World States. For instance, in the 19th century, the British colonial authorities during the Industrial Revolution period imposed free trade policy of the British empire on India, which was prejudicial to India's traditional productivity in the cotton textile industry, as well as its livelihood. Hence, India was forced to accept huge influx of English factory-made textiles into its domestic markets at a price less than the like product being sold by Indian producers.[61] The dumped imports put downward pressure on textile prices in India, which made it difficult for Indian traditional cotton-weaving and spinning producers - whom historians proclaimed were successful and widely dominated world trade in the 17th and 18th Century – to compete against

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[57] See Article VI of the General Agreement on Trade and Tariff 1994, 15 April, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994) (herein referred to as "GATT 1994") and Article 2.1 of the Agreement on the Implementation of Article VI of GATT 1994, 1868 UNTS 201 (known as Anti-Dumping Agreement) (herein referred to as 'ADA'). These provisions have been held to be a definitional provision in *US – Zeroing (Japan) (2007)*, Appellate Body report.

[58] Article 2.1 of the ADA.

[59] See generally WTO, "World Trade Report 2022: Climate Change and International Trade", (2022) WTO Doc WT/WTR/22, online: <www.wto.org/english/res_e/booksp_e/wtr22_e/wtr22_e.pdf> (accessed 15 December 2023) [World Trade Report 2022]; Ajoje Olufunke Iyabo, *South-South Cooperation and the Prospects of Global Economic Balancing: A Study Framework of Nigeria-China Relations* (PhD Dissertation, North-West University, 2018) Chapters 3-6.

[60] Bossche & Zdouc, *supra* note 6 at 757; Jacob Viner, *Dumping: A Problem in International Trade*, (Chicago: University of Chicago Press Reprint, 1966) [Viner, *Dumping: A Problem in International Trade*]; Owais Hasan Khan, *A Critique of Anti-Dumping Laws*, (Newcastle: Cambridge Scholars Publishing, 2018).

[61] See generally Stephen Broadberry & Bishnupriya Gupta, "Cotten Textiles and the Great Divergence: Lancashire, India and Shifting Competitive Advantage 1600-1850", (2005) Centre for Economic Policy Research Discussion Paper No. 518, online: < https://wrap.warwick.ac.uk/id/eprint/1708/> (accessed 23 August 2024).

the Britain industrial textiles in Indian domestic markets. As a result, British industrialization led to India's de-industrialization and the destruction of indigenous handicrafts in the 19th century.[62] Other Third World nations also suffered from British industrialization in this era. According to Roy, the "third world paid the price for Britain's economic emergence.[63] Thus, dumped import has a history of been used as an instrument of imperialism to subjugate the economic sovereignty of poorer States.

1.2.3 Anti-Dumping: Trade Remedy or Not?

Trade remedy is recognised within the framework of WTO rules as an exception to the principle of most-favoured-nation (MFN) treatment[64]. The recognised trade remedies are Anti-dumping, Safeguards and Countervailing measures as a recognised and controlled exception to the multilateralism principle of the WTO.[65] This study focuses on Anti-dumping measures. Anti-dumping measures are trade remedy imposed to counteract the injurious impact of trade-distorting practices such as dumped imports on the domestic industry of an importing country. It is regulated under Article VI of GATT 1994 and the Anti-dumping Agreement. The WTO rules on Anti-dumping seek to promote and restore a healthy competition environment between WTO Members which has been impaired by market-distorting practices. In particular, it sought to secure a predictable level playing field for domestic industries by imposing extra duties on foreign products found wanting.[66] Although WTO Members are not obliged to adopt a national legislation on anti-dumping, those that adopt such legislation must do so in accordance with the multilateral rules on Anti-dumping and in manners consistent with their commitment under the world trade system. [67] This is because the measure is only applicable under the stipulated circumstances and condition. However, many developing countries are not familiar with anti-dumping measures due to lack of awareness and participation in the negotiating history of the

[62] *Ibid*, 13-17. See also Renu Kumari et al, "Industrial Revolution and Deindustrialization of Indian History – An Overview", (2022) 10:5 Intl J Research Educ & Scientific Methods 278-283, online: <www.researchgate.net/profile/Renu-Kumari-23/publication/360447484_Industrial_Revolution_and_Deindustrialization_of_Indian_History_-_An_Overview/links/63abe97cc3c99660ebad7301/Industrial-Revolution-and-Deindustrialization-of-Indian-History-An-Overview.pdf> (accessed 21 November 2023); Tirthankar Roy, *The Crafts and Capitalism: Handloom Weaving Industry in Colonial India*, 1st ed (London: Routledge, 2020); M J Daunton, *Progress and Poverty: An Economic and Social History of Britain, 1700-1850*, (United Kingdom: Oxford University Press, 1995); Authur Louis Dunham, *The Industrial Revolution in France, 1815-1848*, (New York: Exposition Press, 1995).

[63] Roy, *supra* note 62.

[64] The MFN treat imposed obligations on Member States to regulate trade with foreign nations, and levy tariff and duties equally on all trading partners.

[65] Bossche & Zdouc, *supra* note 6 at Chapter 11.

[66] Bossche & Zdouc, *supra* note 6 at 174-176.

[67] See Article VI of GATT 1994 and Part I Article 1 ADA.

WTO trade remedies. Hence, the lack of knowledge and expertise on Anti-dumping measures in the developing world has hindered some of countries from adopting the required trade remedy system.[68] Instead, they relied on restrictive policies to address the undesired effect of liberalization. This is the practice of the Nigerian state.

Anti-dumping mechanism as a trade remedy is not a new phenomenon. Since the 1950s, the adoption of Anti-dumping measures has been investigated by renowned economists and other academics resulting in an extensive literature on this form of trade remedy.[69] However, the studies have so far centred around the Global North experiences.[70] Hence, scarce literature on Global South Anti-dumping practice did not emerge until late 1990s when few of the countries became active.[71] According to Niel and Kate, the four traditional users of Anti-dumping measures initially accounted for 90%, but by end of 1990s, the new users initiated more Anti-dumping investigations than the traditional users.[72] Nevertheless, the studies on Global South Anti-dumping practices are still at the infancy stage and they are narrowly focused and built on addressing the impact of Anti-dumping measures on trade liberalization and market efficiency of the world economy.[73] They are tailored towards sustaining free trade ideology –

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[68] Gupta & Choudhury, *supra* note 6 at 133-134.

[69] Brink Lindsey, "The US Antidumping Law, Rhetoric versus Reality", (2000) 34: 1 J World Trade 1-38; Araujo Jr J T Araujo Macario et al, "Antidumping in the Americas", (2001) 35: 4 J World Trade 555-574; P K M Tharakan, "Political Economy and Contingent Protection", (1995) 105 Eco J 1550-1564 [Tharakan, "Political Economy and Contingent Protection"]; P Didier, "The WTO Antidumping Code and EC Practice, Issues for Review in Trade Negotiations ", (2001) 35: 1 J World Trade 33-54; S Hutton & M Trebilcock, "An Empirical Study of the Application of Canadian Anti-Dumping Laws: A search for Normative Rationales", (1990) 123:4 J World Trade; J Bourgeoise, J & P Messerlin, "The European Community's Experience", (1998) Brookings Trade Forum 127; J M Leclerc, "Reforming Ani-dumping Law: Balancing and interests of Consumers and Domestic Industries", (1998) 44 McGill L J 113-139; Thomas J Prusa & Susan Skeath, "The Economic and Strategic Motives for Antidumping Filings", (2001) NBER working paper 8424, online, <http://www.nber.org/papers/w8424> (accessed 24 January 2024); K Almstedt & M Norton, "China's Antidumping Laws and the WTO Antidumping Agreement,(including Comments on China's Early Enforcement of its Antidumping Laws)", (2000) 34:6 J World Trade 75-113; P K M Tharakan, "Anti-dumping policy and practice of the European Union: an overview" (1994) 48:4 Economisch en sociaal tijdschrift 557-575 [Tharakan "Anti-dumping policy and practice of the European Union: an overview"]; J M Finger, *Antidumping: How It Works and Who Gets Hurt*, (Michigan: University of Michigan Press, 1993); J H Bourgeois & P Messerlin, "The European Communities Experience", (1998) Brooking Trade Policy Forum 127.

[70] See B A Blonigen & T J Prusa, "Antidumping" in E K Choi & J Harrigan, eds, *Handbook of International Trade*, (Oxford: Blackwell, 2003) 251-284; Tharakan "Anti-dumping policy and practice of the European Union: an overview", *supra* note 57; R M Feinberg & B T Hirsch, "Industry Rent Seeking and the Filing of 'Unfair Trade' Complaints", (1989) 7 Intl J Industrial Organization 325-340; Finger, *supra* note 23; Bourgeois & Messerlin, *supra* note 69.

[71] These new active users from the developing world were India, Brazil, China, Argentina and Turkey. See Niel & Kate, *supra* note 10 at 169; Xuan Gao, "Does Good Governance Matter in Anti-Dumping Decision-Making - A North South Perspective" (2009) 6:2 Manchester J Int'l Econ L 2.

[72] Niel & Kate, *supra* note 10.

[73] See Aradhna Aggarwal, "Antidumping Law and Practice: An Indian Perspective", (2002) Indian Council for Research on International Economic Relations Working Paper No 85, online: <www.icrier.org/pdf/antiDump.pdf> (accessed 13 January 2024) [Aggarwal, "Antidumping Law and Practice:

dominated by northern practice – and ignores the reality of industrial and income inequality of the Global South. Against this background, the author aims to contribute to the limited literature by overcoming some of its limitations.

1.3 Research Questions

Historically, Nigeria has been a dumping site for cheap and substandard foreign capitalist products.[74]. The unfair trading practice is even more pronounced in contemporary trading climate where free trade treaty such as WTO rules, Economic Community of West Africa States (ECOWAS), African Continental Free Trade Area (AfCFTA), are being adopted. On different occasions there have been reports of cheap imports dominating the Nigerian market and forcing widespread scale-down of strategic domestic industries.[75] In turn, the competitiveness of the country's manufacturing sector on the global economic scene has been damning to Nigeria's industrial capability, livelihood, economy and sustainability in contemporary times. For instance, Nigeria recorded an all-time low economic income in 2020

An Indian Perspective"]; Aggarwal, "A Comparative Analysis of Developed and Developing Countries", *supra* note 11; Niels & Kate, *supra* note 11; B A Blonigen & T J Prusa, "Antidumping" in E K Choi & J Harrigan, eds, *Handbook of International Trade*, (Oxford: Blackwell, 2003) 251-284; R M Van Dijk, *Anti-dumping in Mexico: Curtailment of Unfair Practices or Renewed Protectionism?*, (M.Sc. Thesis: Erasmus University, 1997) [unpublished]; J Francois & G Neils, "Political Influence in a New Antidumping Regime: Evidence from Mexico", (London: Centre for Economic Policy Research, 2004) CEPR Discussion Paper 4297; J R Coleman et al, "Use of Antidumping Measures by Developing Countries: The Impact on US Exports of Agricultural Products", (2003) Agricultural Policy Reform and the WTO, Paper for the Conference June 23-26; G Niels & A ten Kate, "Antidumping Protection in a Liberalizing Country: Mexico's Antidumping Policy and Practice", (2004) 27 World Economy 968-983 [Niel & Kate, "Antidumping Protection in a Liberalizing Country: Mexico's Antidumping Policy and Practice"]; P A Messerlin, "China in WTO: Antidumping and Safeguards", in D Bhattasali et al, eds, *China and the WTO: Accession, Policy Change, and Poverty Reduction Strategies*, (Washington DC: World Bank, 2004).

[74] See Chibundu, *supra* note 16, 17-41; Ifesinachi Okafor-Yarwood & Ibukun Jacob Adewunmi, "Toxic Waste Dumping in the Global South as a Form of Environmental Racism: Evidence From the Gulf of Guinea", (2020) 79:3 Afri Stu 285-304, online: <https://doi.org/10.1080/00020184.2020.1827947> (accessed 20 January 2024); Sola Akinrinade & Olukoya Ogen, "Globalization and De-Industrialization: South-South Neo-Liberalism and the Collapse of the Nigerian Textile industry", (2008) 2:2 Afri Glo Age 159-170, online: <www.jstor.org/stable/40339266> (accessed 20 January 2024); T R Pressu & F Agboma, "Dwarfed Giant: Impact of Trade and Related Policies on SMEs in the Nigerian Textile Industry", (2018) 8:6 Intl J Academic Research Bus and Soc Sci 602-629, online: <https://hrmars.com/papers_submitted/4260/Dwarfed_Giant_Impact_of_Trade_and_Related_Policies_on_SMEs_in_the_Nigerian_Textile_Industry.pdf> (accessed 20 January 2024)

[75] Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two", *supra* note 24; Osondu-Oti, s*supra* note 24 at 203-218; Anudu, "Nigeria's Giant Industries are Silently Disappearing", Part 1, *supra* note 24; Akinrinade & Oghen, *supra* note 74; "Product Dumping: How Asians are Killing Made-In-Nigeria Goods", *Vanguard* (2 April 2012), online: <www.vanguardngr.com/2012/04/product-dumping-how-asians-are-killing-made-in-nigeria-goods/> (accessed 21 January 2024); Margaret Egbula & Qi Zheng, 'China and Nigeria: A Powerful South-South Alliance', (2011) 5 West African Challenges 3-19, 65; Franklin Alli & Providence Obuh, "Nigeria Gats Anti-Dumping Relief from WTO – Minister", *Vanguard* (22 February 2016), online: <www.vanguardngr.com/2016/02/nigeria-gets-anti-dumping-relief-from-wto-minister/> (accessed 21 January 2024).

with over 133 million Nigerians deemed to be into multidimensional poverty.[76] The economic recession was ascribed to a decline in her manufacturing base that situated the share of total export at 5.2% in 2021.[77] This poor state of the Nigerian economy represents a grim picture of the economic inequality within the world trade system. Nigeria lacks a clear regulatory and institutional framework for curbing injurious dumped import. Instead, the country has consistently resorted to unilateral trade approach that has so far been ineffective towards combating unfair trade practice.[78] Thus, considering that unilateral practice is non-acceptable and that establishing an Anti-dumping regime involves political, economic, and social dynamics, this thesis examines these issues by asking the question thus -

Central Research Question:

1. Considering Nigeria's international trade commitment under the WTO rules and regional trade agreements, what type of trade remedy approach is best suited to revitalize her local manufacturing sector and combat the trade-distorted practice that continues to hinder her industrialization?

2. In view of the increasing income inequalities from the Global South-Global North narrative in current multilateralism trading climate, how best can Nigeria design and approach such trade remedy system taking into account practice of successful Global South countries and that of Global North?

These core questions are principally analytical as they seek to promote understanding of Nigeria's policy on trade remedy alongside her multilateralism commitment in an era of shifting industrial landscape from a historical and contemporary perspective. It also seeks to examine the trade tension within the multilateral trading system from an angle of its Anti-dumping mechanism. Furthermore, the question seeks to elucidate the best approach for designing and establishing Nigeria's Anti-dumping regime – to overcome her premature de-industrialization and bolster her economic income - via lessons to be drawn from the above-

[76] See National Bureau Statistics, "Labor Forces Statistics: Unemployment and Underemployment Report", (2021) NBC, online: < https://africacheck.org/sites/default/files/media/documents/2022-07/Q4_2020_Unemployment_Report_compressed%20%282%29.pdf> (accessed 21 January 2024); National Bureau Statistics, "Nigeria Multidimensional Poverty Index", (2022) NBS, online: <https://nigerianstat.gov.ng/elibrary/read/1241254> (accessed 21 January 2024); Wilson Erumebor, "Nigeria in 2023: Bridging the Productivity Gap and Building Economic Resilience", *Brooking* (6 February 2023)
[77] See NBS 2022 Report on Foreign Trade, *supra* note 28.
[78] Fasan, *supra* note 25; Alayande, *supra* note 32 at 162.

mentioned jurisdictions. The answers to the research questions will be woven throughout the Chapters of the thesis.

1.4 Methodology and Theoretical Framework

The issues to be examined in this research are multifarious in nature, and they lend allegiances to interdisciplinary approach. Thus, single methodological analysis will be insufficient to address the research concerns. This work draws methodological inspiration from comparative research, historical analysis, doctrinal scholarship whilst the analysis will be framed from the experiences of third world nations – that is the Third World Approaches to International Law (TWAIL). They are discussed thus:

1.4.1 Comparative Methodology

According to Kenndy, comparative research, otherwise known as comparativism, is the intellectual project of understanding different legal cultures by understudying the similarities and differences that are abound therein.[79] It is the socio-political avenue of learning and advancing knowledge through different legal cultures. In particular, it is an influential thought upon though intellectual exercise that existing legal and institutional systems, cultures and traditions done through review.[80] The research of legal culture is the study of legal rules 'in text' and 'in action'. It is concerned with the effectiveness of the law and the general attitude of the society to its implementation. It also differs in its levels of legal families and countries. Thus, comparative research approaches legal culture by way of collecting and comparing data in different legal systems to establish the importance of law in societies.[81] It is useful for the socio-legal analysis of cross-national legal rules and international regime, which is the central objective of this research.

Although there is lack of decisiveness on what constitute Comparative legal research, it has been defined in international law as the analytical and expository act of identifying the

[79] David Kennedy, "New Approaches to Comparative Law: Comparativism and International Governance" (1997) 1997:2 Utah L Rev 545, 554; Colin B Picker, 'An Introduction to Comparative Analyses of International Organizations' in Lukas Heckendorn & Colin Picker, eds, *Comparative Law and International Organizations: Cooperation, Competition and Connections* (Swiss Institute of Comparative Law, 2013)

[80] Gunter Frankenberg, "Critical Comparisons: Re-thinking Comparative Law" (1985) 26:2 Harv Int'l L J 411, 412-413; Philarete Chasles, "Littérature étrangère compare [1835]", in H J Schulz & P H Rhein, eds, *Comparative Literature: The Early Years*, (University of North Carolina Press, 1973) 13-39; Sussan Bassnett, *Comparative Literature: A Critical Introduction*, (Blackwells, 1993)

[81] Mathias Siems, *Comparative Law*, (London: Cambridge University Press, 2018) 148; David Nelken, "Comparative Legal Research and Legal Culture: Facts, Approaches, and Values", (2016) 12 Ann Rev L and Soc Sci 45-62.

similarities and differences in how actors in various legal system engage, approach and interpret international law.[82] It is concerned with promoting clarity and universality of the law across legal systems.[83] As a methodology, comparativism is not only a valuable inspirational source of domestic legal reforms and harmonizing international legal rules, but it is also a tool for approving and disapproving of a cultural practice.[84] This can be traced to the essence of the method, which is the act of analysing and aligning the data derived from different jurisdictions.[85] Thus, an analysis of the Global South' trade remedy practice through the studies of selected national culture would reflect the ever importance of comparative research in prompting domestic reforms and homogeneity of foreign legal cultures in the field of international economic law. It will provide new perspective on the effect of their legal culture, normativity, political and economic approach on international economic law. This shows the cross-disciplinary nature of comparative methodologies.

The methodology is useful for explaining the content of legal rule and critically evaluating the potential and efficacy of rule of law with the aim to promote better understanding of different legal culture or develop common solution to legal problem. This has been ascribed to the functional perspective of comparative law.[86] According to Zweigert & Kotz, the central function (and perhaps the only function) of comparative research is to facilitate 'better solutions' to socio-cultural, political and economic problems in laws.[87] Also, Maine asserted that the chief function of comparative jurisprudence is to proffer practical improvement of the

[82] Anthea Robert et al, "Comparative International Law: Framing The Field", (2015) 109:3 Am J Intl L 467, 469. See also Graig Lawson, "The Family Affinities of Common-Law and Civil-Law Legal System" (1982) 6 Hastings Intl & Comparative L Rev 85, 85-131; Esin Orucu, "Developing Comparative Law, in Esin Orucu & David Nelken, eds, *Comparative Law: A Handbook*, (2007) 44, 45, 62; David Nelken, "Comparative Law and Comparative Legal Studies", in Esin Orucu & David Nelken, eds, *Comparative Law: A Handbook*, (2007) 3; Charles M Fombad, "Comparative Research in Contemporary African Legal Studies", (2018) 67:4 J Legal Edu 984, 986-988

[83] Edward J. Eberle, "The Methodology of Comparative Law" (2011) 16:1 Roger Williams U L Rev 51, 52-55; Frank Esser & Rens Vliegenthart, "Comparative Research Methods", in Jorg Mathes et al, eds, *The International Encyclopedia of Communication Research Methods*, (John Wiley & Sons Inc, 2017) 1, 1-12, online: < https://onlinelibrary.wiley.com/doi/pdf/10.1002/9781118901731.iecrm0035> (accessed 23 August 2024). See generally Kennedy, *supra* note 79, 551-559.

[84] See generally M Smits, 'Comparative Law and Its Influence on National Legal Systems', in M Reimann & R Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 513; M Bussani & U Mattei, eds, *The Common Core of European Private Law* (The Hague: Kluwer Law International, 2003); J Gordley, 'Comparative Legal Research: Its Function Critical Comparisons: Re-thinking Comparative Law In the Development of Harmonized Law', (1995) 43 Am J Comp L 555; U Mattei, Comparative Law and Economics (University of Michigan Press, 1997); Eberle, *supra* note 83.

[85] Eberle, *supra* note 83, 52 K Zweigert & H Kotz, *An Introduction to Comparative Law*, 3rd edn, (Oxford: Oxford University Press, 1998).

[86] *Ibid*; Maine, *Village Communities in the East and the West*, 2nd edn, (1872) 4; Zweigert & Kotz, *supra* note 85.

[87] Zweigert & Kotz, *supra* note 85 at 31.

law.[88] The functionality perspective advocates comparing legal issues that are designed to address similar legal problem irrespective of whether different functions within the legal system.[89] In this regard, the comparative analysis of the global south countries' Anti-dumping regime within the WTO system conforms with the functionality test of comparing similar legal issue even though each regime functions differently. There have been mounting critiques on the functionality approach of this methodology for ignoring the expressive value of different law.[90] Notwithstanding, the problem-solving approach provides insight into the normative experience of different legal system and their interactions with international economic order.[91] Functionalism is the backdrop against which this thesis will comparatively analyse answer the identified research problem.

In deploying this methodology, comparative scholars like Frankenberg,[92] Kennedy,[93] Eberle,[94] Hill,[95] Adams[96] noted that comparatist must liberate themselves from personal bias – "cognitive lock-in" according to Curran[97] - to be able to conduct research on the legal cultures of different jurisdictions objectively. The liberation will aid neutrality in the analysis of the different data. Hence, the lack of cognitive control has influenced comparatists to assumed superiority of the Global North legal culture in the predominance of their studies of Anti-Dumping practice of countries in the multilateral trading system.[98] According to Ruskola, it is not surprising that the modern form of comparative international law research emerged in the late 19th century at the

[88] Maine, *supra* note 81 at 4.
[89] Ralf Michael, "The Functional Method of Comparative Law" in M Reimann & R Zimmerman, eds, *The Oxford Handbook of Comparative Law*, (Oxford: Oxford University Press, 2009) 339.
[90] See generally Frankenberg, *supra* note 80; A Watson, *Legal Transplant: An Approach to Comparative Law*, 2nd ed (Athens: University of Georgia Press, 1993); Kennedy, *supra* note 79; M Van Hoecke & M Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" (1998) 47 Intl Comp L Q 495; M Graziadei, "The Functionalist Heritage" in P Legrand & R Munday, eds, *Comparative Legal Studies: Traditions and Transitions*, (Cambridge: Cambridge University Press, 2003); Micheals, *supra* note 89; Maurice Adams & John Griffiths, "Against 'Comparative Method': Explaining Similarities and Differences" in Maurice Adams & Jacco Bomhoff, eds, *Practice and Theory in Comparative Law*, (Cambridge: Cambridge University press, 2012)
[91] Colin B Picker, "Comparative Legal Cultural Analyses of International Economic Law: A New Methodological Approach", (2013) 1:1 Chinese J Comp L 21, 29-30.
[92] *Ibid*, 416.
[93] Kennedy, *supra* note 79.
[94] Eberle, *supra* note 83.
[95] Jonathan Hill, "Comparative Law, Law Reform and Legal Theory", (1989) 9 Oxford J Leg Stud 101.
[96] Adams & Griffiths, *supra* note 90.
[97] Vivian Grosswald Curran, "Cultural Immersion, Differences and Categories in US Comparative Law", (1998) 46 Am J Comp L 43.
[98] See generally Aggarwal, "Comparative Analysis of Developed and Developing Countries", *supra* note 11; Bourgeois & Messerlin, *supra* note 69; Tharakan, Anti-dumping policy and practice of the European Union: an overview", *supra* note 69.

peak of Western Imperialism.[99] Comparatists in international law have relied more on Global North law, in particular, Europe and US as the comparison standard to the detriment of the laws in the Global South.[100] To a degree the discipline of comparative methodology participated in colonialism (directly or indirectly) and it has been used to advance the cause of Western law and neo-imperialism in present time.[101] Thus, the approach is complicit in advancing the project for the continuous colonialization of Third World.[102] This practice presents a particular danger of shunning the development of laws that take into account the peculiarities of Third World, and destroying their legal system. Hence, this research will use the methodology to focus on Global South practice as part of an effort to decolonialise legal rules within the context of the multilateral trading system.

Application of Comparative Methodology to Thesis

The methodology provides the key insight for drawing attention to the success and struggle of the Global South countries' legal cultures on Anti-dumping mechanism in the rule-based multilateral trade system. Its uses will be deployed to analyse and evaluate how WTO framework on Anti-dumping mechanism is used by Global South countries such as Brazil, India and South Africa to address the negative discrimination against their trade. Although these countries have succeeded in the establishment of Anti-dumping regimes, Nigeria as an economically and politically weak Global South country continues to face great obstacles in developing an effective Anti-dumping regime considering that her capacity to utilise the WTO system is limited. Thus, comparative methodology provides the analytical framework for examining the lessons Nigeria can draw from the few successful Global South countries to develop her legal and institutional framework on Anti-dumping duties. The developed

[99] Teemu Ruskola, China in the Age of the World Picture, in Florian Hoffman & Anne Orford, eds, *Oxford Handbook of the Theory of International Law*, (Oxford: Oxford University press, 2016) 138, 143

[100] See Lena Salaymeh & Ralf Michaels, "Decolonial Comparative Law: A Conceptual Beginning", (2022) Max Planck Institute for Comparative and International Private Law Research Paper Series No 22/1, online: <https://ssrn.com/abstract=4014459> (accessed 9 February 2024); A Sil & A I Ahram, "Comparative Area Studies and the Study of the Global South", (2020) 20:2 Vestnik RUDN Intl Relations 279-287, online: <https://vtechworks.lib.vt.edu/server/api/core/bitstreams/2a6bfd26-532a-41af-84a0-6341c0eef906/content> (accessed 9 February 2024).

[101] Tapiwa Warikandwa & Samuel Amoo, "African Law in Comparative Law: A Case of Undermining African Jurisprudence and Promoting a New World Order Agenda?" in Artwell Nhemachena et al, *Social and Legal Theor in the Age of Decoloniality: (Re)-Envisioning Pan-African Jurisprudence in the 21st Century*, (2018) 299, 318; Jedediah Kronche, *The Futility of Law and Development: China and the Dangers of Exporting American Law*, (Oxford: Oxford University Press, 2016).

[102] Arturo Escobar, "Encountering Development: The Making and Unmaking of the Third World", (Princeton: Princeton University Press, 1995)

framework can then be utilised to redress the premature de-industrialization of her domestic industries caused by dumping activities.

This thesis examines the trade remedy practices in Global South countries such as Brazil, India, South Africa as useful examples for drawing lessons on Anti-dumping law making for Nigeria on the premise that they are inextricable connected by colonial history and struggle with systematic exploitation in their experience of the multilateral trading system. These countries have collectively advocated for protection of their weak and relatively powerless local industries against exploitation from industrialized nation. While Brazil, India and South Africa have successfully translated the multilaterally recognized trade remedies (against unfair trade advantages emanating from the pursuit of free trade systems) into their domestic legal regimes, Nigeria is yet to do so and constantly relies on restrictive measures in disregard of her multilateral commitment. The restrictive measures have also been ineffective in addressing deindustrialization of her manufacturing sector.[103] Hence, examining how these identified Global South countries successfully utilise the WTO rules on Anti-dumping duties to combat injuries of dumping practice, and rejuvenate and preserve their local industries, provides useful lessons for Nigeria. Moreover, the identified Global South countries have large base of primary manufacturing sector similar to Nigeria. Their studies can guide Nigeria in designing Anti-dumping measures that best suit her primary production sectors and respond to the changing societal, political, economical and technological context of her industries.

Also, the comparative methodology provides the tools for examining the asymmetric features of the WTO to portray the difference between the Global North and Global South Anti-Dumping Regime. This requires researching into the conflicting interest of these economic groups via the history of the multilateral trading system. The comparative historical studies will illuminate the historical root of the structural inequalities between developed and developing countries in the world trading system. It will also be used to highlight the mounting criticism levied against the WTO system regarding the inequalities and to promote improvement of the neo-liberal trade policies to address the concerns of the Global South. Essentially, the methodology is crucial to my analysis as it accommodates the multifarious discipline of my claims.

[103] Fasan, *supra* note 25; Alayande, *supra* note 32.

1.4.2 Historical Research Methodology

This methodology involves the cross-disciplinary studies of the overlap between history and law that improves understanding of the nature of law. Considering that legal development is an intrinsic part of other historical trend, the methodology is based on the ideology that history matters for it gives an insight into past events for the purpose of eliciting inferences and conclusion on present legal issues.[104] In examining the relationship between law and history, the methodology allows for interrogations into the trajectory of the implementation conundrum of legal doctrines with other factors. According to Phillip, the history of the law passed cannot be separated from larger cultural context such as politics religion, philosophy, economics and many other fields of human thought and activity which aid the transformative nature of legal doctrines, and ideologies.[105] This aligns with the multifarious issues raised in this research

Legal history can make use of diverse types of data that includes primary, secondary and verbal accounts to be gathered about past occurrence evaluated and assessed within the politics of its own time which promotes understanding of present situation.[106] It gives clarification about past events that shape the law and legal institutions in contemporary times.[107] The method approaches international law as an instrument for articulating and unifying international authority's acts as well as state and non-state practices in the international sphere.[108] It places legal and political practice of international law in the context of the past and present time to be able to interpret and respond to the crisis or gaps in its development.[109] In assessing how best to make international law more effective and acceptive, R P Anand noted that it is imperative to look at the problem from a historical perspective.[110] In this regard, this research seeks to deploy the historical methodology to evaluate and interpret the Anti-dumping practices of the de-colonised developing states through the practical lens of past and present evidences within the context of their participation in the international trading system. In order to interpret the

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[104] John Phillip Reid, "Law and History" (1993) 27:1 Loy L A L Rev 193, 194-195; Jim Phillip, "Why Legal History Matters" (2010) 41 VWLR 293, 294-295

[105] Phillip, *supra* note 94.

[106] Hermann Kantorowicz, "Savigny and the Historical School of Law" (1937) 53:3 L Q Rev 326, 333; Anne Orford, "On International legal Method", (2013) 1:1 London Rev Intl Law 166, 167.

[107] Reid, *supra* note 104, 308. See also Ernest J Weinrib, *The Idea of Private Law*, (Cambridge: Harvard University Press, 2005); Lawrence Lee Howe, "Historical Method and Legal Education", (1950) 36:2 Bulletin Am A U Professors 346, 347.

[108] Orford, *supra* note 106 at 168.

[109] *Ibid*, 176; Buckner Melton, "Clio at the Bar: A Guide to historical Method for Legists and Jurists", (1998) 83 Minnesota L Rev 377, 440 See generally Q Skinner, "Meaning and Understanding in the History of Ideas", (1969) 8 History & Theory 3; Q Skinner, "Interpretation and the Understanding of Speech Acts", in *Visions of Politics: Volume I, Regarding Method,* (Cambridge: Cambridge University Press, 2002) 103.

[110] R P Anand, *New States and International Law*, 2nd ed (Gurgaon: Hope India Publications, 2008).

immediate temporal context of the structural imbalance in the multilateral trading system, and the limitations on Nigeria's capacity to utilize the WTO system, this research will explore past legal texts, events, institutions as well as the political intervention and power struggles at the multilateral and national levels. Also, from an historical perspective, the research will examine the industrialised nations' practices that undermine the participation of developing countries in the WTO system.

Moreover, the essence of historical analysis in international law is to ensure reflection on the different events or time by dividing them into periods that would enable accurate account of their cause and effect. The approach makes understandable the development of modern international economic law and its interactions with the national units.[111] Accordingly, Hueck confirmed that the periodisation of past and existing phenomenon in the studies of international law helps develop sophisticated pictures of changes and practice of international law and authority, and the response at national level.[112] Thus, periodization will be deployed in this research to highlight the transformation of the WTO rules on Anti-dumping duties and Nigeria's response to those change via her trade policy practice.

By seeking to find the truth through evaluating different data on the perspective and conduct of every actor involved in the event, historical methodology places emphasis on neutrality as its central theme. Objectivity is crucial to the discovery of the normative 'truth' claim and in using the truth to predict future natural behaviour of a legal rule permitted under this methodology.[113] According to Howe, one of the basic objectives of historical methodology is to ascertain the accuracy and true significance of an event.[114] In the same context, Melton berate legalists on their inability to conduct sound historical research, and also noted the negative impact poor historical analysis has on the truth-finding process.[115] Notwithstanding, the discovery of truth itself is a source of limitation and challenge of the methodology as it is hardly detached from subjectivity and bias.[116] Irrespective, this research will deploy limited degree of subjectivity advocated by Howe and Skinner to trace the genesis, and promote better understanding of the inequalities experienced by the Global South States in contemporary time. In summary, while maintaining high degree of neutrality, normative truth claims will be made

[111] Ingo J. Hueck, "The Discipline of the History of International Law - New Trends and Methods on the History of International Law" (2001) 3:2 J Historical Int'l L 194, 197-198
[112] *Ibid*, 199.
[113] See Skinner, *supra* note 97; Melton, *supra* note 109, 391.
[114] Howe, *supra* note 107.
[115] Melton, *supra* note 109 at 382.
[116] *Ibid,* 384, 386, 455.

to validate colonialism and imperialism experience of the Third World States considering that historical accounts do not exist in isolation.

Application of Historical Research Methodology to Thesis

The use of historical research methodology serves to further legitimize the use of the comparative approach in analysing and critiquing the historical similarities and difference of the trade-distortion practices and unilateralism experience of the Global South and Global North States competitive exports. It will be used to compare the trajectory of the implementation conundrum of each Global South States' legal institutions by looking at the socio-political and economic factors which inform their participation and implementation of the WTO's rule on Anti-dumping mechanism. It will also involve a comparative historical analysis of the variations in the Anti-dumping practice in the Global South and the Global North within the context of WTO rules trade-distorted practice via examining the Brazil, India and South Africa as against that of Canada. The purpose of this examination is to draw lessons on Anti-dumping Mechanism law-making and institutional framework for Nigeria.

The use of the historical research methodology is also grounded in the theoretical lens – TWAIL - deployed to interrogate the research issues. It provides an insight into the past events that informed the adoption of neo-liberalism by majority of the Global South countries in the 1980s, and its link to the current economic inequality entrenched within the workings of the multilateral trading system. The methodology will also help trace the marginalisation of the Global South which has pushed the domestic industries in countries like Nigeria into premature industrialisation, and its impact on their participation in the international institutionalised trading system. Thus, considering that most industrialize their economy prematurely, the historical context of the Anti-dumping mechanism in the WTO system and at the national level will aid understanding of the Global South struggles with their colonial and post-colonial rulers. The essence of the approach is to ascertain how best the WTO rule and practice can be best utilise to consider the interest of the developing world.[117] Therefore, the use of the

[117] See generally Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective" (2005) 43 Osgoode Hall L J 171, 177 [Okafor, "Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective"]; Antonius Rickson Hippolyte, "Correcting TWAIL's Blind Spots: A Plea for a Pragmatic Approach to International Economic Governance" (2016) 18:1 Intl Community L Rev 34.

methodology is crucial to my research in discovering the implication of the advanced nation practice in the multilateral trading system and the WTO framework on Nigerian economy.

1.4.3 Doctrinal Methodology

The third methodology that will be deployed for this research is the doctrinal research method. The methodology is the most accepted, and unique to legal research. Doctrinal methodology focuses on analysing, describing, interpreting, critiquing and explaining laws, legislations, regulations, legal doctrines, principle, rules and case law. It is an exercise that provides for a systematic exposition of the rules governing a specific legal category, analyse the connection between rules, explain ambiguity in laws, and predict the future development of legal rules.[118] An important feature of this method is that it involves a vigorous analysis and creative synthesis of different legislations and case laws that clarify difficulty issues in legal system.[119] Thus, it is concerned with developing legal doctrines through the analysis of legal rules and legal system as the 'main supplier of concepts, categories and criteria'.[120] It is less concerned about the effect of law in the society.[121] Doctrinal legal research is underpinned by legal positivism. It focuses on 'privileged voices' that views legal rules as self-sufficient, self-correct, self-reflect and discrete concept.[122] However, this methodology is employed in this research to demonstrate the inefficiency of law as a concept and why drawing on socio-political perspectives regarding the Global South practice is important for designing an effective Anti-dumping law-making regime for Nigeria.

Doctrinal research is crucial to legal research as it aids proper understanding of the legal rules. The understanding helps researchers to raise thought-provoking questions that enhance the

[118] Terry Hutchinson, *Researching and Writing in Law*, 3rd ed, (Reuters Thomson, 2010) 7.
[119] Council of Australian Law Deans (CALD), "Statement on the Nature of Legal Research", *CALD* (May and October 2005), online: < https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf> (accessed 12 February 2024) [herein refers to as "CALD Statement"]
[120] Pauline Westerman, "Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law" in Van Hoecke, ed, *Methodologies of Legal Research, Which Kind of Method for What Kind of Discipline?*, (Hart Publishing, 2011) 87, 91; Paul Chynoweth, "Legal Research", in A Knight & L Ruddock, eds, *Advance Research Methods in the Built Environment*, (Oxford: Wiley-Blackwell, 2008) 28, 29.
[121] Hutchinson, supra note 108, 8; Hazel Genn et al, *Law in the Real World: Improving Our Understanding of How Law Works*, (London: The Nuffield Foundations, 2006), online: < https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/law_in_the_real_world_-_improving_our_understanding_of_how_law_works.pdf> accessed 12 February 2024).
[122] Hutchison, *supra* note 118, 36; Terry Hutchinson & Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research", (2012) 17:1 Deakin L Rev 83, 116.

quality of a research.[123] To effectively employ this methodology, Hutchinson & Ducan noted that there is need to first locate the source of the legal rules so as to reveal the statement of law relevant to the issue being examined. The source is usually that of a primary source, but the analysis can also be aided by secondary sources such as literature reviews.[124] Afterward, the researcher is required to analyse and synthesize the various identified sources within the context of the matter being investigated.[125] The synthesis process usually entails a number of techniques that vary from analytical, conceptual, evaluative, descriptive or explorative among others depending on the reasoning methods adopted.[126] These intellectual and practical skills are essential for conducting a sound doctrinal legal research.

Nonetheless, the doctrinal methodology is limited in nature as its analytical tool is restricted to legal norms – legislation or case laws – in isolation of the social system. As such, it is difficult to rely solely on this methodology to resolve research problem raised in this research, in particular, interdisciplinary research that raised questions on the impact of law within the society. [127] With respect to this research project, the questions raised are interdisciplinary in nature. The use of the methodology will generate research gaps in studies considering that the research seeks to explore the impact of advance nation's economic law on the industrial capacity of developing countries within the context of the multilateral trading system. Thus, the doctrinal research methodology will be employed to supplement other non-doctrinal approach that are accommodating of interdisciplinary claim raised in this research.

Application of Doctrinal Methodology to Thesis

The use of the doctrinal methodology reliance will be placed on wide range of primary and secondary sources. The major primary sources include the text of WTO Anti-Dumping Agreement, GATT 1994, AfCFTA Protocol on Trade in Goods, Treaty of ECOWAS, Nigeria Trade Policies on dumped import, Brazilian Anti-Dumping Regulations, India Anti-Dumping Regulations, South Africa Anti-Dumping Regulations and Canada's Anti-Dumping Laws and

[123] Rob van Gestel & Hans Micklitz, "Revitalizing Doctrinal Legal Research in Europe: What About Methodology?", (2011) European University Institute Working Papers Law 2011/05, 28, online: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=182423> (accessed 12 February 2024).
[124] Hutchinson & Ducan, *supra* note 117, 113
[125] *Ibid*, 110-111; Maggie Walter, ed, *Social Research Methods*, (Oxford University Press, 2nded, 2010) 485
[126] *Ibid*. See Chynoweth, *supra* note 114, 32; John H Farrar, *Legal Reasoning*, (Thomson Reuters, 2010) 92; CALD Statement, *supra* note 114, 4.
[127] See Vijay Gawas, "Doctrinal Legal Research Method: A Guiding Principle in Reforming the Law and Legal System Towards the Research Development", (2017) 3:5 Intl J L 128, 129; Hutchison & Ducan, *supra* note 115; M Pradeep, "Legal Research-Descriptive Analysis on Doctrinal Methodology", (2019) 4:2 Intl J Management, Tech & Soc Sci 2581-6012.

Regulations, case laws and other official sources on international treaties among others. Also, the research will benefit from secondary sources such as government, industry and non-profit or non-governmental organisations (NGOs) documents including working papers and policy reports on dumping activities and Anti-dumping mechanism in WTO, Nigeria, Brazil, India, South Africa and Canada. In addition, textbooks, articles, journals, unpublished thesis, newspapers, and web sources on the structural imbalance in the international trading system and unfair trade practice, and Anti-dumping mechanism-related issues are also useful source of data for this research project. The primary and secondary sources are accessible from libraries – Sir James Library, Killam Library and Queen's University library) and online through Hein Online, Westlaw etc.

To carry out the above research exercise, I will assess and analyse all the historical and current legal norms, policies, and administrative regulations of the rule-based multilateral trading system, Global South countries (Brazil, India, South Africa), Nigeria and Canada. Also, the interpretation of those legal norms and events by academic scholars will be assessed to promote understanding of the issues raised and draw lessons on Anti-dumping rule-making for Nigeria. In essence, the use of the doctrinal methodology in this research gives legitimacy to other research methodology and theoretical perspective (that is comparative and historical methodology, as well as the TWAIL lens) employed to interrogate the problems identified in this research project.

1.4.4 Third World Approach to International Law (TWAIL)

International law from a Marxist perspective is argued to be incapable of furthering a 'just world order' even if effective as law because of the power struggle among industrialist states for domination over the rest of the world to be able to secure resources for capital.[128] Nonetheless, TWAIL scholars are of the view that regardless of the criticism against

[128] See China Mieville, *Between Equal Rights: A Marxist Theory of International Law*, (Haymarket Books, 2006) 3, 17, 25-27, 293; China Mieville, "The Commodity-Form Theory of International Law: An introduction", (2004) 17 Leiden J Intl L 271, 291-293. According to Umut Ozsu, Mieville substantiated the thesis of international law being incapable of serving as an agent for emancipatory action with "wide-ranging discussion of international discussion of international legal theory's engagement with questions of rhetorical indeterminacy, an expository study of Evgeny Pashukanis' commodity-form theory of law, and a series of politico-economic investigations into the colonialist and imperialist underpinnings of international law. Driving his analysis is a desire to destabilize the assumption that international law must inform any attempt to lay the groundwork for the construction of a more "just" and "pacific" world." See Umut Ozsu, "Reviewed Work: *Between Equal Rights: A Marxist Theory of International Law by China Mieville*", (2008) 72:3 Sci & Society 371-373. See also Sara Seck, "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?', (2008) 46 Osgoode Hall L J 565, 590-597 where she argued the contestable state of Mieville's theory on international law.

international law as a tool of domination, a just world cannot be devoid of international law and as such seeks to re-examine international law from a Marxist perspective as a useful tool for identifying a group of method, practice, and understanding that can be applied to empower the marginalised class of nations in the international community.[129] TWAIL scholar B S Chimni duly noted that contemporary international law has the potential of offering a protective shield, although frail, to the economically disadvantaged States in the international system.[130] Thus, the TWAIL scholars acknowledge the emancipatory potential of international law by seeking to make the Third World States and its people the paramount decision maker when international legal rules are being identified and interpreted.[131] The approach perceives Third worlders as having no real voice in international law and proposes new method and understanding for actualizing and enhancing their voices in the international system. In light of the research questions raised in this project, insight will be drawn from the TWAIL perspective as it is instructive for telling the story of international law as it offers an academical, ethical, cultural and political outlook in the history, structure and processes of the multilateral trading system from the experience of the Third World.

As a distinct form of critical legal theory,[132] TWAIL engages critical thinking to analyse international law through the lens of Third World experience.[133] It is a framework for analysing international law and its institutions, and describing the behaviour of a related set of social phenomena.[134] It thereby gives an otherwise untold alternative account of international as contemporary international law remains wedded to Western ideals and practice.[135] In providing an alternative account of international Law, TWAIL scholarship focuses on the history of

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[129] See Obiora Chinedu Okafor, "Marxian Embraces (and De-couplings) in Updendra Baxi's Human Rights Scholarship: A Case Study", in Susan Marks, ed, *International Law on the left: Re-Examining Marxist Legacies*, (Cambridge: Cambridge Press University, 2008) [Okafor, "Marxist"]; B S Chimni, "An Outline of a Marxist Course on Public International Law", (2004) 17 Leiden J Intl L 1 [Chimni – Marxist (2004)].

[130] B S Chimni, "Third World Approaches to International Law: A Manifesto", in A Anghie et al, eds, *The Third World and International Order: Law, Politics and Globalization*, (Leiden: Martinus Nijhoff, 2003) [Chimni, "TWAIL Manifesto"].

[131] Sara Seck, "Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations", (2011) 3:1 Trade L & Dev 164, 182; Anne-Marie Slaughter & Steven R Ratner, "The Method is the Message" (2004) 36 Stud Transnat'l Legal Pol'y 239, 243, 248-450.

[132] On critical legal theory see generally Alan Hunt, "The Theory of Critical Legal Studies", (1986) 6 Oxford J Legal Stud 1; Nigel Purvis, "Critical Legal Studies in Public International Law", (1991) 32:1 Harv Intl L J 81; Roberto Mangabeira Unger, "The Critical Legal Studies Movement", (1983) 96:3 Harv L Rev 561.

[133] Okafor, "Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective", *supra* note 112, 191.

[134] See Obiora Chinedu Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology or Both?", (2008) 10 Intl Community L Rev 371 [Okafor, "Critical TWAIL"]

[135] James Thuo Gathii, "Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory, Symposium Issue Forward", (2000) 4:2 Harv Intl L J 263, 265 Gathii, "Alternative and Critical"]; Okafor, "Critical TWAIL", *supra* note 134 at 377.

colonialism, capitalism, imperialism foundations of international law to promote understanding of the genesis and continuity of the contemporary forms of domination and oppression.[136] It encourage examination of the historical foundations of international law as a means for understanding its present form.[137] This is because it is only by examining past events that one can truly understand the contemporary events in the international discipline, and in turn, reevaluate the future development of international law to be responsive to Third World concerns.[138] Hence, TWAIL scholarship has been described as "a broad dialectic (or large umbrella) of opposition to the generally unequal, unfair, and unjust character of an international legal regime that all too often (but not always) helps subject the Third World to domination, subordination, and serious disadvantage" in the workings of the international system.[139] In essence, TWAIL scholarship allows a researcher to effectively incorporate the experiences of the Global South into international legal history and analysis. It helps amplify the voice of the marginalised in international system.

In understanding how the scholarship amplifies the voice of the suppressed in the international system, it is crucial to understand the word "Third World" considering how problematic the categorization has become in the multilateral trading system. The term has been used to refer to countries in Africa, Asia and Latin America that are economically and politically behind the "West", "North" or "developed countries". According to Julius Nyere, Third World States are the resource-endowed States that have no say in the arrangement of their economic affairs and are powerless in the international economic community. They are the recipients of international rules. The scholar ascribed the Third World scheme to trade union whose unity serves as a compensating strength against the power imbalance of the international community.[140] An outstanding feature of the Third World State is that majority of the States are politically independent nations after decades of colonial rule or subjugation. The critics of the term "Third Word" argued that it is semantically meaningless as it represents the old economic order of the

[136] Olabisi Akinkugbe & Adebayo Majekolagbe, "International Investment Law Climate Justice: The Search 'for a Just Green Investment Order" (2023) 46:2 Fordham Intl L J 169,175; James Thou Gathii, "TWAIL: A brief History of its Origins, its Decentralization, Network, and a Tentative Bibliography" (2011) 3:1 Trade L & Dev 26, 30 [Gathii, "TWAIL: A Brief History of Its Origins"]; Okafor, "Newness", *supra* note 105, 171-176.
[137] Gathii, "TWAIL: A Brief History of Its Origins", *supra* note 136.
[138] Makau Mutua, "What is TWAIL?", (2000) 94 Am Soc'y Intl L Proc 31, 31-32.
[139] *Ibid*; Okafor, "Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective", *supra* note 112, 176; Karin Mickelson, "Taking Stock of TWAIL Histories", (2008) 10 Intl Community L Rev 353.
[140] Julius Nyerere, "South-South Option" in Altaf Gauhar, ed, *The Third World Strategy: Economic and Political Cohesion in the South* (New York: Praeger, 1983). See also Karin Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1998) 16 Wis Intl L J 353, 356-357

colonial and imperial era which fails to reflect the current global realities of power in terms of their industrialization level. It was proposed that the term be discarded due to the potential of perverting the struggle and survival of the poor amongst them.[141] By viewing the classification from the perspective of gross domestic product (GDP), levels of industrialisation, volume of trade etcetera, the critics neglected and disregard the shared values and self-determination rights of the "Third World". Departing from this limited construction, this thesis analyses the "Third World" (also known as Global South) as a contingent category that insists on history and continuity as advanced by TWAIL scholarship. Believing that "Third World" goes beyond geographical boundaries and economic indicators, TWAIL scholarship define the term as symbol of people with shared historical experiences of colonialism and similar concerns of marginalisation or oppression.[142] Hence, TWAIL scholars like Balakrishnan Rajagopal,[143] Dianne Otto,[144] Obiora Okafor[145] B S Chimni,[146] Karin Mickelson[147] and others view "Third World" as a category that helps reveal the systematic hierarchy of the international community that have spilled over from the historical experience of colonialism and imperialism to the present time. Perceiving "Third World" in this manner allows this author to address the marginalisation and struggles of the Global South that abounds the history and practice of the world trading system. In the context of this research, Third World includes states considered as "Global South" or "developing" regardless of the disparities in their level of industrialization.

In amplifying the voice of the marginalised TWAIL scholarship describes how international law has historically marginalised Third World States and people through the "civilised mission" framework. According to Antony Anghie and B S Chimni, the framework provided the moral basis by which the West economically exploit the Third World. It was also used to

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[141] For a detail view of the criticism see Balakrishnan Rajagopal, "Locating the Third World in Cultural Geography", (1998-99) Third World Legal Studies 1 [Rajagopal, "Locating Third World"]. See generally Arif Dirlik, "Spectres of the Third World: Global Modernity and the End of the Three Worlds" (2004) 25:1 Third World Q 131-148, online: <https://doi.org/10.1080/0143659042000185372> (accessed 9 November 2023);; Vicky Randall, "Using and Abusing the Concepts of the Third World: Geopolitics and the Comparative Political Study of Development and Under-development" (2004) 25:1 Third World Q 41-53, online: < https://www.jstor.org/stable/3993776> (accessed 10 November 2023).

[142] See Rajagopal, "Locating Third World", *supra* note 141, 19-20

[143] *Ibid*.

[144] Dianne Otto, "Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference", (1996) 5:3 Soc & Leg Stud 337-364.

[145] Okafor, "Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective", *supra* note 110.

[146] Chimni, "TWAIL Manifesto", *supra* note 130.

[147] Karin Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse", *supra* note 139.

justify their interference in the affairs of the Third World.[148] It is also reflective of the contemporary practice of the advance nations. The "civilised mission" has metamorphosed into "superiority" concept which is used by the advanced nations to politically intervene in the trading activities of the Global South in the WTO system.[149] To ensure the voice of the oppressed are heard, the scholarship proposes that investigations should be carried out on interventions of concerted social movements.[150] Rajagopal investigation of these intervention reveals that international norms are increasingly changing due to the outcome of the interaction between states, international authorities and social movements amongst others.[151] Therefore, this research project will also undertake the investigation to see if such interaction shaped the multilateral trading system to produce positive norms that take accounts of the Global South trade interest and concerns.

TWAIL scholarship is undertaken in variety of ways that twist, blend and recycle the TWAIL and non-TWAIL ideology to present new ways of approaching international law through the experience of the Third World.[152] This fluidity and diversity feature of the scholarship has been criticised by commentators that aver that it needs to be more coherent so as not to breed confusion concerning its nature.[153] Responding the criticism, Titilayo Adebola noted that the fluid feature of the scholarship is a positive attribute that decentralised the approach and encourages new TWAIL scholars to introduce novel analytical tools needed to address the Third World concerns.[154] In essence, the scholarship accommodates all international law scholarship that subscribe to the shared commitment of the approach to address the underdevelopment concerns of the Third World.

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[148] Anthony Anghie & B S Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflict", (2004) 36 Stud Transnatl Leg Pol'y 185, 186.
[149] See Alessandrini, *supra* note 7.
[150] See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance*, (Cambridge University Press, 2005) [Rajagopal, *international Law from Below*]; Okafor, "Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective", *supra* note 110, 174-175; B S Chimni, "Capitalism, Imperialism, and International Law in the Twenty-First Century", (2012) 14 Oregon Rev Intl L 17, 19 [Chimni, "Capitalism, Imperialism and International Law"]
[151] Rajagopal, "Locating Third World", *supra* note 141, 397.
[152] Luis Eslava, "Istanbul Vignettes: Observing the Everyday Operation of International Law" (2014) 2 London Rev Intl L 3.
[153] Gathii, "TWAIL: A Brief History of Its Origins", *supra* note 135, 37; David Fidler, 'Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law' (2003) 2:1 Chinese J Intl L 29, 73.
[154] Titilayo Adebola, *The Regime Complex for Plant Variety Protection: Revisiting TRIPS Implementation in Nigeria*, (Dissertation for PH. D: University of Warwick, 2017) 31 [Unpublished Thesis].

Application of TWAIL to Thesis

The TWAIL scholarship provides the theoretical background for addressing the multifarious interdisciplinary issues relating to Anti-dumping practice in the Global South. It will be challenging the historical events that contributed to the current structural imbalances in the multilateral trading system. It will place emphasises on the interconnection of dumping activities, colonial continuity and other political, social and economic factors. The historical analysis will shed light on the origins of Anti-dumping mechanism, international North-South contestation about gain from trade liberalisation, trade policies and industrialisation, as well as the political and economic dynamics in Anti-dumping mechanism law-making at the national level. It will also be employed to critique injurious dumped-import and Anti-dumping mechanism from a third world perspective.

TWAIL provides the critical basis engaging the Third World experience (which this research project seeks to do) to transform and make international law more responsive to their cries. It will be used to reflect the interest and aspirations of the suppressed domestic industries - many of which have been shut-down in Nigeria, in particular, the textile, steel and automobile sectors. In doing this, this research will investigate several terrains, including substantial discussion of the place and role of international institutions, international authorities, state actors and non-state-actors. It will be used to query the inequitable impact of the trade relationship between Nigeria and her trade partners through reliance on the Anti-dumping mechanism overseen by the WTO. Furthermore, attention will be drawn to how implementation of international law at the national level, in particular that of Global South, can quietly expand international law interpretation and thereby contribute to reforms of the multilateral trading rules. The research will look to Brazil, India, South Africa and Canada (that have successfully carried such intervention against de-industrialization through Anti-dumping mechanism at national level) as a guide for reforming Anti-dumping practice and implementation in Nigeria, as well as drafting a comprehensive Anti-dumping regulation. Ultimately, TWAIL provide the theoretical lens for understanding the historical context for addressing the current state of income inequalities in Global South.

In summary, this research deploys the methodological approach that not only analytical, critical, historical, empirical and comparative in nature, but they are also evaluative, descriptive, and reformative in their use as they allow the author draw on legal texts, historical event, power struggle, and other political and economic event between the developed and

developing nations in the multilateral trading system. Thus, this research situates the study of trade policies on Anti-dumping as complicit in legal, political, and economic factors and it analyses the impact of the power dynamic within the multilateral trading system.

1.5 Scope, Limitation and Structure of the Research

1.5.1 Scope and Limitation of Research

Although the topical issues to be covered in this research are broad, its scope is limited in nature. For instance, consideration will be given to the economic and socio-political impact of unfair trade activities as foreign state practices instead of individual organizational practices. This limit is based on the fact that the multilateral trade system is solely concerned with trade practices of WTO Members that are either sovereign states or recognised separate customs territories.[155] Hence, this is only ground upon which trade issues within the context of the international trading system can be analysed and critiqued. In doing this, I limit myself to the use of the multilateral rules on Anti-dumping to examine the trade approach of WTO Members and their impact on Global South industrialization. The limit also streamlines the target audiences for the research to international trade institutions, state actors, indigenous industries, legislatures, trade policy makers, Nigerian institute of advanced legal studies (NIALS) and international trade lawyers amongst others.

Also, the questions raised are empirical in nature – as the research draws on empirical claims of other works - but actual empirical research was not conducted due to time and funds constraint. In addition, Nigeria lacks an electronic directory for most of the laws, regulations, trade policies, bills and parliamentary sessions that the research draws on to examine the issues raised. There are also limited literature on the topic of Anti-dumping practice in Nigeria. Hence, I had to rely on people physically in Nigeria to scan me hardcopies of the laws and other necessary regulations that are electronically not available.

1.5.2 Structure of Chapters

Chapter 2 highlights the historical and contemporary approach of the WTO policy on unfair trade practices and Anti-dumping measures. It starts with analysing the various negotiation rounds of the multilateral trading system, the colonial and imperial dynamic of the successive rounds, the negotiation tactics and influence of the Global North, and the limited participation

[155] See Bossche & Zdouc, *supra* note 6 at Chapters 1 and 2

of Global South nations. The Chapter also contextualise dumping and Anti-dumping measures under the multilateral trading system. Lastly, it will propose a rethink of the WTO approach from a TWAIL perspective.

Chapter 3 explores the trade remedy practice in Nigeria. In doing so, the Chapter analyse the trade approach and factors that influence Nigeria's industrial policy from a historical and contemporary perspective. It highlights the international and regional obligations of the country on trade liberalization and trade remedy, as well as the state actors responsible for its implementation. It also investigates the existing legal and institutional framework regulating and preventing dumping and smuggling activities. Furthermore, the Chapter examines winner-loser dynamic of the trade relationship between Nigeria and WTO Industrialised Members, dumped import emanating from the trade interactions and its impacts on the specific domestic industries – Textile, Steel and Automobile industries - and the livelihood of Nigerians. The Chapter also reveals the Anti-dumping campaign so far conducted in Nigeria against the injurious impact of market-distorted practice. Finally, it briefly assessed the Anti-dumping measures contained in regional trade treaties such as ECOWAS and AfCFTA -which Nigeria is a member and a signatory to.

Chapter 4 focus on the trade remedy practice of other Global South countries such as Brazil, India and South Africa to see how they have been able to translate the common Global South position dumped import into domestic legislation and successful national implementation regime that has preserved their local markets and positioned them as emerging economies within the WTO. Brazil, India and South Africa practice exemplify the TWAIL approach of implementing international laws in ways that address the needs of marginalised countries. Also, the Chapter unpacks the Anti-dumping practice of the Global North in current time vis-à-vis the Canadian Anti-Dumping to demonstrate the application and implementation differences that exist between the Global North and Global South. It points out the uniqueness of the Anti-dumping measures as a tool for revitalizing de-industrialised sectors, and the resistance of the third world against trade practice that are prejudicial to their interest. The essence of this Chapter is to identify the lessons that can be drawn from these countries to provide a rich insight on developing rule-making and implementation on Anti-dumping mechanism for Nigeria.

Chapter 5 summarise the trends in this thesis by synthesizing the main findings in Chapters 1 to 4. It also sets out the recommendations and suggestions for further research.

CHAPTER 2

THE MULTILATERAL TRADING SYSTEM POLICY ON ANTI-DUMPING

2.1 Introduction

Although the World Trade Organisation (WTO) and its predecessor - the General Agreement on Tariffs and Trade (GATT) – have been argued to play an important role in helping Member States maintain level playing ground in international trade,[1] the systematic disproportional engagement of its members proved otherwise.[2] In fact, the world continues to witness trade problems in light of the rising unfair trade practices, widespread global distrust, economic nationalism, and the Doha negotiation deadlock amongst others, all of which reinforce and intensify obvious gaps that exist within the multilateral trading system.[3] Particularly, concerns about overcapacity and dumping within the multilateral trading community and what it means for the industrialisation and competitiveness of poor countries have increasingly featured as problems of international trade.[4] Hence, the importance and effectiveness of the WTO as an

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[1] See generally Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 5th ed (Cambridge, UK: Cambridge University Press, 2022); Edalio Maldonado, "Managing Free Trade under the WTO in an Era of Rising National Tensions" (2024) ODUMNC 2024 Issue Brief, online: < https://ww1.odu.edu/content/dam/odu/col-dept/al/docs/2nd-wto.pdf> (accessed 20 April 2024); Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission*, (Oxford: Hart, 2010); WTO, "World Trade Report 2023: Re-globalization for a Secure, Inclusive and Sustainable Future", (2023) WTO Doc WT/WTR/23, online: < https://www.wto.org/english/res_e/booksp_e/wtr23_e/wtr23_e.pdf> (accessed 21 January 2024) [WTO Report 2023]; WTO, *World Trade Report 2022: Climate Change and International Trade*, (2022) WTO Doc WT/WTR/22, online: <www.wto.org/english/res_e/booksp_e/wtr22_e/wtr22_e.pdf> (accessed 15 December 2023) [World Trade Report 2022]; Madeleine et al, eds, *The Future of Multilateralism Global Cooperation and International Organization,* (Maryland: Rowman & Littlefield, 2021); EH Preeg, *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System,* (Chicago, University of Chicago Press, 1995).

[2] See generally Alessandrini, *supra* note 1; Nam-Ake Lekfuangfu, "Rethinking the WTO Anti-Dumping Agreement from a Fairness Perspective" (2009) 4:2 Cambridge Student L Rev 300; Antony Anghie, "Rethinking International Law: A TWAIL Retrospective" (2023) 34:1 Eur J Intl L 7; Maldonado, *supra* note 1; Preeg, *supra* note 1; Bossche & Zdouc, *supra* note 1 at Chapter 1

[3] See generally Lekfuangfu, *supra* note 2 at 300; Maldonado, *supra* note 1; Shekhar Aiyar et al, "Geoeconomic Fragmentation and the Future of Multilateralism", (2023) IMF Staff Discussion No 2023/001; Shawn Donnan & Enda Curran, "The Global Economy Enters An Era of Upheaval", *Bloomberg News* (18 September 2024), online: < https://www.bloomberg.com/graphics/2023-geopolitical-investments-economic-shift/> (accessed 26 February 2024); Carlos Goes & Eddy Bekkers, " The Impact of Geopolitical Conflicts on Trade, Growth, and Innovation", (2022) Economic Research and Statistics Division of World Trade Organization, Working Papers ERSD-2022-9, online: <https://doi.org/10.30875/25189808-2022-9> (accessed 7 April 2024).

[4] Maldonado, *supra* note 1; Camille Boullenois et al, "Overcapacity at the Gate" *Rhodium Group* (26 March 2024), online: < https://rhg.com/research/overcapacity-at-the-gate/> (accessed 25 April 2024); Marius Zaharia et al, "What Overcapacity", *Reuters* (11 April 2024), online: < https://www.reuters.com/graphics/CHINA-USA/TRADE/zdvxneaaxvx/?utm_source=Sailthru&utm_medium=Newsletter&utm_campaign=Weekend-Briefing&utm_term=041324&user_email=75ccc3ecf59b70297998356091488c5f65199b837e7a94ee4df121edc330831b> (accessed 25 April 2024); and Thang Nguyen-Quoc, "The De-Globalization Myth: How Asia's Supply Chains are Changing", (2023) Oxford Economic Consulting Report, online:

engine of world trade growth has been called into question in view of these contemporary events.[5] To understand these trade issues and their impacts on the multilateral trade system's promise of economic globalisation and world trade unity, in particular, industrialisation and reciprocal market access for poor Global South States, it is necessary to undertake a historical and contemporary analysis of the WTO framework within the context of its Anti-dumping rules. The historical and contemporary phenomena will help make sense of the TWAIL perspective adopted in this thesis, which aims at revealing how the developed countries' practices shaped the ideology of the multilateral trading system to the detriment of the Global South States.

This Chapter focus on the multilateral trade system simply because the WTO and its predecessors, as opposed to the regional trading systems such as the African Continental Free Trade Area (AfCFTA), brought into existence the trade liberalization scheme, and were instrumental in ensuring countries across the globe embraced the scheme to advance foreign trade[6] - achieved through two non-discrimination principles; the most favoured nation ('MFN) and the national treatment obligation ('NT').[7] In recognition of the potential harm the pursuit of economic globalization may cause to domestic industries, the multilateral body also created trade remedies to ensure a predictable level playing field amongst Member States.[8] But to what extent has the multilateral trade system achieved this goal via those trade remedies? In answering the question, this Chapter will examine the sufficiency of the WTO's Anti-dumping framework, as trade remedy, from a historical and contemporary perspective because it is only

<https://research.hinrichfoundation.com/hubfs/White%20Paper%20PDFs/STI%202023%20Deep%20Dive%20-%20How%20Asia%20supply%20chains%20are%20changing%20-%20Hinrich%20Foundation%20-%20January%202024.pdf?__hstc=251652889.8902d32841fcb87e2d10cf372dc5aa9d.1713875750655.1713875750655.1713880624298.2&__hssc=251652889.2.1713880624298&__hsfp=48619184> (accessed 24 April 2024).

[5] See generally Bernard Hoekman & Petros Mavrodis, "WTO Reform: Back to the Past to Build for the Future", (2021) 12:3 Global Polcy; Alessandrini, *supra* note 1.

[6] See generally H Jackson, *The World Trading System,* (Cambridge: MIT Press, 1997); Bossche & Zdouc, *supra* note 1; LuAiyar et al, *supra* note 2; Alessandrini, *supra* note 1; Ajakaiye, Olu & Afeikhena Jerome, "Economic Development: The experience of Sub-Saharan Africa" in Bruce Currie-Alder et al, eds, *International Development: Idea, Experience & Prospects* (Oxford, United Kingdom: OUP, 2014); D, Froning. 'The Benefits of Free Trade: A Guide For Policymakers' (2000) Centre for International Trade and Economics No. 1391; Preeg, *supra* note 1.

[7] The most favoured nation (MFN) and national treatment obligation (NTO) principles are the cornerstone of the WTO system. The MFN prohibits Member States from discriminating "between like products originating in, or destined for different countries", whilst NTO prohibit Member States from discriminating between imported and locally produced goods or services with reference to the application of internal taxes or government regulations. See *Canada – Autos,* Appellate Body Report; Bossche & Zdouc, *supra* note 1 at Chapters 4 & 5; W Mayurama, "Preferential Trade Arrangements and the Erosion of the WTO's MFN Principle", (2010) 46:2 Stanford J Int'l L 177; Lekfuangfu, *supra* note 2 at 303-309.

[8] Lekfuangfu, *supra* note 2 at 300-301; Bossche & Zdouc, *supra* note 1 at Chapter 11; Philippe De Baere et al, *The WTO Anti-Dumping Agreement: A Detailed Commentary,* (Cambridge: Cambridge University Press, 2021); Owais Hasan Khan, *A Critique of Anti-Dumping Laws*, (Newcastle: Cambridge Scholars Publishing, 2018).

by understanding those phenomena that the current struggle of the Global South States – in particular, Nigeria - regarding dumping activities and deindustrialisation will be well appreciated. It will also shed light into the context underlying the asymmetrical participation between the global north and Global South countries in the multilateral trading system and how it informed the global tension and renewed industrial policy in today's world.

Against this background, this Chapter is subdivided into five sections. The first subsection provides a historical and contemporary backdrop of the WTO Anti-dumping framework to show how the ideas of the advanced countries becomes dominant in the multilateral trading system to the detriment of the developing countries. It also illustrates the marginalised position of the developing countries and the disproportionate participation in multilateral negotiations. Section 2.3 explore dumped import as a concept of unfair trade practice. It also examines the contextuality and motive driving the regulation of dumping activities under the multilateral trading system. This section is key toward understanding the Anti-dumping mechanism for determining dumped import, investigating Anti-dumping claim and imposing Anti-dumping measures alongside the dispute settlement process under the WTO rules on Anti-dumping found in section 2.4. Section 2.5 examines the challenges within the WTO's rule on Anti-dumping mechanism and consider equality approach by which WTO can address those challenges, in order to make Anti-dumping mechanism more effective and operational to the interest of developing countries. Section 2.6 conclude the Chapter.

2.2 Historical Context of Anti-Dumping Regulation in the Multilateral Trade System

The origin of global Anti-dumping administration does not begin with the multilateral trade negotiations but dates back to the industrialization era when the traditional Western powers – Australia, Canada, New Zealand and the United States ('US') - dominated global trade, and enacted Anti-dumping legislations to combat unfair trade practices of powerful firm during that era.[9] Brussel Sugar Convention of 1902 was the earliest attempt at combating the injurious impact of dumped import,[10] whilst Canada enacted the first national Anti-dumping legislation in 1904.[11] Shortly afterward, the other Western States with the addition of South Africa – a

[9] See Aiyar et al, *supra* note 3; De Baere et al, *supra* note 8 at 1; Khan, *supra* note 8 at 19; Jacob Viner, *Dumping:A Problem in International Trade* (New York: Kelley, 1923 (1966)) at 37–44, cited in J H Jackson, *The World Trading System* (Cambridge: MIT Press, 1997) 255.

[10] De Baere et al, *supra* note 8 at 1; UK Treaty Series 007/1903: Cd.1535, concluded between Great Britain, Germany, Austria-Hungary, Belgium, Spain, France, Italy, the Netherlands and Sweden

[11] J H Jackson et al, *Legal Problems of International Economic Relations*, (St. Paul: West Group, 2004) 694; De Baere et al, *supra* note 8 at 1; Khan, *supra* note 8 at 19-20.

colony of the United Kingdom (UK) during this period - enacted their respective domestic Anti-dumping legislation.[12] Although there were discussions - such as the discussion at both the League of Nations and the World Economic Conference in 1933[13] - at the international level on dumping activities, the international community lacked concrete rules on Anti-dumping until the creation of the General Agreement on Tariff and Trade (GATT) system in 1947.[14] Notwithstanding, the modern era of multilateral rule on Anti-dumping mechanism can be traced to the few multilateral trading negotiations that informed the formation the GATT system.

Hence, the review period has been divided into three phases of – (i) Pre-GATT 1947 Era; (ii) GATT 1947 and Anti-Dumping Code Era; (iii) Uruguay Round and GATT 1994 Period; (iv) Doha Round and Contemporary Period - for ease of account.

2.2.1 Pre-GATT Era

The initiative that laid the foundation for the modern multilateral rules on Anti-dumping can be traced to the US proposal - made shortly after the end of World War II (WWII) - to form the International Trade Organization (ITO).[15] The proposal was part of the US attempt to facilitate economic globalization through free trade during the 1946 post-war period. Whereas the US had emerged the dominant economic power in the immediate post-WWII era, the UK and the rest of Europe suffered heavily from the cold war. As such, the European economies during this era placed emphasise on equity in the negotiation of international trade.[16] Moreso, many of the developing economies at the time were still under colonial or gunboat rule.[17] Hence, acting as the hegemon, the US sought to promote and spread American values on globalization, trade liberalization and multilateralism via imperialism.[18] To facilitate post-war

[12] New Zealand, Australia, South Africa, United State of America (USA) and the United Kingdom (UK) all enacted their domestic Anti-dumping legislation in 1905, 1906, 1914, 1916 and 1921 respectively. See T P Stewart et al, *The GATT Uruguay Round: A Negotiating History (1986–1992)*, (Deventer: Kluwer, 1993) 1390–1404.
[13] De Baere et al, *supra* note 8 at 1. See also Stewart et al, *supra* note 12 at 1404; Jackson et al, *supra* note 11 at 694.
[14] Khan, *supra* note 8 at 20-21; De Baere et al, *supra* note 8 at 1.
[15] *Ibid*; Lekfuangfu, *supra* note 2 at 303-304
[16] *Ibid*.
[17] See generally Antony Anghie, "Francisco de Victoria and the Colonial Origins of international Law", (1996) 5 Soc & Legal Stud 321 [Anghie, "Colonial origin of International Law"]; Alessandrini, *supra* note 1 at Chapter 1; M Sornarajah, *The International Law on Foreign Investments*, 2nd edn, (Cambridge: Cambridge University Press, 2004).
[18] See generally, Alessandrini, *supra* note 1 at Chapters 1-3; and Morgane B De Clercq, "The Multilateral Trading System in a Changing World: The WTO and Current Threats Challenging Its Survival" in Madeleine Hosli et al,

economic recovery and world unity, the US called for the establishment of an institution that would aid international trade amongst states. During the negotiation of the ITO Charter, the US in its draft included provisions on Anti-dumping measures that imitated its Anti-dumping legislation of 1916.[19]

Although the negotiating parties acknowledged the need to address the introduction of anti-dumping provision in the ITO Charter, they initially failed to agree on its inclusion which would permit countries to impose anti-dumping measures against dumped import activities. In particular, during the Havana Conference, the parties after careful reconsideration of the anti-dumping provision failed to agree on the model that would govern the use of the measure.[20] The focus at this time was not to prohibit dumping but to design a discipline that would justify the imposition of anti-dumping measures.[21] As such, the Havana resolution[22] (which was the charter of the defunct ITO) contained lot of compromise that failed to strike a balance between the parties that supported total free trade and the protectionist.[23] Eventually, negotiations on the ITO stalled and its charter never came into force as it failed to secure the continue support of the US Congress.[24]

Nonetheless, the GATT was formulated as a "provisional" mechanism to replace the defunct ITO, based on the proposal of the US. Unlike the ITO Charter, the GATT 1947 contained less ambitious provisions that were limited to border measures amongst Members. Also, largely at the demand of the US, contracting parties of the GATT 1947 agreed on the inclusion of Article VI which provided the basic framework on how prevent dumping activities.[25] Thus, the preliminary anti-dumping proposal modelled after the US own legislation became the basis for

eds, *The Future of Multilateralism: Global Cooperation and International Organizations,* (Maryland: Rowman & Littlefield, 2021) 55.

[19] De Baere et al, *supra* note 1-2; Khan, *supra* note 21-22; J H Jackson, *World Trade and the Law of GATT,* (Indianapolis: Bobbs-Merrill, 1967) 403-424; D A Irwin et al, *The Genesis of the GATT,* (New York: Cambridge University Press, 2009) 144-145.

[20] *Ibid*.

[21] US was one of the countries that championed the notion of condemning dumping in 1948, while the UK proposed that Anti-dumping be ban, instead of dumping. See ibid; International Conference on Trade and Employment Technical Sub-Committee, Sixth Meeting, E/PC/T/C.II/46 (7 November 1946) 11.

[22] Havana Charter for an International Trade Organization, signed 24 March 1948.

[23] Lekfuangfu, *supra* note 2 at 304-305.

[24] *Ibid*; Khan, *supra* note 8 at 21; De Baere et al, *supra* note 8 at 2; Clercq, *supra* note 17 at 55; Alessandrini, *supra* note 1 at Chapter 3.

[25] Bossche & Zdouc, *supra* note 1 at 805; De Baere et al, *supra* note 8 at 2; Khan, *supra* note 8 at 21-22; Stewart et al, *supra* note 12 at 1417-1433.

the GATT 1947 Anti-dumping framework, which served as an exception to the free trade objective.

2.2.2 GATT 1947 and Anti-Dumping Code Era

In the years following the formulation of the GATT 1947, the application of Article VI proved insufficient in responding to dumping claims.[26] The provision lacked clarity as it merely defined dumping and laid down two conditions for the imposition of Anti-dumping measures. It failed to exhaustively provide for necessary procedural requirements on how to Apply Anti-dumping measures.[27] Hence, the Members interpreted and applied Article VI ambiguously in manners that allowed the measure to be converted into a protectionist instrument to keep foreign competition away from their domestic market, instead of eliminating unfair trade advantages of the exporters in their market.[28] The inadequacies of Article VI of the GATT 1947 were not resolved until the Kennedy Round (1964-1967),[29] where the GATT Contracting Parties fleshed out systematic issues such as Anti-dumping and other non-tariff barriers. The inconsistency of the Anti-dumping provisions was included in the Kennedy Round agenda on the recommendation of the US negotiators on account that "genuine exports might face discrimination under the guise of Anti-dumping actions".[30] The draft Anti-dumping code that informed the issuance of the Kennedy Round Anti-Dumping Code was proposed by the UK in 1965.[31] The Code provided procedures for determining dumped import and injury, investigation and imposing Anti-dumping measures. In the words of De Baere et al, the Kennedy Anti-Dumping code brought about clarity in the investigation and administration of Anti-dumping measures. Also, its application and benefit were not limited to parties that negotiated the Code, but to all GATT Members.[32]

In 1979, the Kennedy Anti-Dumping Code was replaced by Tokyo Anti-Dumping Code after the conclusion of the Tokyo Round of negotiation (1973-1979). Although the Tokyo Anti-

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[26] *Ibid*.
[27] Bossche & Zdouc, *supra* note 1 at 755; Khan, *supra* note 17 at 22; De Baere et al, *supra* note 2.
[28] *Ibid*.
[29] The Kennedy Round was the sixth multilateral trade negotiation which was held in Geneva, Switzerland. During this round, the GATT Contracting Parties increased from the 26 participants that formed the GATT 1947 system to 62 nations. See Khan, *supra* note 8 at 23.
[30] Khan, *supra* note 8 at 23.
[31] See Group on Anti-Dumping Policies, *Draft International Code on Anti-Dumping Procedure and Practice*, Note by the United Kingdom Delegation, Spec(65)86 (7 October 1965). See also De Baere et al, *supra* note 8 at 2.
[32] De Baere et al, *supra* note 8 at 2; D Palmeter, "A Commentary on the WTO Anti-Dumping Code", (1996) 30 J World Trade 43 at 44.

Dumping Code maintained many provisions and structures of the Kennedy Anti-Dumping Code, it added more details that clarified and elaborated Article VI of the GATT 1947 to further deter Member States from using measures to constitute undue trade barriers to the weaker or vulnerable Members.[33] In particular, the European Union (EU) and US negotiators were largely influenced by the removal of terms such as dumping being the "principal" cause of injury and the phrase "material injury" due to the controversies that surround them.[34] Also, the Code briefly introduced special treatment of developing countries.[35] Thus, the Tokyo Anti-Dumping Code recognised the trade interest of developing Member States – many of whom had gained independence from their colonial masters during this period – when compared to its predecessors.

2.2.3 Uruguay Round (UR) and GATT 1994

In spite of the coherence and predictability which the Tokyo Anti-Dumping Code brought to Anti-dumping administration, the regime continued to attract criticism up to the late 1980s. In fact, Anti-dumping actions were highly proliferated during this period as the developed economies – i.e. Canada, US, UK and Australia – topped the chart as the dominant use of the Anti-dumping mechanism, whilst the developing countries became the principal target for the measure.[36] Thus, it came as no surprise that the GATT Anti-dumping regime was raised in the agenda of the Uruguay Round (UR), which was initiated in 1988.[37] Most Importantly, Anti-dumping was one of the long-outstanding controversial issues hindering developing countries' trade, that were negotiated during the round under the aegis of the Negotiating Group on MTN Agreements and Arrangements.[38] While the period witnessed the traditional users of Anti-dumping measures clamouring for the continuous usage of the regime, the emerging economies (such as the East and Southeast Asian economies) sought the imposition of a stricter limitation on the use of Anti-dumping.[39] Particularly, the disagreement relates to the use of Anti-dumping measures as import protection measures to restrain the trade of developing countries from

[33] The details included stricter time-limits, guidance on determination of injury, confidentiality rules and dispute resolution clause. See Khan, *supra* note 17 at 24; Bossche & Zdouc, *supra* note 1 at 755; De Baere et al, *supra* note 8 at 2; Stewart et al, *supra* note 12 at 1453-1461.
[34] Baere et al, *supra* note 8 at 3. See also Stewart et al, *supra* note 12 at 1447-1448; Palmeter, *supra* note 31 at 44.
[35] *Ibid*.
[36] Bossche & Zdouc, *supra* note 1 at 755; Baere et al, *supra* note 8 at 3; Khan, *supra* note 8 at 45-47; Lekfuangfu, *supra* note 2 at 309.
[37] Baere et al, *supra* note 8 at 3; Alessandrini, *supra* note 1 at Chapter 3.
[38] De Baere et al, *supra* note 8 at 3; and Alessandrini, *supra* note 1 at Chapters 3-5.
[39] De Baere et al, *supra* note 8 at 3; Bossche & Zdouc, *supra* note 1 at 755.

entering the market of the advanced countries.[40] The practice had been increasing since the 1980s, and the US and Europe were the principal countries that imposed the most Anti-dumping duties during this era.[41] The abuse during this era occurred due to the large loopholes and discretions that existed in the determination of dumped products and conditions for determining injury inflicted on the domestic industry.[42] Thus, the developing countries supported that stricter limitation and transparency be placed on the use of the measure. Analysing the dispute that emanated from the negotiation of Anti-dumping issue, Alessandrini explained thus:

> Developing countries therefore supported an agreement which would discipline these practices in a transparent manner. However, the United States and Europe resisted the formulation of such an agreement until the issue of circumvention, that is, the practice of exporting units of products which would be assembled in the importing country in order to avoid anti-dumping duties, was adequately addressed. No compromise was therefore achieved at Brussels with respect to anti-dumping rules.[43]

Hence, the discord between these two competing interests dragged on, and widened into other issues on the UR agenda – the disagreements made it impossible to conclude the UR in 1990.[44] In particular, the subsidies and agriculture negotiations - both of which were part of the long-standing importance for developing countries - were also stalled.[45] As such, the timeline for the UR was extended to afford more time to reconcile the various positions on those controversial issues.[46] The negotiation of these controversial issues clearly exposed the reality of the multilateral trade negotiations – on the surface, the negotiations were formally or openly conducted on multilateral terms, but important decisions were made in the background by the US and the European Community (EC).[47] In most cases, the Member States with the largest economic powers strategically utilised their position on the global scene to pressurize and

[40] *Ibid*; Khan, *supra* note 8 at 46-47
[41] M J Trebilcock & R Howse, *The Regulation of International Trade* (London; New York, Routledge, 2005) 235; Preeg, *supra* note 1 at 102; Alessandrini, *supra* note 1 at 117-118, 125-126 & 135-137.
[42] *Ibid*.
[43] Alessandrini, *supra* note 1 at 117-118.
[44] One of such anti-dumping issues was anti-circumvention disagreement between the traditional power and the emerging economies, that attracted widespread criticism during the negotiation. Circumvention is the practice of exporting component of goods to be assembled in a third country so as to avoid imposition of anti-dumping duties. For detail explanation on this see De Baere et al, *supra* note 8 at 4-5; Stewart et al, *supra* note 12 at 1515-1527
[45] See Trebilcock & Howse, *supra* note 32 at 334; Alessandrini, *supra* note 1 at Chapter 4.
[46] *Ibid*.
[47] Alessandrini, *supra* note 1 at 113.

threaten developing economies to embrace their agendas and values during the multilateral rounds of negotiation.[48] This kind of trade negotiation strategy not only undermined the engagement of the poor developing countries but also reinforced the systematic inequalities that exist within the multilateral trading system and seeks to jeopardize the objective of the Anti-dumping rules to level the playing field for the weak and vulnerable members within the multilateral trading community.

While the UR negotiation lengthened, the number of anti-dumping actions continued to grow. The continuous growth created actual concerns amongst the Contracting Parties that the measures might override the negotiated tariff concessions.[49] Thus, the Contracting Parties presented the 'Ramsauer Draft' in 1991 to put a pause on the continuous rise in the number of Anti-dumping actions. Nevertheless, the outstanding issues, including Anti-dumping rules continued to linger due to strong resistance from the US and EC negotiators.[50] Despite the dissent amongst the GATT Contracting Parties, the GATT Director General (DG) during this period released the 'Draft Final Act Embodying the Results of the Uruguay Round' - but with 'a single undertaking' clause that the Draft Final Act shall not be considered as the agreement of the parties until they agreed on all elements contained in the draft.[51] Concerning the Anti-dumping measures, the final draft proposed that the "[n]ew agreement on Anti-dumping would become part of the multilateral agreements".[52] In addition, the DG drafted and published a Draft of the Anti-Dumping Agreement.[53] However, the discontent amongst the Contracting Parties persisted. Moreso, the US continued to employ its dominant position to pressurize and subjugate the voice of the developing countries throughout the negotiations of the controversial issues up to the Marrakesh meeting in 1992.[54] Importantly, the lack of agreement on the agriculture issue – an area of particular trade interest to developing countries – delayed the consensus on the Draft Final Act.[55] Nonetheless, in 1993, the newly elected Clinton

[48] See generally Alessandrini, *supra* note 1 at Chapter 3-6.
[49] While approximately 1500 Anti-dumping actions were instituted during the 1980s, over 2000 actions were initiated in the 1990s. See J Croome, *Reshaping the World Trading System: A History of the Uruguay Round,* (The Hague: Kluwer, 1999) 264; JM Finger et al, "Antidumping as Safeguard Policy", (2001) The World Bank Policy Research Working Paper 2730, p 22; De Baere et al, *supra* note 8 at 5; Khan, *supra* note 8 at 45-46.
[50] Alessandrini, *supra* note 1 at 115-121; Bossche & Zdouc, *supra* note 1 at 755.
[51] Trade Negotiations Committee, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA (20 December 1991); De Baere et al, *supra* note 8 at 5.
[52] De Baere et al, *supra* note 8 at 5-6.
[53] Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (20 December 1991), F.1–34; De Baere et al, *supra* note 8 at 6.
[54] Alessandrini, *supra* note 1 at 119
[55] *Ibid*; J. Croome, Reshaping the World Trading System: A History of the Uruguay Round (The Hague: Kluwer, 1999) 321, 326–327; De Baere et al, *supra* note 8 at 6

Administration received a mandate from the US Congress that pegged the deadline for the conclusion of US negotiation at 1994 – which in turn became the effective deadline for the UR. In so doing, the mandate made the US negotiators more aggressive toward coercion of other members for market access abroad.[56] The pressure the Clinton Administration mounted on developing countries has been explained thus:

> During the period leading to the conclusion of the UR, it used both unilateral threats and bilateral and regional instruments to advance its agenda at the multilateral level. The unilateral strategy focused on the so-called Big Emerging Countries, six of which, India, China, Indonesia, Korea, Thailand and Malaysia, were East and Southeast Asian countries..... His commercial strategy was aimed directly at those economies considered to be the new productive centres of dynamic capital accumulation which directly threatened US economic interests..... On the regional front, Clinton fully supported the conclusion of the North American Free Trade Agreement in 1993, threatening Europe over the agricultural issue with the launch of a trade war from the North American bloc.[57]

Hence, the negotiation on agriculture was finalised in 1993. Also, although the US made series of final amendments to the Anti-Dumping Agreement Draft in 1993, the GATT Contracting Parties eventually reached a compromise that informed the current day Agreement on the Implementations of Article VI of GATT 1994, also known as the Anti-Dumping Agreement ('ADA') and the Article VI of the GATT 1994, that set out the contemporary discipline on dumped import and Anti-dumping measures. Furthermore, the compromise reached "represented the final significant obstacle to finding an agreement on the other draft texts and the Draft Final Act itself."[58] In 1994, the Final Act and the associated agreements were adopted by the parties, and it marked the conclusion of the UR of multilateral trade negotiation[59]. The adoption was done under the umbrella of the General Agreement on Trade and Tariff, 1994 (GATT 1994), which came into force in January 1995. It also informed the establishment of the WTO as the multilateral body for GATT administration.

[56] Alessandrini, *supra* note 1 at 119.
[57] *Ibid*, 120-121
[58] Baere et al, *supra* note 8 at 6. See also Bossche & Zdouc, *supra* note 1 at 755; and Alessandrini, *supra* note 1 at 119-121.
[59] *Ibid*.

Although the final agreement on the Anti-dumping issue was supposed to provide, *inter alia*, greater transparency and impose an obligation on the investigation officers to give written explanations,[60] the US deployed its economic weight to maintain the anti-circumvention practice as the ADA lacked anti-circumvention provisions – which was left to be negotiated in later rounds.[61] Hence, according to Alessandrini, "the US obtained its original objective demanded by the private sector and congressional leaders to maintain the current situation despite the opposition of developing countries".[62] Moreso, the disagreements between the developed and developing countries exhibited during the negotiation of Anti-dumping rules are evident in the level of vague and ambiguous phrases that are contained in the ADA. Also, too many loopholes and administrative discretions were included in the substantive determination of dumped import, injury and dumping margin.[63] Whilst some of the confusing languages have been clarified and laid to rest by case laws, others are yet to be resolved.[64] Thus, the trade negotiation dynamics of the UR leading up to the adoption of GATT 1994 reflect the long-standing structural inequalities and the power imbalance that exist within the international trading regime, which characterized most of the multilateral trading system practice. It shows the contradictory reality between the commitment and actual practice of the developed countries during multilateral rounds of trade negotiation. It also demonstrates the influence and powers the advanced countries weigh during negotiations to the detriment of the developing countries. In particular, it reveals how the objectives and demands of the developed countries significantly influenced the underlying objectives of the multilateral trading system – considering that the developed economies (the US and the EC) were able to facilitate the continue use of Anti-dumping regime, while the emerging economies were not able to achieve stricter rules on the use of Anti-dumping measures. In essence, this shows the nature of the 'ideological predilections' which informed the imbalance that emanated from the UR, which continues to exist within the structure of the multilateral trade system till date. Most importantly, it exemplifies and reinforces the aggressiveness of the US and the EC trade and negotiation strategy that prompted colonization and imperialism, and also being used to advance the cause of Western neo-imperialism in today world.

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[60] See the Anti-Dumping Agreement (ADA), Articles 5.8 and 6
[61] See Baere et al, *supra* note 18 at 6; Croome, *supra* note 42 at 327; Alessandri, *supra* note 1 at 127
[62] Alessandrini, *supra* note 1 at 127. See also Preeg, *supra* note 31 at 170.
[63] See generally Khan, *supra* note 8 at Chapters 2-3; De Baere et al, *supra* note 8 at Chapters 2-5; Bossche & Zdouc, *supra* note 1 at Chapter 11; Teurai Thirdgirl Dari, *A Critical Assessment of Zimbabwe's Anti-Dumping Laws*, (LLD Thesis, University of Western Cape, 2018) Chapter 2 [unpublished thesis].
[64] See Bossche & Zdouc, *supra* note 1 at 755.

2.2.4 Doha Round and Contemporary Issues

In November 2001, the Doha Development Round was initiated to address many of the power imbalances occasioned by the UR negotiations, and also to deliver the long-standing development promise of the multilateral trading system. Similar to the previous rounds, the discipline on Anti-dumping duties was one of the controversial issues the WTO Members placed in the Round agenda to address the use of the measure as a tool for negative discrimination against the developing countries' trade interest – that had characterised the multilateral trading system history.[65] Hence, the trade remedy was included to clarify and improve strictness of the ADA, "while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants."[66] In particular, it was imperative to address the ambiguous phrases and the discretions in Anti-dumping rules that had allowed the developed countries to maintain the measure as great protectional practices, and also great flexibility during the investigation phase.[67] As such, it was observed that the US and the EU Members were the "largest initiators"' of Anti-dumping actions between 1999 to early 2000s – the period immediately after the conclusion of the UR – to undermine the developing countries' trade interest and hinder their access to market abroad.[68] Furthermore, the trade remedy was placed in the Doha Round agenda to address the difficulties the developing countries encountered in implementing the measure in accordance with their multilateral trading commitment in order to protect their local industries against market-distorted practice.[69]

In 2002, the WTO Member set-up a Negotiation Group on Rules to "discuss issues relating, *inter alia*, to the Anti-Dumping Agreement" in lines with the round negotiating mandate.[70] In 2003, the Chair of the Group collated and distributed a compendium of issues and proposals submitted by many members during the first phase of the negotiation. Many of the Anti-dumping issues raised relate, *inter alia,* to the determination of dumping and injury, initiations

[65] Alessandrini, *supra* note 1 at 164-166; Baere et al, *supra* note 18 at 7; Bossche & Zdouc, *supra* note 1 at 756.
[66] Ministerial Conference, Ministerial Declaration, adopted on 14 November 2001, WT/ MIN(01)/DEC/1 (20 November 2001), para 28. See also De Baere et al, *supra* note 8 at 5; Khan, *supra* note 8 at 79
[67] Most importantly, it was noted that "The increasing misuse of Anti-dumping and safeguard measures also belies the commitments of the developed countries to put an end to the discrimination against the trade of developing countries." See Alessandrini, *supra* note 1 at 135-136
[68] Alessandrini, *supra* note 1 at 135 & 166; TN Srinivasan, "Developing Countries and the Multilateral Trading System after Doha", (2002) Economic Growth Centre, Discussion Paper No 842.
[69] Baere et al, *supra* note 8 at 7.
[70] *Ibid*.

and conducting Anti-dumping investigations and evidence.[71] The second and third phases of the negotiations were held from 2004-2006, which prompted the issuance of the first draft text of a revised ADA in 2007.[72] The first draft was fiercely and promptly criticised by a number of WTO Members for the inclusion of zeroing[73] that was proposed by the US.[74] Hence, in 2008, a new draft text was issued with a commentary on the "disagreement on zeroing, public interest considerations, the 'lesser-duty' rule, anti-circumvention and sunset reviews".[75] Since then, negotiation on Anti-dumping issues took on a slower pace and operated under the concept of "nothing is agreed until everything is agreed". Even the outgoing Chair of the Group attested to this in 2010 when he explained that "on the most politically sensitive issues in respect of Anti-dumping, it is clear that we have not yet seen any real narrowing of the substantive gaps that have existed since the beginning of this negotiation".[76] In 2011, the Group issued another draft text[77] that prompted further discussion on Anti-dumping issues ranging from public interest, transparency, due process amongst others up till 2015.[78] However, the Doha Round negotiation on Anti-dumping hit rock bottom similar to negotiations on other outstanding issues concerning developing countries' trade interest. It is important to emphasise that the negotiation on Anti-dumping issues during round was intertwined with other controversial issues such as subsidies, textiles, market access, and agriculture, and one would not progress without the other. These long-outstanding trade issues were all about elimination and prevention of trade restriction, discrimination and market-distorting practices in order to

[71] Anti-Dumping Agreement, Articles 2,3,4,5 and 6 respectively. See Baere et al, *supra* note 8 at 7

[72] Negotiating Group on Rules, Draft Consolidated Chair Texts of the AD and SCM Agreements, TN/RL/W/213 (30 November 2007). See also Baere et al, *supra* note 8 at 7-8.

[73] Zeroing is the methodology of calculating Anti-dumping duties by overestimating the final dumping margins gotten from the difference between the 'normal value' and the 'export price' of the exporter's products. Zeroing calculation device disregard export sale that produces negative result by treating negative margins of dumping at zero. As such, the practice artificially inflates the 'dumping margins' as well as increases the likelihood of the findings of injury from dumped imports that are not injurious. Despite zeroing being legally condemned as unfair practice, the US still used its to calculate and establish Anti-dumping measures. See 55; *US – Zeroing (Japan) (2007)*, Appellate Body Report, para 146; *US – Washing Machines (2016)*, Appellate Body Report, para 6.10; *US – Softwood Lumber V (Article 21.5 – Canada) (2005),* Appellate Body Report, paras 132, 138-142. For more discussion on 'zeroing' see B Y Kim, "Understanding 'Zeroing' in Anti-Dumping Procedures and Korea's Negotiation Strategy", (2004) Korea Rev Intl Stu 89; De Baere et al, *supra* note 8 at 107-108; Bossche & Zdouc, *supra* note 1 at 775-776.

[74] Baere et al, *supra* note 8 at 8; Negotiating Group on Rules, *Statement on 'Zeroing' in the Negotiations*, TN/RL/W/214 (7 December 2007) and TN/RL/W/214/Rev.3 (25 January 2008).

[75] Baere et al, *supra* note 8 at 8; J Kazeki, "Anti-Dumping Negotiations Under the WTO and FANs" (2010) 44 J World Trade 931 at 942. See also Negotiating Group on Rules, New Draft Consolidated Chair Texts of the AD and SCM Agreements, TN/RL/W/236 (19 December 2008).

[76] Negotiating Group on Rules, Statement by Chairman, TN/RL/W/247 (17 May 2010) 2; Baere et al, *supra* note 8 at 8.

[77] See Negotiating Group on Rules, Communication from the Chairman, TN/RL/W/254 (21 April 2011)

[78] See Negotiating Group on Rules, Report by the Chairman, H.E. Mr. McCook to the Trade Negotiations Committee, TN/RL/26 (30 July 2015), para 1.7; De Baere et al, *supra* note 8 at 8.

achieve fair and balance market access within the multilateral trading system.[79] Moreso, the Anti-dumping reforms received severe resistance from the US and the EU throughout the negotiation process, as they persistently refused to eliminate domestic support in agriculture and textiles contrary to the objective of the Doha Declaration.[80] This reveals the hypocritical nature of the trade liberalization objective of the developed countries during negotiations. Hence, it was observed that the round "followed the GATT practice of employing free-trade principles while pursuing '[sectorally] selective' free trade".[81]

Although the WTO Members were hopeful that the Nairobi Ministerial Declaration adopted in 2015[82] would restore the Round, it broke down again during the 2017 Eleventh Ministerial Conference due to the disagreement between the US and India over reference to development and the agenda of the Doha Round. With respect to Anti-dumping measures, China voiced the concerns of most members when it sought stricter discipline on transparency and due process – which a number of countries had agreed to in principle. Nonetheless, the US was opposed to further reforms negotiations on the grounds "that the Doha Mandate has expired".[83] Thus, although members have expressed interest in continuous negotiation Anti-dumping issues, Baere et al noted that "the outcome of the Eleventh Ministerial Conference, and the apparent preference by the United States to eschew future multilateral negotiations, is likely to delay significantly the process of amending the Anti-Dumping Agreement."[84] The deadlock of the Doha mandate demonstrate what Hudec explained to be persistent practice of the developed countries in making inspiring statements to present the illusion of greater commitment without pursuing any determinable legal obligation.[85] In essence, the Doha Round similar to the UR failed to eliminate the structural unequal bargaining power that exist amongst the WTO Members. Also, the trade strategy and negotiation practice of developed countries during this

[79] See S Lester, "Is the Doha Round Over? The WTO's Negotiating Agenda for 2016 and Beyond", (2016) 64 Free Trade Bulletin 1; Kazeki, *supra* note 75 at 939, 942–943.
[80] See Alessandrini, *supra* note 1 at Chapter 5; Lekfuangfu, *supra* note 2 at 303-309; Khan, *supra* note 8 at 79
[81] It was also noted that "the fact that during the Doha Round the US and EU exerted a level of bilateral pressure on developing countries comparable to that under the UR does not just expose the WTO development myth, it also demonstrates the willingness of the US and EU to actively forego the multilateral trade arena when their agenda is not fulfilled." See Alessandrini, *supra* note 1 at 176.
[82] Ministerial Conference, Nairobi Ministerial Declaration, adopted on 19 December 2015, WT/MIN(15)/DEC (21 December 2015).
[83] De Baere et al, *supra* note 8 at 8. See Negotiating Group on Rules, Proposal on Trade Remedies, Submission by China, TN/ RL/GEN/185 (24 April 2017); Follow-Up Paper on Enhancing Transparency and Strengthening Due Process in Anti-Dumping and Countervailing Proceedings, Communication from China, TN/RL/GEN/190 (26 June 2017); "U.S. rejects Chinese proposal for trade remedy rules negotiations at WTO" Inside US Trade (1 June 2017)
[84] Baere et al, *supra* note 8 at 8
[85] RE Hudec, *Developing Countries in the GATT Legal System,* (London: Trade Policy Research Centre, 1987) 56.

round show their unwillingness to continue multilateralism negotiation once they stand not to gain from it. It also speaks to some of the current challenges – ranging from rise of industrial policies,[86] the escalating Sino-America trade war, Russia's invasion of Ukraine[87] etc - affecting the effective operation of the WTO. These crises continue to shape and undermine the future of the institution and consequently, multilateralism.

2.3 Contextualisation of Dumped Import under the WTO Rules

The multilateral trading system is premised upon rules and principles that presuppose free and fair market economies in the multilateral community. The system seeks to liberalize trade by eliminating trade barriers and unfair trade practices in the community. However, the reality is that not all members will operate under a free and fair market principle in a global economy, and that the readiness of economic sector of the members for neoliberalism differs. Moreso, the historical antecedent WTO's trade development promise to developing countries is far from being actualized, instead it exposed them to the pressure of the global market economy. In particular, it made the poor countries whose economies are unprepared vulnerable and worse off. Conversely, the multilateral trading system provides the advanced and few emerging economies with considerable opportunity to enhance their market-access.[88] Hence, the power imbalances have prevented low- and lower-middle-income developing countries from enjoying the supposed benefit to be derive from trade liberalization.[89] Also, the rich countries were found to utilise their market-access opportunities to undermine the competitiveness of the developing countries' trade – which makes it almost impossible for the globalization process to lift all economies equally.[90] As a result, the income gaps, both between and within states, continue to

[86] See generally Anna Ilyina et al, "Industrial Policy is Back But the Bar to Get it Right is High" *IMF Blog* (12 April 2024), online: < https://www.imf.org/en/Blogs/Articles/2024/04/12/industrial-policy-is-back-but-the-bar-to-get-it-right-is-high> (accessed 24 April 2024); Brad MacDonald et al, "Industrial Policy: Trade Policy and World Trade Organization Considerations in IMF Surveillance", (2024) International Monetary Fund NOTE/2024/002.

[87] *Ibid*. see also Gita Gopinath et al, "Changing Global Linkage: A New Cold War?", (2024) IMF Working Paper No. 2024/076; Lorenzo Rotunno & Michele Ruta, "Trade Spillovers of Domestic Subsidies", (2024) IMF Working Paper 2024/41; Matteo Crosignani et al, "Geopolitical Risk and Decoupling: Evidence from U.S. Export Controls", (2024) Federal Reserve Bank of New York Staff Reports, no. 1096, online: < https://doi.org/10.59576/sr.1096> (accessed 24 April 2024); Ngunyen-Qouc, *supra* note 4; De Clercq, *supra* note 17; Aiyar et al, *supra* note 3.

[88] See generally Alessandrini, *supra* note 1 at Chapter 4-6; Maldonado, *supra* note 1; Lekfuangfu, *supra* note 2.

[89] Alessandrini, *supra* note 1 at Chapter 6.

[90] See generally Ajoje Olufunke Iyabo, *South-South Cooperation and the Prospects of Global Economic Balancing: A Study Framework of Nigeria-China Relations* (PhD Dissertation, North-West University, 2018) [unpublished]; RG Muganda 'Lets enforce dumping laws' *The Herald* (27 September 2012); Lekfuangfu, *supra* note 2.

present socioeconomic and political issues in the multilateral trading system.[91] It has created a situation where the Global South States that lack the required industrial measures are exploited by transnational capitalist through trade-distorted practice.

Trade-distorted practice - also known as unfair practice - takes many forms including dumped import, subsidization, anti-competitive agreement, price fixing, abuse of dominant position, cartel agreements amongst others. In recognition of these unfair trades, WTO laws provide for trade remedies to offset the negative effect of such trade-distorted practice and to 'level the playing field'.[92] However, the rules on trade remedy measure cover only limited practices such as dumping and subsidisation.[93] For the purpose of this thesis, only dumping will be examined as a trade-distorted practice.

2.3.1 Dumping

Dumped import is an unfair trade practice whereby imported products are sold at a price lesser than that of the like product in the domestic market of the exporting country with the intention of capturing new market other than the home market. It thus enables the introduction of foreign products into the local market of the importing country at a lower price compared to the market price of similar product in the exporting country or country of origin.[94] As such, it has been defined as the international price discrimination of products between sovereign States' markets.[95] However, this nomenclature is defective and problematic for the reason that price discrimination in itself is not an unfair trade practice compared to dumping. Dumping is also classified as a prejudicial trade conduct that is capable of curtailing permitted market competition.[96] Article 2 of the ADA defined dumping as occurring when a foreign producer introduces its product into the domestic market of another country at prices lesser than their

[91] See WTO Trade Report 2023, *supra* note 1; Bossche & Zdouc, *supra* note 1 at Chapter 1; Nicolas Albertoni & Carol Wise, "International Trade Norms in the Age of Covid-19 Nationalism on the rise", (2021) 14 Fudan J Human & Soc Sci 41-66, online: <https://doi.org/10.1007/s40647-020-00288-1> (accessed 1 April 2024); Carlos Primo Braga et al, "Confronting Deglobalisation in the Multilateral Trading System", (2022) 14:1 Trade, L & Dev 1-38, online: <www.tradelawdevelopment.com/index.php/tld/article/view/215/237> (accessed 1 April 2024); Harold James, "Deglobalization: The Rise of Disembedded Unilateralism", (2018) 10 Ann Rev Fin Econ 219-237, online: <https://doi.org/10.1146/annurev-financial-110217-022625> (accessed 8 April 2024).
[92] Bossche & Zdouc, *supra* note 1 at Chapter 11.
[93] See *US – Line Pipe*, Appellate Body Report, para 80.
[94] See generally Jacob Viner, *Dumping: A Problem in International Trade*, (Chicago: University of Chicago Press Reprint, 1966) [Viner, *Dumping: A Problem in International Trade*]; Khan, *supra* note 8 at 1-5; Gottifried Von Haberler, *The Theory of International Trade with its Application to Commercial Policy*, translated by Alfred Stonier & Frederic Benham (New York: Macmillan, 1937) 300.
[95] Bossche & Zdouc, *supra* note 1 at 757; Viner, *Dumping: A Problem in International Trade*, *supra* note 94.
[96] See generally BM Hoekman & PC Mavroidis, "Dumping, antidumping and antitrust" (1996) 30 J World Trade.

'normal value', i.e. a price charged in the ordinary course of trade for the like products in the domestic market of the importing country.[97] This implies that the consumers in the importing country pay lower prices for foreign products than those charged by the domestic producer for similar products. Although a lower price may be beneficial to the consumers in the importing country, it may also be harmful to the domestic industry.[98] Hence, Article VI of the GATT 1994 conceived dumping as the process whereby "products of one country are introduced into the commerce of another country at less than the normal value of the products, and causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry."[99] While ADA is silent on material injury, the GATT expressly comprehends dumping to be an act that injures the domestic industries. Regardless, both rules are usually read together as they complement each other and are conceived as an "inseparable package of rights and disciplines".[100] Thus, in *US – Zeroing (Japan)* , it was held that both Article VI:1 of the GATT 1994 and Article 2.1 of ADA are definitional provisions that, when read individually, do not impose any independent obligations.[101] Their combined reading reveals that although dumped imports relate to actions taken by private' organizations, the WTO Anti-dumping rules only regulate States actions and as such do not discipline dumping itself but "focuses on the measures that importing Members may take in response to dumping if that dumping causes injury to their domestic industry".[102] In essence, dumping is the act of selling an imported product at a price lower than the amount the similar product is being traded in the domestic industry of the country of origin. On the other hand, injurious dumping is a market-distortion practice that is achieved through either price discrimination or export sales below cost of production,[103] which inflicts or threatens to

[97] Agreement on the Implementation of Article VI of GATT 1994, 1868 UNTS 201 (known as Anti-Dumping Agreement) (herein referred to as 'ADA'), Article 2.1. See also the General Agreement on Trade and Tariff 1994, 15 April, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994) (herein referred to as "GATT 1994"), Article VI. These provisions have been held to be a definitional provision in *US – Zeroing (Japan) (2007)*, Appellate Body report.

[98] See generally World Trade Report 2022, *supra* note 1; Iyabo, *supra* note 90 at Chapters 3-6.

[99] GATT 1994, Article VI.1. For commentary, De Baere et al, *supra* note 8.

[100] See *US – Shrimp (Thailand)*, Appellate Body Report, para 233; *US – 1916 Act*, Appellate Body Report, para 114; De Baere et al, *supra* note 8 at 14

[101] *US – Zeroing (Japan)*, Appellate Body Report, para 140

[102] De Baere et al, *supra* note 8 at 11-12.

[103] Price discrimination has been described as a situation "where a company's domestic market is shielded from international competition by trade barriers, allowing domestic prices to remain high. An exporting producer can thereby continue to earn high profits in its home market while undercutting the prices of its competitors abroad through low-priced exports. This gives the company an unfair advantage over producers in open economies". While Sale below costs of production can occur due to one or two factors explained thus: "First, in a home market recession, a manufacturer may not be able to cover its fixed costs, such as rent, loan charges and equipment maintenance, meaning it will produce below its average cost. Nevertheless, production still makes sense as long as the company can cover the marginal costs of each new item produced (typically raw material costs). By

inflict a material injury on the domestic industry of the importing country.[104] In reality, the cheap and injurious nature of the foreign products is often due to it poor quality, low-standard, faultiness or being declared obsolete in their countries of origin.[105] Thus, dumping as an unfair trade practice has significant distorting effect on international trade and healthy competition in the global economy.[106]

Dumped import takes different forms depending on the reasons the exporters decide to resort to this unfair trade practice. Although the circumstances informing dumping activities are not universally agreed to and have generated controversies amongst economist,[107] but for simplicity's sake it is safe to classify dumped imports into two types based on the effect and its continuity, namely: (i) Non-predatory Dumping; and (ii) Predatory Dumping. *Non-predatory* dumping takes place when there is competition amongst exporting countries over limited market access. This entails what Jacob Viner classifies as sporadic or occasional dumping, and continuous dumping.[108] Suppliers engage in this kind of dumping activity not to eliminate competition or restrict entry into the market but to dispose of the excesses from overproduction

producing and exporting in this way, the company exports the harm of its domestic recession to other producers in export markets through unsustainably low prices. Second, a company may export below cost in an attempt to eliminate foreign producers in the company's export market through 'predatory pricing'. 58 The idea is to force other producers out of the market, gain economies of scale and then recoup losses by charging supra-competitive prices once the competition has been eliminated." See De Baere et al, *supra* note 8 at 10. For more distinction, see W Davey, "Antidumping laws: A Time for Restriction' in *North America and Common Market Antitrust and Trade Laws*, (New York: Matthew Bender, 1988). For discriminatory price, see Khan, *supra* note 17 at Chapter 1; P C Mavroidis, *Trade in Goods,* (Oxford: Oxford University Press, 2007) 361–365; E Vermulst, *The WTO Anti-Dumping Agreement*, (Oxford: Oxford University Press, 2005) 1–2.

[104] De Baere et al, *supra* note 8 at 10.

[105] See Bright Nwachukwu, "Nigeria, to be the World's Car Dump", *LinkedIn* (12 May 2022), online: < https://www.linkedin.com/pulse/nigeria-worlds-car-dump-bright-nwachukwu/> (accessed 16 May 2024); Lara Eviota, "The Cultural Impact of Colonialism From Production to Disposal", *Remake* (14 March 2023), online: < https://remake.world/stories/colonialism-and-fashion/> (16 May 2024); Iyabo, *supra* note 90 at 78; Janet Ogundepo, "Second-hand Clothes from West Pose Environmental Challenges in Africa – Experts", *Punch* (27 November 2022), online: < https://punchng.com/second-hand-clothes-from-west-pose-environmental-challenges-in-africa-experts/> (accessed 16 May 2024).

[106] See generally Iyabo, *supra* note 90 at Chapters 3-6; Dari, *supra* note 62 at Chapter 5.

[107] Jacob Viner, "Dumping as a Method of Competition in International Trade II", (1923) 1:2 UJ Bus 182-190, online: <www.jstor.org/stable/2354812> (accessed 13 October 2023) [Viner, "Dumping as a Method of Competition in International Trade II"]; Jose Tavares de Araujo Jr et al, "Anti-dumping in the Americas Organisation of American States Trade Unit"; Khan, *supra* note 8 at 8-10; Thomas Howell & Dewey Ballantine, "Dumping: Still a Problem in International Trade", in National Research Council , Board on Science, Technology and Economic Policy & Charles Wessner, eds, *International Friction and Cooperation in High-Technology Development and Trade: Papers and Proceedings* (Washington, DC: The National Academic Press, 1997), online: <https://doi.org/10.17226/5902> (accessed 5 October 2023); M Tao, *Dumping and antidumping regulations with specific reference to the legal framework in South Africa and China*, (South Africa: University of Free State, 2006); Lee YS , *Safeguard Measures in World Trade: The Legal Analysis,* 2nd edn, (2005); Anwar R & Raslan A, *Anti-dumping: A developing country perspective* (2009) 13; RA Bolton, "Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the W.T.O. through Heightened Scrutiny", (2011) 29:1 Berkeley J Intl L 72; K D Raju, *World Trade Organization Agreement on Anti-dumping: A GATT/WTO and Indian Jurisprudence*, (2008) 10; J M Finger, ed, *Antidumping: How it Works and who Gets Hurt,* (1993) 13.

[108] Viner, "Dumping as a Method of Competition in International Trade II", *supra* note 107 at 188-189.

in large-scale economies at the price reality of the importing country's market.[109] It usually occurs where the supply of products is more than the demand. This type of dumping is not characterized by deliberate production of commodities to be dumped – which are done to inflict injury on the domestic capacity of the importing country by eliminating competition so as to dominate the domestic market. Although non-predatory dumping is not much of threat to local production, it can still be harmful to importing country' industrial development in the long run, considering the exporters usually choose to sells the excess products to the importing country at a price lesser than it is being traded in the exporting country.[110]

On the other-hand, *Predatory dumped import* is the deliberate abuse of the importing countries' domestic market through adoption of lower prices of goods with the aim of dominating the market and driving out competitors. This occurs when foreign producers deliberately produce commodities and sell them at a price lesser than the market value of the goods in the importing country's local market with the sole aim of eliminating competition and restricting entry into the market.[111] Predatory dumping is usually backed by an established price or policy export in the exporting country to perpetuate monopoly in an importing country.[112] This type of dumped import is harmful to the importing country's domestic industry as it cripples the local manufacturing sector by forcing the local producer out of the market, whilst empowering the exporting producer to gain economic scale and also regain losses by aggressively increasing the price to the detriment of the consumers after eliminating competition in the market.[113] It also disrupts healthy competition in the global economy and undermines the economic sovereignty of states. Both predatory and non-predatory dumped imports are envisaged and regulated under the WTO laws through Anti-dumping measures.[114] Hence, the WTO Anti-

[109] See Jean-Marc Leclerc 'Reforming Anti-Dumping Law: Balancing the Interests of Consumers and Domestic Industries' (1999) 44 McGill LJ 117; Jason Douglas, "Flood of Cheap Chinese Steel Fuels Global Backlash" *The Wall Street J* (19 April 2024); Boullenois et al, *supra* note 4; Marius et al, *supra* note 4; Alicia Garcia Herrero et al, "China Thematic Research – Green Tech", *Natixis* (10 April 2024), online: < https://research.natixis.com/Site/en/publication/jdHpNptGiYJ2c10y-Ju3kQ%3D%3D> (accessed 24 April 2024).
[110] Sikhwari Tshivhasa Tshedza & Yende Nsizwazonke Ephraim, "An Analysis of China's Dumping of Cheap Products in South Africa in the Perspective of Import Substitution Policy", (2021) 8:1 J Afr Foreign Aff 115, 120, online: <www.jstor.org/stable/pdf/27159653.pdf?refreqid=excelsior%3A5cb52fdb16706b65aa3ba1a6233a5cbf&ab_segments=&origin=&initiator=&acceptTC=1> (accessed 20 November 2023).
[111] Khan, *supra* note 8 at 35; and De Baere et al, *supra* note 8 at 10
[112] World Trade Report 2022, *supra* note 1; Iyabo, *supra* note 90 at Chapter 3; Viner, "Dumping as a Method of Competition in International Trade II", *supra* note 107 at 189.
[113] See Khan, *supra* note 8 at 36; and Baere et al, *supra* note 8 at 10.
[114] See Article VI of GATT 1994 and Article 2.1 of ADA.

dumping rules offset or prevent the injurious impact that these types of dumping activities can have on the economy of a sovereign state in the pursuit of economic globalisation.

2.3.2 Dumping under the International Trade Regime

Since the WTO law does not govern the actions of private companies, dumping itself is not prohibited under the WTO law except it causes or threatens material injury to the industrial capacity of a sovereign Member State or its domestic industry.[115] This is because the WTO law focuses on imposing obligations and disciplinary measures undertaken by importing Members to address injurious dumped imports. Hence, dumped import under the WTO Agreement is only condemned when it –

(i) causes material injury to a domestic industry; or
(ii) poses a threat of material injury to a domestic industry; or
(iii) causes material retardation of the existence of a domestic industry.[116]

A causal link between dumped import and the material injury must also be established. To redress and prevent the destructive effect of dumping on Members' economic sovereignty, Article VI of the GATT 1994 and the Anti-Dumping Agreement ('ADA') set out the framework that Members can adopt to curb dumped imports through the imposition of Anti-dumping duties. The adoption of these substantive and procedural requirement on Anti-dumping are not obligatory on Members. However, once a WTO Member makes a policy choice to legislate and implement an Anti-dumping measure, the Member is under a mandatory obligation to ensure that the adopted measures conform with the circumstances and obligations contained in the WTO Anti-dumping rules.[117] In *US – 1916 Act (2000),*[118] the Appellate Body ruled that any specific action taken against dumping should only take the form prescribed in Article VI:2 of the GATT 1994. The provisions and case laws confirm the close relationship between ADA and Article VI of GATT 1994. They do not supersede one another but complement each other, and are applied and interpreted together.

[115] *Ibid*.
[116] Emphasis mine. See Article 3 of ADA. See Bossche & Zdouc, *supra* note 4 at Chapter 11.
[117] See ADA, Article 1 & 18.1. See also Baere et al, *supra* note 18 at 51-52.
[118] See *US – 1916 (2000)*, Appellate Body Report, para 137. See also *Mexico – Anti-Dumping Measures on Rice (2005)*, Panel Report, para 7.278; Panel Report, *US – Shrimp (Thailand)*, paras 7.94, 142; see also *US – Shrimp (Thailand) / US – Customs Bond Directive*, Appellate Body Report, para 8.202.

The next section will briefly analyse and criticise the applicable rules on the substantive and procedural requirements of the Anti-dumping regime under the WTO framework.

2.4 Contextualisation of Anti-Dumping Measure under the WTO Rules

This section discusses the treatment of dumping under the WTO framework concerning the substantive requirement that must be fulfilled to impose Anti-dumping measures, the procedural measures of the regime (i.e. the initiation and conduct of Anti-dumping investigation, imposition and collection of Anti-dumping duties, duration, termination and review of Anti-dumping etcetera), and the dispute settlement process under the multilateral trading system rule. As previously mentioned, Article VI of the GATT 1994 and the ADA set out the applicable rules for the Anti-dumping regime by governing the response of WTO Members to the impact of injurious imports, and not the dumping action taken by private companies. Thus, the treatment of dumped imports under the WTO framework will be examined within this context to foster an understanding of the innate complexities of fair trade practice within the multilateral trading system, and to tease out the inherent weakness(es) of the regime as it relates to safeguarding the interest of the poor Global South States.

It is important to reiterate that the WTO Anti-dumping rules exist to remedy and prevent injurious dumped import in the importing countries' domestic industry. That is, its purpose is to redress the unfair trade practices of the foreign producers (which often causes the erosion of national industries) in the domestic market of the importing countries. It is not a protectionist instrument that keep foreign competition away from the domestic market of the importing country. As such, it seeks to promote and restore a healthy competition environment between WTO Members that might be impaired by market-distorting practices of powerful firms.[119] Hence, Anti-dumping rules within the multilateral trading system aim to secure a predictable level playing field for domestic industries by enabling the States' Anti-dumping duties on foreign products found wanting.[120] Also, a Member State can only impose Anti-dumping measures after the determination of dumping circumstances by examining the discriminatory

[119] See GATT 1994, Article VI:2; *Mexico – Anti-Dumping Measures on Rice*, Appellate Body Report, para 165.
[120] Bossche & Zdouc, *supra* note 1 at 174-176.

pricing behaviour of the exporter transactions within a duration of time.[121] As such, the intent of the exporter is irrelevant in the determination of dumped import.[122]

2. 4.1 Anti-Dumping Measure Substantive Requirement

The substantive requirement for the imposition of Anti-dumping measures via determining whether dumped imports exist entails establishing three factors thus: (i) whether there is dumping; (ii) whether the local industry of the importing country is suffering or there is threat of injury; and (iii) whether there is causal relationship between the dumped imports and injury inflicted or threatened to be inflicted on the domestic industry. These requisite elements will be examined accordingly in the following subsections.

2.4.1.1 Determination of Dumping

The WTO framework defines 'dumping' as a concept whereby the export price introduced into the domestic market of the importing country is 'less than its normal values'. Although the definition presupposes that the WTO Member must carry out a 'price-to-price comparison' of the 'export price' and the 'normal values' to discern the existence of dumped imports, the framework does anticipate situations where this might not be possible or appropriate. As such, it makes provision for alternative means to establish dumping in such cases. Hence, the determination of whether an exporter is selling its product at a reduced price, in the importing country's domestic market, which amounts to dumped import requires examining key concepts such as 'normal value', 'export price', and 'dumping margin'.

i. Normal Value[123]

Article 2.1 ADA defines 'normal value' of a product as the comparable price imposed in the ordinary course of trade on a similar product destined for consumption in the exporting country. That is, the normal value is the price of the like product in the producer's home market.[124] The inference is that there is need to compare the price of an exported product with that of a similar

[121] See Article VI:1 GATT 1994; *US – Stainless (Mexico) (2008)*, Appellate Body Report, para 98.
[122] See *US -1916 Act (2000)*, Appellate Body Report, para 107 where it was held that the intention of the exporter engaged in 'dumping' is irrelevant in the determination of dumping.
[123] See ADA, Article 2.1-2.2 See also De Baere et al, *supra* note 8 at 54-97.
[124] Bossche & Zdouc, *supra* note 1 at 761. See generally United Nations Conference on Trade and Development, "Training Module on the WTO Agreement on Anti-Dumping" (New York and Geneva: United Nation, 2006) UNCTAD/DITC/TNCD/2006, online: <https://unctad.org/system/files/official-document/ditctncd20046_en.pdf> (accessed 28 November 2023) [UNCTAD, "Training Module on the WTO Agreement on Anti-Dumping"].

product sold in the domestic market of the exporter. Hence, the ADA definition has been held to impose four (4) conditions on domestic sales that must be met before they are used in determining the 'normal value'. These are –

(i) the sale must be 'in the ordinary course of trade', that is normal trading condition;
(ii) the sale must be of the 'like product';
(iii) the product must be destined for 'consumption in the exporting country'; and
(iv) the price must be 'comparable'.[125]

Although the expression "the ordinary cause of trade" is not defined, the same has been clarified by case laws. Thus, in *US – Hot-Rolled Steel,* it was held to mean the sales that are "made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product".[126] The definition presupposes that there are situations where transactions may be determined not to be made "in the course of trade". Such situations have been held *may* exist in sales made to affiliated parties[127] or sales below cost.[128] Although the question of sales with affiliated parties is not addressed under Article 2.2.1 of the ADA, case laws have typically considered sales with related parties not to be in the ordinary cause of trade due to the possibility of such sales not being at arm's length. In *EU – Fatty Alcohols (Indonesia) (2017),* it was found that the existence of a close relationship between transacting firms might be material in the determination of how it affects the comparison of export prices with normal value.[129] On the other hand, Article 2.2.1 of ADA establishes the methodology for identifying whether 'sales below cost' are 'in the ordinary course of trade' when it provides that such sales may be disregarded in the determination of normal value 'only if' considered to be - (a) made within an extended period of time; (b) in substantial quantities; and (c) at prices. These three conditions must be met simultaneously for such sales to be disregarded.[130] The disregard of such sale is to ensure that the price used in the determination of normal value reflects the ordinary trading conditions.[131] It is also worthy of mention that the provision does not require

[125] *Ibid*. See *US – Hot Rolled Steel* (2001), Appellate Body Report; *Ukraine – Ammonium Nitrate (Russia) (2019)*, Panel Report, paras 7.72, 7.94 and 7.99.
[126] *US – Hot-Rolled Steel,* Appellate Body report.
[127] See *Australia – Anti-Dumping Measures on Paper,* Panel Report, para 7.153.
[128] See ADA, Article 2.2.1; *EC – Salmon (Norway) (2008),* Panel Report.
[129] *EU – Fatty Alcohols (Indonesia) (2017),* Appellate Body report, paras 5.36, 5.44, 5.109, 5.112 & 6.2-6.3.
[130] *China – HP-SSST (EU) / China – HP-SSST (Japan)*, Appellate Body Report, para 5.22; *EC – Salmon (Norway),* Panel Report, paras 7.315 – 7.316, 7.240-7.241 & 7.275.
[131] *Ukraine – Ammonium Nitrate (Russia) (2019),* Appellate Body Report.

investigating authorities to ordinarily treat domestic below-cost sales as not being 'in the ordinary course of trade' except when the methodology in Article 2.2.1.1 has been fulfilled.[132] Thus, in *Ukraine – Ammonium Nitrate,* the panel found that the investigating authority acted contrary to the provision of Article 2.2.1.1 of the ADA because it failed to consider the methodology contain therein while making its determination.[133] Furthermore, it has been noted that the provision confers the authority with the 'discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not "in the ordinary course of trade"'. However, such discretion is not without limitations as the same is required to be exercised in an unprejudiced manner in regards to all concerned parties.[134]

Like product as a second requirement for determining 'normal value' is defined under Article 2.6 as "[a] product which is identical, that is alike in all respects to the product under consideration, or [where such product does not exist], another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". That is, it is a similar product or one that share direct resemblance to the dumped product under consideration.[135] Hence, the determination of 'like product' for calculation of 'normal values' requires first examining the exported or dumped product(s) and then establishing the products within the local market of the exporting country that is similar. In *US – Softwood Lumber,* it was found that a 'like product' for the purpose of determining the existence of dumped import is the similar product that is destined for consumption in the exporting country and which is compared with the dumped/exported product.[136] Case laws have also confirmed that the phrase 'like product' must be given the specific meaning that Article 2.6 ascribed to it within the context of dumping.[137]

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[132] Article 2.2.1.1 set down conditions concerning the calculation and allocation cost to see if below-cost sale is 'in the ordinary course of trade'. The provision requires such calculation to be base on the records of the exporter provided that – (i) the exporter's records are in accordance with the generally accepted accounting principle of the exporting country; and (ii) the records 'reasonably reflect the cost =s associated with the production and sale of the product under consideration'. See *EU – Biodiesel (2016),* Appellate Body Report, para 6.26; 6.55-6.57; *Ukraine – Ammonium Nitrate (Russia) (2019),* Appellate Body Report, paras 6.87. 6.105 & 6.124 for the interpretation of these conditions.

[133] *Ibid*, paras 6.87, 6.105 & 6.124.

[134] *US – Hot Rolled Steel,* Appellate Body Report, para 140. See also Baere et al, *supra* note 18 at 59.

[135] See *EC & Certain Member States – Large Civil Aircraft 2011),* Appellate Body Report, para 1118

[136] *US – Final Dumping Determination on Softwood Lumber from Canada VI (2004)*, Panel Report, para 7.152.

[137] See *EC – Measures Affecting Asbestos and Asbestos-Containing Products,* Appellate Body, para 88 where it was held that "in each of the provision where the term 'like products' is used, the term must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears".

The third requirement, concerning the determination of 'normal value', is that the product must be destined for consumption in the exporting country. Although the term 'exporting country' is not defined under Article 2.1, its meaning becomes crucial specifically where the disputed product is not manufactured in the country where the exporting firm is located, which is under scrutiny for dumped import.[138] Notwithstanding, Article 2.5 of the ADA makes provisions for situations where an intermediary country produces the goods exported by the exporting country.

Regarding the fourth requirement, i.e. the price must *comparable*, Article 2.4 of the ADA requires that such comparison must be done fairly between the dumped product under investigation and the normal value.[139] For the determination of normal value, fair comparison is required to be made between exported or dumped products and the like products in the exporters' home country. In light of the rules in Article 2.1, sale transactions can only be used in the calculation of 'normal value' when all the four conditions highlighted above are met.

However, the ADA acknowledges that there are situations whereby the consideration of domestic price in the exporting country would not produce an appropriate normal value that can be compared with the export price. In turn, the calculation of normal value in the ordinary course of business would be difficult to make due to the lack of sales of like products in the exporting country's domestic market. Hence, Article 2.2 provides for two alternative methods for determining 'normal value', namely: (i) third-country exports; and (ii) constructed normal value.[140] In *US – OCTG (Korea) (2018),* the panel recognised the two methods in Article 2.2 as constituting the 'alternative bases' for determining normal value.[141]

The first alternative method pre-empts situations where "there are no sales of the like product in the ordinary course of trade in the domestic market"[142] This means that the exported product under consideration is not traded in the domestic market of the exporting country but can be found in a third country. Thus, to calculate the normal value in this situation, for the purpose

[138] See H Andersen, *EU Dumping Determinations and WTO Law*, (2009) 106.
[139] See *EC – Fasteners (Article 21.5 – China)*, Appellate Body Report, para 5.163 and the *EU – Biodiesel (2016),* Appellate Body Report, para 6.87, where the Appellate Body direct the investigating officers to make 'fair comparison' between the price of the dumped product and the normal value to be able to make due allowance for differences which affect price comparability.
[140] Appellate Body Report, *EU – Biodiesel*, para 6.24, referring to Panel Report, *Thailand – H-Beams*, para 7.112; Panel Report, US – Softwood Lumber V, para 7.278.
[141] *US – OCTG (Korea),* Panel Report, para 7.15. see also *EC – Tube or Pipe Fittings*, Appellate Body Report, paras 93–95.
[142] See ADA, Article 2.2

of determining dumping, the investigating authorities can rely on the export price of a third-country.[143] The second alternative method anticipates situations where the volumes of sales of like products destined for consumption in the exporting country's local market are too low for calculating the normal value[144] - this kind of situation would not produce an appropriate normal value for the purpose of comparison with the export price. In such situations, the second alternative method allows the investigating authorities to calculate via constructed normal value. By virtue of Article 2.2, such normal values would be constructed based on the costs of production in the exporting country plus a reasonable amount for selling, general and administrative costs and for profits.[145] The calculation the amount for selling, general and administrative costs and for profits shall be premised on actual data concerning the production and sale in the ordinary course of business of the identical product by the foreign producer under consideration.[146] In *Thailand – H-Beams,* it was found that the fundamental goal for constructed normal value "is to ensure a result as close as possible to what would be obtained on the basis of a price-to-price comparison"[147] This constructed practice has been deeply frowned upon by academic commentators on the grounds that leaves room for great manipulation for turning the trade remedy into a protectionist tool.[148] It is important to emphasise that the investigating authorities relying on the alternative method must adopt the correct procedure in the calculation of normal, otherwise such may be flawed and violate the rules in ADA.

ii. Export Price

An investigating authority is also required to calculate the 'export price' for the purpose of comparison with the 'normal value'. Export price is the price at which an exporter sells its products in the importing country's domestic market.[149] That is, it is the actual sale price of the

[143] *Ibid*. See GATT 1994, Article VI:1(b)(i) which refers to 'the highest comparable price for the like product for export to any third country in the ordinary course of trade'. The case laws have noted that both Article VI of the GATT and the ADA are complementary of each other and none supersede the other as seen in *US – Shrimp (Thailand), US – Customs Bond Directive,* Appellate Body Report, para 233. See also *US – OCTG (Korea),* Panel Report, para 7.15 the choice of the WTO Members to relies on the third-country export price for the calculation of normal value was confirmed.
[144] See ADA, Article 2.2 & the footnotes
[145] See also GATT 1994, Article VI:1(b)(ii). See ADA, Article 2.2.2 which set down the rules for calculating the amount for selling, general and administrative costs and for profits.
[146] See generally ADA, Article 2.2.2; *China – HP SSST (Japan) (2016),* Appellate Body Report, para 5.59; *EC – Bed Linen (2001),* Panel Report, paras 6.59-6.562; and *EC – Bed Linen (2001),* Appellate Body Report, paras 74-83.
[147] *Thailand – H-Beams,* Panel Report, para 7.127.
[148] Khan, *supra* note 8 at 42-44; and Karoline Andersson & Carin Thuresson, "The Impact of an Anti-dumping Measure – A Study on EU Imports of Chinese Footwear" (2008).
[149] Bossche & Zdouc, *supra* note 1 at 770; De Baere et al, *supra* note 8 at 97-99.

exported or dumped product. Although 'export price' is not defined under the WTO rules on Anti-dumping, Article 2.3 provides for alternative bases and methodology for determining the export price in certain circumstances where the actual export price cannot be ascertained or may be unreliable, namely: (a) dues to an association; or (b) a compensatory arrangement that exists between the exporter and importer or a third country[150] - these necessary preconditions must be fulfilled before Article 2.3 becomes applicable. In such circumstances, the provisions acknowledge that the investigating authorities can construct the export price.[151] In *US – OCTG (Korea),* the panel defined the term 'association' and interpreted what it means as a precondition for construction of export price. It was held that before an investigating authorities can rely on constructed export price due to association, it must demonstrate that there are grounds for holding the view that association exists. Otherwise, such construction would hold no weight in the absence of unrealisable export prices.[152] On the methodology, Article 2.3 directs the investigating authorities to base the construction on the determination of the price at which the exported product is sold to the first independent buyer or at a reasonable basis to be determined by the investigating authorities.[153] The methodology was clarified in *EU – Biodiesel (Indonesia)*[154] when the panel found that it is only after the methodology has been applied that the authority may make any adjustment for allowance concerning the fair comparison in Article 2.4. In summary, Article 2.3 is an exception to the general conditions stipulated in Article 2.1.

iii. Comparison of Normal Value with Export Price

Article 2.4 lays down the rules for the comparison between established 'normal value' and 'export price' to determine the 'dumping margin'.[155] That is, it requires the investigating authorities to make fair comparison between both element for the purpose of calculating the dumping margin.

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[150] See *US – Zeroing (EC) (2006),* Appellate Body Report; *EU – Biodiesel (Indonesia) (2018),* Panel Report; *US – Stainless Steel Korea (2001)*, Panel Report.
[151] ADA, Article 2.3.
[152] *US – OCTG (Korea),* Panel Report, paras 7.146-7.147, 7.150-7.151, 7.165, 7.173. See also De Baere et al, *supra* note 8 at 99-102.
[153] ADA, Article 2.3
[154] *EU – Biodiesel (Indonesia),* Panel Report, paras 6.91, 7.114, 7.116. See also De Baere et al, *supra* note 8 at 102-104.
[155] See *US – Zeroing (Japan) (2007),* Appellate Body Report, para 1112; *US – Stainless Steel (Mexico) (2008)*, Appellate Body Report, para 89; *US – Continued Zeroing (2009)*, Appellate Body Report, para. 283; *US – Anti-Dumping Methodologies (China) (2017),* Appellate Body Report; *US – Washing Machines (2016),* Appellate Body Report; Article 2.4.2 of the ADA.

The first sentence of Article 2.4 explicitly directs that the comparison be 'fair' thereby creating a stand-alone obligation of 'fair comparison' between normal value and export price. In *EC – Bed Linen,* the Appellate Body held that 'fair comparison' obligation is a stand-alone and an overarching obligation that acts as a precondition for the task contained in Article 2.[156] Although the term 'fair' comparison is not defined in the ADA, it has been interpreted to mean that the comparison must be unbiased, objective, and even-handed.[157] In this regard, the *zeroing practice*[158] has persistently been found to be inconsistent with the requirement of 'fair comparison'[159] – considering that 'fair comparison' between normal value and the export price takes account of the price for all the comparable export sales (whether negative or positive), while the fundamental nature of zeroing practice is to disregard export sale that produces a negative result.[160] Thus, in *US – Washing Machines,* it was found that the act of an investigating officer setting to zero 'individual export transactions' that produces negative comparison results is not fair as the authority fails to consider the price of all comparable export transactions that meet the applicable requirement under the second sentence of Article 2.4.2. In essence, it was held that the determination of dumping must meet the 'fair comparison' obligation in Article 2.4. The practice is common with the US investigating authorities[161] and it was why the US negotiator proposed its inclusion in the Anti-dumping discipline during the Doha Round of negotiation.

The second sentence of Article 2.4 elaborates on the requirement/methodology for fulfilling the general obligation of 'fair comparison'; which is that it "shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time". That is, the comparison between the export price and normal value shall be made at, namely: (i) 'same level of trade' – both normal value and export price should contain the same pricing component; (ii) 'normally at ex-factory level' – i.e. comparison should be based on the moment the goods were moved from the factory; and (iii) 'as nearly as possible the same

[156] *EC – Bed Linen,* Appellate Body Report, para 59
[157] *EC – Bed Linen (Article 21.5 – India)*, para 133; *EU – Fatty Alcohol (Indonesia),* Appellate Body Report, para 5.21; *US – Washing Machines (2016)*, Appellate Body Report, para 6.10; *US – Softwood Lumber V (Article 21.5 – Canada) (2005),* Appellate Body Report.
[158] See Khan, *supra* note 8 at 44, where he defined Zeroing practice as one which allow the investigating authorities to omit 'the calculations where the export price was higher than the normal value'.
[159] See *EC – Bed Linen*, Appellate Body Report, para 55; *US – Zeroing (Japan) (2007)*, Appellate Body Report, para 146; *US – Washing Machines (2016)*, Appellate Body Report, para 6.10; *US – Softwood Lumber V (Article 21.5 – Canada) (2005),* Appellate Body Report, paras 132, 138-142.
[160] De Baere et al, *supra* note 8 at 107-108. For more discussion on the consistence of 'zeroing' with fair comparison requirement in Article 2.4. See Bossche & Zdouc, *supra* note 1 at 775-776
[161] See Khan, *supra* note 8 at 44-45.

time' – i.e. a comparison on a transaction-to-transaction basis must occur at or around the same date.[162] The Appellate Body in *EU – Fatty Alcohol (Indonesia)* explained that these conditions constitute the 'basic parameters that further the goal of achieving a fair comparison'.[163] It must be emphasised that in fulfilling the 'ex-factory' condition, any additional cost incurred by the exporter in transporting the products from the factory to the independent buyer, and other expenses such as insurance, freight etc., that are included in the sales price shall be deducted.[164] The deductions are known as allowances.

To ensure a fair comparison between normal value and export price, the third sentence of Article 2.4 directs the investigating authority to make adjustments to both elements so as to create due allowances for 'differences which affect price comparability'.[165] The difference affecting price comparability was defined in *EU – Fatty Alcohols (Indonesia)* to mean 'differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the prices of the transactions.'[166] Article 2.4 also lays down that the 'difference affecting price comparability' includes differences in conditions and terms of sale, taxation, levels of trade, physical characteristics, quantities and any other differences.[167] In *EU – Biodiesel,* the panel held that these differences are 'all features, or characteristics, of the transactions that are compared to determine whether there is dumping'.[168] Also, the intention behind the requirement to account for those differences is to 'neutralise difference in a transaction that an exporter could be expected to have reflected in his pricing.'[169] While the 'fair comparison' obligation is imposed on the investigating officer, the burdens lies on the exporter to make a request for an adjustment that would accommodate the differences.[170] It must be noted that the inclusion of the phrase 'any other differences' in Article 2.4 leaves room for expansion of the difference category in the future. It shows that the differences listed in the provision are non-exhaustive. Thus, the investigating authorities have the discretion to design

[162] It must be noted that these requirements must be fulfilled concurrently.
[163] *EU – Fatty Alcohols (Indonesia),* Appellate Body Report, para 5.21. See also *US – Hot-Rolled Steel*, Appellate Body Report, para 178; *Argentina – Poultry Anti-Dumping Duties*, Panel Report, para 7.235; *EU – Biodiesel*, Panel Report, para 7.293.
[164] See De Baere et al, *supra* note 8 at 108-109.
[165] See *EC Fasteners (Article 21.5 – China) (2016),* Appellate Body Report, para 5.204.
[166] *EU – Fatty Alcohols (Indonesia)*, Appellate Body Report, para 5.22, referring to *US – Zeroing (EC)*, Appellate Body Report, para 157.
[167] See *US – Softwood Lumber V (2004),* Panel Report, para 7.165; *EC – Tube or Pipe Fittings (2003),* Panel Report, para 7.157. See also Footnote 7 to the third sentence in Article 2.4 of the ADA further explained that 'some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under' the provision.
[168] *EU – Biodiesel*, Panel Report, para 7.295.
[169] *US – Stainless Steel (Korea),* Panel Report, para 6.77.
[170] *EC Fasteners (Article 21.5 – China) (2016),* Appellate Body Report, para 5.204.

a new set of differences affecting price comparability which may be recognised in the future. This is one of the many discretions in the WTO Anti-dumping framework that can be abused to undermine the very objective of the trade remedy.

iv. Determination of Margin of Dumping

The calculations of dumping margins are based on the assessment of the exporter's pricing behaviour via fair comparison between the export price and the normal value. Such comparison must take into account the prices of all exports sales of the exporter to be able to ascertain in clear terms whether the exporter is, in fact, dumping the products under consideration. This confirms that 'dumping' and 'dumping margin' both relate to the sale transactions of the exporter.[171]

To determine the margins, Article 2.42. of the ADA sets out the three methodologies, namely: (i) weighted average-to-weighted average; (ii) transaction-to-transaction; (iii) 'weighted average-to-transaction' method. The first method allows dumping margin to be established 'on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions.'[172] That is, the method requires comparison between a single weighted average normal value and a single weighted average export price comparable transaction.[173] The second method entails 'a comparison of normal value and export prices on a transaction-to-transaction basis'.[174] These two methods are the general methods for calculating dumping margin, and they are also known as '*symmetrical comparison methodologies*'. The Appellate Body has found them to involve a comparison of all transactions of the exporter being investigated , whose product falls within the scope of like product.[175] The third method relates to the normal value established on a weighted average basis that is compared with the export price of an individual export transactions.[176] In *US – Washing Machines*, the panel explained the phrase "individual export transactions" as transactions that are within the "relevant pricing pattern, a more limited universe than the export transactions covered when applying the symmetrical comparison methodologies

[171] See *US – Zeroing (Japan),* Appellate Body Report, para 112; *US – Stainless Steel (Mexico) (2008),* Appellate Body Report, paras 87-89, *US – Continued Zeroing (2009),* Appellate Body Report, para 283.
[172] See generally ADA, Article 2.4.2.
[173] *US – Zeroing (Japan),* Appellate Body Report, para 6.112.
[174] See generally ADA, Article 2.4.2.
[175] See *EC – Fasteners (Article 2.15 – China) (2016),* Appellate Body Report, para 5.282.
[176] See the second sentence in Article 2.4.2 of the ADA.

foreseen in the first sentence of Article 2.4.2."[177] It is an exception to the first two general methods of calculating the dumping margin described in the first sentence of Article 2.4.2.[178] The provision further sets out the conditions for using the third methodology, namely: (i) if investigating authorities find a pattern of export prices which differs significantly among different buyers, region or period; (ii) if investigating authorities provide an explanation for the reason such differences cannot be accounted for under the symmetrical methodologies.[179]

It is important to note that the 'zeroing' policy is a controversial practice that has caused problems in the calculation of dumping margins within the multilateral trading system. Hence, the *practice* has been challenged and branded unfair by case laws.[180] In *US – Softwood Lumber V (2004),* where the US infused the zeroing model in the methodologies under Article 2.4.2 to calculate dumping margin during the investigation, the Appellate Body found that "If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into accounts the results of all those comparisons in order to establish margins of dumping for the product as a whole."[181] The ruling on the 'model zeroing' has been affirmed in cases such as *US – Zeroing (EC (2006), US – Zeroing (Japan) (2007),* and *US – Stainless Steel (Mexico) (2008)* that there is no justification infusing the zeroing practice in the process of calculating dumping margins.[182] Also, in *US – Washing Machines (2016),* the Appellate Body found that the US investigating authority used the zeroing practice to utilise the exceptional method in the second sentence of Article 2.4.2 to calculate margins of dumping.[183] The reported cases indicate that the practice of zeroing is mostly used by the US investigating authorities in the determination of dumping. They used the zeroing method in the calculation of a dumping margin. This US zeroing practice has been severely condemned as it artificially inflates 'dumping margins, increasing both the likelihood that the [Department of Commerce] will find injury and the value of punitive duties that can be assessed on dumped

[177] *US – Washing Machines Machines,* Panel Report, 7.188.
[178] See *US – Softwood Lumber V (Article 21.5 – Canada) (2006),* Appellate Body Report, para 97; *US – Zeroing (Japan) (2007),* Appellate Body Report, para 123.
[179] *Ibid*; *US – Washing Machines (2016),* Appellate Body Report, paras 5.29 & 5.36.
[180] *US – Washing Machines (2016),* Appellate Body Report. For more context on the zeroing practice in the calculation of margins of dumping see Bossche & Zdouc, *supra* note 1 at 777-778; De Baere et al, *supra* note 8 at 125-128 & 132-133
[181] *US – Softwood Lumber V (2004),* Appellate Body Report, para 98.
[182] See *US – Zeroing (EC) (2006),* Appellate Body Report, para 126; *US – Zeroing (Japan) (2007),* Appellate Body Report, paras 125-128; *US – Stainless Steel (Mexico) (2008),* Appellate Body Report. See also *US – Softwood Lumber V (Article 21.5 – Canada) (2006),* Appellate Body Report, para 132.
[183] See *US – Washing Machines (2016),* Appellate Body Report, paras. 5.55, 5.98, 5.111, 5.117, 5.124, & 5.129-5.130. See also *US – Certain Anti-Dumping Methodologies (China) (2017),* Appellate Body Report, paras 5.105-5.107.

products.'[184] In essence, the use of the practice increases the chances of making positive determination of dumped import and thereby turning the measure - that is supposed to level the playing field between the rich and vulnerable countries – into a trade restriction instrument.

The determination of dumping so far examined has disclosed that it is the first step toward investigating the existence of dumped import activities within the local industry of an importing country. As such, an affirmative finding of dumped imports is not enough to trigger the application of the WTO framework. There is a need to demonstrate the existence of 'material injury' and a causal link between the dumped import activities and the injury.

2.4.1.2 Establishment of Injury to Local Industry

The determination of whether an importing country's domestic industry is suffering from, or there is a threat of injury is the second element that must exist – after having established the existence of dumped import - in order to impose Anti-dumping measure under the WTO framework. To do this, the investigating authority must first establish that a domestic industry exists.

A. Domestic Industry

Under the ADA, the concept of domestic industry is crucial to the imposition of Anti-dumping measures as it determines the parties that may file a petition requesting for the initiation of Anti-dumping investigation. It also identifies the scope of data that may be considered in the determination of injury. Once the concept is established, it informs the basis for the determination of injury pursuant to Article 3 of the ADA. Article 4.1 of the ADA defines 'domestic industry' to mean either the domestic producers as a whole of the like products or those domestic producers whose collective output of the products constitutes *a major proportion* of the total domestic production of the exporter.[185] This definition is for the purposes of the ADA. In *EC – Salmon (Norway),* it was found that while the description of 'domestic industry' in Article 4.1 is definitional, it imposes an 'obligation on [M]embers which

[184] D Markheim, "Time to End "Zeroing" in Trade Dumping Calculations", *The Heritage Foundation* (31 December 2008), online: <www.heritage.org/trade/report/time-end-zeroing-trade-dumping-calculations> (accessed 1 May 2024). See also Khan, *supra* note 8 at 44-45.

[185] *EC – Fasteners (China) (2011)*, Appellate Body Report, where the Appellate Body noted that domestic producer s of the "like Products" are the starting point for accurately defining the domestic industry. See *Argentina – poultry Anti-Dumping Duties* (2003), Panel Report; *Russia Federation – Commercial Vehicles (2018),* Appellate Report; *Korea – Pneumatic Valves (Japan) (2019)*, Appellate Body Report.

can be the basis of a finding of violation'.[186] Although the term 'producers' in Article 4.1 is referenced in plural, it has been undisputedly noted 'that a single domestic producer may constitute the domestic industry under the [Anti-Dumping] Agreement'.[187]

The ADA identifies two circumstances in which a producer may be exempted from the definition of 'domestic industry'. These circumstances are, namely: (i) the producers are 'related to the exporters or importers' under investigation or are they are the importer of the alleged dumped import;[188] and (ii) the domestic producer in an isolated competitive market produces and sells all or most of their product, and the demand is not substantially supplied by the producer elsewhere in the territory[189]. The first circumstance presupposes that there is a relationship between the producer and the importer. In this regard, Footnote 11 of Article 4 of the ADA explained that the relationship shall only be implied where: (a) there is direct or indirect control between the two; (b) there is direct or indirect control by a third party between the producer and the importer or exporter; or (c) both parties control a third person and there are grounds which support that the control may affect the producers' behaviour. The second circumstance relate to situation 'where a market is divided into series of distinct competitive market and producers in each market', that may be considered a separate industry.[190] It presupposes that Anti-dumping duties would not be imposed on an isolated market. Although the exclusion of these circumstances is to prevent situations where the domestic producers can benefit from dumped imports, the exclusion is still subject to the decision of a competent authority.[191] After establishing the existence of 'domestic industry', the competent authority must prove the occurrence of injury. This is because the WTO framework condemned dumping only when it inflicts or threatened to inflict injurious injury on a domestic industry.

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[186] *EC – Salmon (Norway)*, Panel Report, para 7.118. See also *Argentina – Poultry Anti-Dumping Duties*, Panel Report, para 7.338.
[187] *EC – Bed Linen*, Panel Report, para 6.72.
[188] See Article 4.1 (i) and footnote 11 of the ADA; UNCTAD, "Training Module on the WTO Agreement on Anti-Dumping Module on Anti-Dumping", *supra* note 155 at 26.
[189] See Article 4.1(ii) ADA; Taona Sean Mwanyisa, *The Increasing Need for Anti-Dumping Regulation in Africa: A Case Study of Zimbabwe*, (LLM Thesis: University of Pretoria, 2021) 19 [unpublished], online: <https://repository.up.ac.za/bitstream/handle/2263/82946/Mwanyisa_Increasing_2021.pdf?sequence=3&isAllowed=y> (accessed 28 November 2023).
[190] De Baere et al, *supra* note 8 at 195.
[191] United Nations Conference on Trade and Development (UNCTAD), "Dispute Settlement in World Trade Organization: Anti-Dumping Measures" (New York and Geneva: United Nations, 2003), online: <https://unctad.org/system/files/official-document/edmmisc232add14_en.pdf> (accessed 28 November 2023) [UNCTAD, "Dispute Settlement in World Trade Organization: Anti-Dumping Measures"].

B. Injury

The determination of injury in the domestic market of an importing country is another important precondition for imposing Anti-dumping duties. Footnote 9 of Article 3 of the ADA defines injury to mean either of the following: (i) material injury; (ii) threat of material injury; or (iii) material retardation. Whilst Article 3 sets out the guidelines for establishing each of the three types of injury. Hence, in *China – HP-SSST (EU)/China - HP-SSST (Japan) (2015),* it has been held that Article 3 contains an 'overarching obligation' on the determination of injury alongside and the causation analysis.[192] These three categories of injury will be discussed below –

i. Material Injury

Material injury as a concept for imposing Anti-dumping measure is not defined, but the ADA sets out the guidelines for establishing what constitutes a material injury. Article 3.1 of the ADA imposes obligations on the investigating authorities to prove the existence of material injury based on positive evidence conducted through objective examination of the – (1) volume of dumped imports and their effect on prices of like products in the domestic market of the importing country; and (2) the subsequent impact on products of the domestic producers.[193] These two conditions informed the detailed obligations that are contained in succeeding paragraphs of Article 3 thus: (i) the volume of dumped imports and their effect on prices (Article 3.2); and (ii) cumulative assessment of the imports from more than one country (Article 3.3); (iii) the impact of dumped imports on the local industry(Article 3.4); (iv) causal link between the dumped imports and the injury inflicted on the domestic industry (Article 3.5); (v) the domestic production of the like product (Article 3.6); (vi) threat of material injury (Article 3.7).[194] As such, in *Thailand – H-Beans (2001),* the Appellate Body found that the obligation in Article 3.1 are substantive in nature and the authority must prove them to establish an injury to the domestic industry.[195]

To prove the first main condition, the investigating authority is required to establish whether there has been substantial or significant increase in dumping products either in the absolute

[192] *China – HP-SSST (EU)/China - HP-SSST (Japan) (2015),* Appellate body Report, para 5.137;. See also *China – GOES (2012),* Appellate Body Report, para 128; *EU – Biodiesel (2016),* Appellate Body Report, para 6.124.
[193] See *US – Hot-Rolled Steel (2001)*, Appellate Body Report, para 192; *China – HP SSST (EU)/China – HP-SSST (Japan) (2015),* Appellate Body Reports; Bossche & Zdouc, *supra* note 1 at 788 – 795.
[194] See generally Article 3 of the ADA.
[195] *Thailand – H-Beans (2001)*, Appellate Body report, para. 106.

term or relativeness to production or consumption in the importing country (all of which are possible alternatives for determining the volume of dumped import).[196] The second condition entails that the competent authority examines whether there has been a significant reduction in export sales price due to dumped import compared to the price of like product in the importing country. It also requires that they determine the effect of the dumped imports preventing the increase of prices of like products which would have occurred if not for the dumping.[197] In summary, the second condition demands that an assessment be conducted on the impact of the dumped imports on the domestic market. However, the examination must disclose evidence of all economic factors relevant to the domestic market of the importing country. [198] In *EC – Bed Linen,* it was held that all the factors must be collectively determined to have a decisive guideline.[199]

The lack of definition of what constitutes 'material injury' has been criticised and argued to serve as an impediment to the effectiveness of the WTO framework on Anti-dumping measures. It is perceived that the flexibility of the Anti-dumping discipline leaves rooms for the trade remedy to be deployed as a protectionist measure.[200] Hence, reasons the developing countries clamoured for stricter discipline on the application of the measure during the Uruguay Round of negotiations. Moreover, the negotiation dispute on Anti-dumping measures that played out throughout the history of the multilateral trading system continues to inform how the Members deploy and interpret the rules on Anti-dumping measures.

ii. Threat of Material Injury

Article VI of the GATT 1994 and the ADA also recognised the 'threat of material injury' in the absence of actual injury as an element for determining the existence of injury in the domestic industry of an importing country. It allows the competent authorities to determine the imposition of Anti-dumping duties under the WTO framework which would prevent threat of material injury to the domestic market. However, the first sentence in Article 3.7 of the ADA

[196] See generally the first sentence of Article 3.2 of the ADA. See also *China – Cellulose Pulp,* Panel Report, paras 7.36-7.39; *EC – Bed Linen (Article 21.4 – India) (2003),* Appellate Body Report; *China – HP SSST (EU)/China – HP-SSST (Japan) (2015)*, Appellate Body Reports, para. 5.156.
[197] See generally Article 3.2 of the ADA.
[198] See Article 3.4 of the ADA; Appellate Body Reports, *China – HP SSST (EU)/China – HP-SSST (Japan) (2015)*, para. 5.211.Ssee also De Baere et al, *supra* note 8 at 156-164
[199] *EC – Bed Linen (Article 21.4 – India) (2003),* Appellate Body Report.
[200] M Bolton, "Anti-dumping and Distrust: Reducing Anti-dumping Duties under the WTO through Heightened Scrutiny", (2012) 29 Berkeley Journal of International Law 76; Khan, *supra* note 8 at Chapter 4; and Dari, *supra* note 64 at Chapter 2.

requires that such determination be based on objective factors instead of mere allegation or remote possibility.[201] Also, the second sentence set out that "[t]he change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent." In the words of De Baere et al, the provision imposed both positive and negative obligations on the investigating authority.[202] Whilst the determination of the threat of material injury must be objective and clearly foreseen, the provision prohibits the authority from relying on mere allegation or remote possibility.[203] Furthermore, Article 3.7 listed, *inter alia,* four (4) special factors the investigating authorities must consider to validly determine the existence of a threat of material injury,[204] namely:

i. "a significant rate of increase of dumped imports into the domestic market indicating the possibility of substantially increased importation;
ii. sufficient freely disposable, or an imminent substantial increase, in, capacity of the exporter indicating the possibility of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
iii. whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would be likely to increase demand for further imports; and
iv. inventories of the product being investigated."[205]

These factors all relate to the likelihood of increased imports, on account of increased rate of dumped imports and capacity of the exporter (i.e. overcapacity of the producer is a likely factor for increased imports), and impacts of those imports on the future domestic prices and an increased demand from buyers for further imports and inventories. The panel in *US – Coated Paper (Indonesia)* affirmed the nature of these special factors when it found that it relates to the likelihood of increased imports and their effects on future prices and future demand for import and inventories (which must all be considered in order to make the determination of threat of injury).[206] Also, in *Mexico – Corn Syrup,* it was held that 'Article 3.7 sets out

[201] *US – Coated Paper (Indonesia*) *(2018)*, Panel Report, paras 7.265–7.319. See *Mexico – Corn Syrup (Article 21.5 – US) (2001),* Appellate Body Report.
[202] De Baere et al, *supra* note 8 at 186.
[203] *Mexico – Corn Syrup (Article 21.5 – US),* Appellate Body Report, para 85
[204] *Ibid*, para 83.
[205] Article 3.7(i) –(iv) of the ADA.
[206] *US – Coated Paper (Indonesia),* Panel Reports, para 7.262.

additional factors that must be considered in a threat case".[207] The competent authority must be able to determine the possibility of a material injury occurring in the absence of Anti-dumping measures.[208] In summary, material injury is the possible effect which dumped imports may have on like products in the domestic market of an importing country, that must be measured through the decline in the industrial performance of the domestic industry.

iii. Material Retardation

Material retardation is another form of injury recognised under the WTO framework on Anti-dumping.[209] However, it neither defines nor prescribes any guidelines for the determination of material retardation – except for its mention in the WTO Anti-dumping rule.[210] In the absence of multilateral guidelines for the determination of material retardation, some WTO Members have enacted legislation to guide their application of the element.[211] In contrast to material injury or threat of material injury, material retardation is mainly applicable to unestablished domestic industries,[212] that have either commenced production but are not stabilized or have not commenced production at all.[213] A classic case of material retardation is that of *Morocco – Hot-Rolled Stell (Turkey)*[214] where the panel commented on the lack of prescribed methodology for assessing material retardation and proceeded to establish five-part criteria for determining whether an industry was unestablished thus:

> "(a) how long the domestic industry had been producing the domestic like product; (b) the market share of the domestic like product; (c) whether the domestic industry's production had been stable; (d) whether the domestic industry had

[207] *Mexico – Corn Syrup*, Panel Report, para 7.131. See Article 3.7 of the ADA which listed the key element that must be considered in the determination of the 'threat of material injury', which includes – (a) increase in dumped imports; (b) an increase in capacity of the exporter, imports entering at prices that will have substantial suppressing or depressing effect; and (c) inventories of the imported product being investigated.
[208] *Mexico – Corn Syrup (2000)*, Panel Report, para 7.127; *US – Softwood Lumber VI (2004)*, Panel Report, para 7.105.
[209] See generally ADA, Article 3 and Footnote 9.
[210] For more context on material retardation see Meredith A Crowley & Federico Ortino, "Establishing a New Role for Antidumping Policy: Protection of an Unestablished Industry (*Morocco – Hot-Rolled Steel (Turkey)*)", (2021) 20:4 World Trade Rev 533-545; P Narayanan, "Injury Investigation in 'Material Retardation' Anti-Dumping Cases" (2004) Northwestern J Intl L & Bus 38.
[211] For example, China's Rule on Investigations and Determinations of Industry Injury for Anti-dumping, 2001 G/ADP/1/CHN/2/Suppl.3, Article 5 provide the guideline that "although no material injury or threat of material injury has been caused to a domestic industry; the establishment of a domestic industry has been seriously retarded".
[212] Footnote 9 of Article 3 of the ADA. See Crowley & Ortino, *supra* note 210 at 537-540; Narayanan, *supra* note 210 at 41.
[213] *Morocco – Hot-Rolled Steel (Turkey) (2019)*, Panel Report, para 7.152. See also Narayanan, *supra* note 209.
[214] See *Morocco – Hot-Rolled Steel (Turkey) (2019)*, Panel Report; *Morocco – Hot-Rolled Steel (Turkey) (2019),* Appellate Body Report.

reached profitability/break-even point; and (e) whether the domestic industry constituted a "new" industry"[215]

Despite the classic case's guidelines for unestablished industry, the WTO rules on Anti-dumping is yet to prescribe any methodology for assessing whether an unestablished industry has suffered material retardation. The absence of this guidance is one of the loopholes in the WTO framework which has afforded the investigatory authority of the advanced and emerging economies (with functional Anti-dumping system) with certain degree of discretion in choosing a methodology that suite their agenda or analysis.[216] Considering that the issues of material retardation would mostly likely affect the poor Global South countries (as most of their industries are infant industries which would easily passed the five-part test), the flaw in Article 3.1 of the ADA on 'material retardation' serve to benefit the interest of the Global North countries (with more established industry than unestablished industry). To this end, absence of sufficient guidance on the issue of material retardation is an impediment to the competitiveness of the low- and lower-middle-income developing economies compared to the Industrialized economies with more established industries.[217]

While the many loopholes in the WTO Anti-dumping regime have afforded Global North and few Global South State (with functional Anti-dumping regimes) the opportunity of utilizing the measure as a protectionist tool to discriminate against the trade, it has denied the low-middle-income Global South States the opportunity to genuinely use the trade remedy regime to counter the market-distortion practice of foreign power firms industrialised countries. It has also denied them the opportunity of using Anti-dumping measures to revive their de-industrialised manufacturing sectors, as well as to improve the competitiveness of their export. For instance, the Nigerian government has been unable to curb the trade-distorted practices of foreign firms from its industrialised trade partners. It has never initiated any Anti-dumping investigation despite evidence of injurious dumping activities – that has contributed the premature de-industrialization of some of her manufacturing sectors[218] due to her constrained

[215] *Morocco – Hot-Rolled Steel (Turkey) (2019)*, Panel Report, para 7.141, 7.153-154
[216] *Ibid*, para 7.155; Crowley & Ortino, *supra* note 210 at 537-545.
[217] See generally Alessandrini, *supra* note 1 at Chapters 4-6.
[218] See generally WTO, *Trade Policy Review Body: Report By the Secretariat on Nigeria*, WTO Doc WT/TPR/S/356 (9 May 2017), online <www.wto.org/english/tratop_e/tpr_e/s356_e.pdf> (accessed 13 January 2024) (herein referred as WTO 2017 Report on Nigeria); Sola Akinrinade & Olukoya Ogen, "Globalization and De-Industrialization: South-South Neo-Liberalism and the Collapse of the Nigerian Textile Industry", (2008) 2:2 The Global South 159-170, online: <www.jstor.org/stable/40339266> (accessed 8 April 2024); Goddy Uwa Osimen & Ezekiel Eiton Micah, "Nigeria-China Economic Relations: Matters Arising", (2022) 10:3 Global J Pol Sci & Admin 42, 49, online: <www.researchgate.net/profile/Goddy-Osimen/publication/363634201_Nigeria-

capacity and lack of measures within the WTO framework to cater for redressing such power imbalance.

2.4.1.3 Causative Link

The determination of a causal link is fundamental to imposing Anti-dumping measures. It is important that a competent authority establishes a close relationship between the dumped imports and the injury suffered in the domestic market of an importing country before it imposes Anti-dumping measures. Thus, Article VI of the GATT 1994 and Article 3.5 of the ADA envisage that the trade remedy becomes applicable only when it is demonstrated that the dumped import caused the injury suffered or has the effect of causing material injury to the domestic market.[219] Moreso, Article 3.5 imposed both negative and positive obligations on the investigating authorities to establish the causative link. While the positive obligation requires that the investigating authority demonstrates the existence of casual relationship between the dumped imports and the injury to the domestic market, the negative obligation demands an examination of 'any known factors other than the dumped imports which at the same time are injuring the domestic industry'.[220] That is, the authority must examine both attributive and non-attributive factors to establish the causative link.

Article 3.5 identifies a number of relevant or attributive factors that can be used to establish causal link, and in guaranteeing that non-attribution do not occur thus: (a) the volume and price of imports not sold at dumped import prices; (b) contraction in demand or changes in the patterns of consumption; (c) trade-restrictive practices of and competition between foreign and

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China_Economic_Relations_Matters_Arising/links/632626ce70cc936cd3161647/Nigeria-China-Economic-Relations-Matters-Arising.pdf> (accessed 6 April 2023); "Product Dumping: How Asians are Killing Made-In-Nigeria Goods", *Vanguard* (2 April 2012), online: <www.vanguardngr.com/2012/04/product-dumping-how-asians-are-killing-made-in-nigeria-goods/> (accessed 25 November 2024); Iyabo, *supra* note 90; Odinaka Anudu, "Nigeria's Giant Industries are Silently Disappearing", *International Centre for Investigative Reporting* (21 December 2021), online: <https://www.icirnigeria.org/nigerias-giant-industries-are-silently-disappearing/> (accessed 5 April 2024) [Anudu, "Nigeria's Giant Industries are Silently Disappearing"] ; Odinaka Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two", *International Centre for Investigative Reporting* (22 March 2022, online: <https://www.icirnigeria.org/nigerias-giant-industries-are-silently-disappearing-part-two/> (accessed 5 April 2024) [Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two"]; Adaora Osondu-Oti, Adaora, "China's Market Expansion and Impacts on Nigeria's Textile Industry", (2021) 2:1 J of Contemporary Intl Relations & Diplomacy 192: Iloh et al, *supra* note 23; Jeremiah, "CBN's Efforts to Revive the Textile Industry" (2019) Leadership, online: <https://leadership.ng/cbns-efforts-to-revive-the-textile-industry/> (accessed 10 January 2024).

[219] *See China – HP-SSST (EU)/China – HP-SSST (Japan) (2015),* Appellate Body Report, paras 5.251, 5.256 & 5.262 where it was found that China acted inconsistently with the provision of Article 3.1 and 3.5 given that MOFCOM improperly relied on the market share of dumped import and, flawed price effects and impact analyses, in establishing a causative relationship between dumping and material injury to the domestic industry.

[220] See generally ADA, Article 3.5.

local producers; (d) development in technology; and (e) the export performance and productivity of the domestic industry. Nonetheless, these lists of factors have found to be non-mandatory. In *Thailand – H-Beans (2001)*.[221] It was held that although the list contains useful guide, it is not mandatory compare to those in Article 3.4. Hence, the factors are merely illustrative. It is important to emphasise that to ensure non-attribution of dumping to injury caused by other factors, the investigating authorities are required to examine the injurious impact of those other factors. Also, non-attribution in Article 3.5 would only become applicable where dumping and other known factors are causing injury to the domestic injury simultaneously.[222]

So far, the analysis of the WTO framework on Anti-dumping substantive requirement reveals the comprehensive commitment required of WTO Members in offsetting the injurious impact of trade-distortion practice. These detailed commitments presuppose that the Members have in place adequate and effective institutional resources at their disposal to engage the Anti-dumping regime. Conversely, the trade remedy aims to level the playing field between the developed and developing countries – i.e. redress the structural imbalance that exist amongst its members. In reality, many of the 164 WTO Members are developing countries with constricted capacity, and underdeveloped infrastructures and resources to actively engage the WTO principles.[223] Hence, the reason about 60 out of the 117 WTO developing-countries Members are yet to initiate Anti-dumping measures.[224] This shows the how far off the multilateral trading system is fulfilling its developmental promise to the developing countries. As such, critics have observed that the WTO framework contains principles 'favouring

[221] *Thailand – H-Beans (2001),* Panel Report, para 7.274.
[222] For more context see *US – Hot-Rolled Steel (2001),* Appellate Body Report, paras 224 and 226. See also *EC – Tube or Pipe Fittings (2003),* Appellate Body Report, para 189 where it was clarified that for the non-attribution obligation to be triggered, Article 3.5 requires that the factor under investigation must be: (i) known to the investigating authority; (ii) a factor other than dumped imports; (iii) be injurious to the domestic industry at the same time as the dumping.
[223] See De Clerq, *supra* note 17; Alessandrini, *supra* note 1 at Chapters 4-6; Marc Busch et al, "Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping action in the WTO" (2008) ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper No.4, online: < https://www.researchgate.net/profile/Eric-Reinhardt/publication/255639194_Does_Legal_Capacity_Matter_Explaining_Dispute_Initiation_and_Antidumping_Actions_in_the_WTO/links/0f31753bc5ba8d78b0000000/Does-Legal-Capacity-Matter-Explaining-Dispute-Initiation-and-Antidumping-Actions-in-the-WTO.pdf> (accessed 3 May 2024); Maldonado, *supra* note 1.
[224] WTO, "Anti-Dumping Measures by Reporting Member 01/01/1995 – 30/06/2023" (2023), online: < www.wto.org/english/tratop_e/adp_e/ad_measuresbyrepmem.pdf> (accessed 3 May 2024) [WTO, "Anti-Dumping Measures by Reporting Member 01/01/1995 – 30/06/2023"]. See also World Trade Organisation, "WTO in Brief", *WTO,* online: <www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm> (accessed 5 May 2024); and De Clerg, *supra* note 17 at 67-68.

wealthier Members outstripping the capacity of Global South countries to advance … policies that tackle extreme poverty, underdeveloped infrastructure, and other endemic issues in the Global South region'.[225] In addition, the WTO framework on Anti-dumping contains flaws that leaves room for impediments of its very purpose. The next section will examine the investigatory procedure for Anti-dumping under the WTO rules.

2. 4.2 Anti-Dumping Procedural Requirement

The WTO framework sets out the procedure by which the competent authorities must conduct Anti-dumping investigation. Although these procedural requirements do not prevent WTO Members from creating supplementary procedure, but such procedure must be compliant with the WTO framework. It must also comply with and not offend the WTO non-discrimination principle. This section will briefly examine these procedural requirements.

2.4.2.1 Initiation

Article 5 of the ADA provides that Anti-dumping investigation should only be initiated by a written complaint lodged by or on behalf of a domestic industry alleging dumped import.[226] It also prescribes the content requirement for the initiation request which must, *inter alia,* contain proof of dumping, injury to the domestic industry and casual link between the dumped import and injury.[227] Thus, a mere assertion without evidences will not meet this requirement. Notwithstanding, the application need not contain an analysis of the evidence, but detail information on those evidences is enough to ground the requirement in Article 5.2 of the ADA.[228] In *US – Softwood Lumber V (2004),* it was held that the provision do not intend to impose obligation on the applicant to submit all information that is reasonably related to the claim.[229]

Although investigation authorities have an obligation to examine the accuracy and adequacy of the evidence contained in the application to determine whether it warrants commencing the

[225] Maldonado, *supra* note 1 at 5. See also Alessandrini, *supra* note 1 at Chapters 4-6; Khan, *supra* note 8 at Chapter 4.
[226] See *US – 1916 Act (Japan) (2000),* Panel Report. See also S E Lee, *World Trade Regulation: International Trade under the WTO Mechanism*, (2012) 126
[227] ADA, Article 5.2. See *US – Softwood Lumber,* Panel Report, para 7.52
[228] *Mexico – Corn Syrup (2000),* Panel Report, para 7.76; *Thailand – H-Beams (2001),* Panel Report, para 7.75.
[229] *US – Softwood Lumber V (2004),* Panel Report, para 7.54.

investigation,[230] they are not required to assess the sufficiency of the evidence submitted.[231] Prior to commencing the actual investigation, Article 5.5 requires the investigating authorities to notify the exporting countries of their intention to commence investigation. Also, to lessen the disruptive effect of Anti-dumping investigation, Article 5.10 imposes a time limit of one year for the completion of the investigation – the one year would run from the date of initiation. In exceptional situations, the investigation time limit can be extended to a maximum of 18 months. Nevertheless, the ADA requires that Anti-dumping investigations must not be an obstacle to customs clearance procedure in the importing country.[232] Thus, the normal day-to-day customs procedure continues and is not disrupted by Anti-dumping investigations.

With regards to termination, the investigation authorities must reject an application to initiate Anti-dumping investigation, and promptly terminate the investigation once satisfied that the evidence submitted are not enough to warrant dumped import or injury.[233] Moreso, Article 5.8 of the ADA directs prompt termination of Anti-dumping investigation where – (i) the dumping margin is less than two-percent (2%) of the export sale price (i.e. considered *de minimis)*; (ii) the volume of import from the exporting country is less than three-percent (3%) of the import of similar product into the importing country (i.e. considered *negligible* volume of import). These conditions are set out to prevent the continuation of unwarranted investigation.

2.4.2.2 Conduct

Article 6 of ADA lays down the rules for conducting the investigation, including the techniques for collection and use of evidence, and the condition for due process. Firstly, all interested parties must be notified concerning the information the authorities require for conducting the investigation.[234] Also, the parties must be given ample opportunity to present in writing all evidences considered as relevant to the investigation.[235] To achieve this, the investigating authorities customarily send questionnaires to all concerned parties, within which the authorities identify the information they request of the parties for the purpose of conducting

[230] See generally Article 5.3 of the ADA. See also *Guatemala – Cement II (2000),* Panel Report, para 8.62; *US – Softwood Lumber V (2004),* Panel Report, para 7.24
[231] See *Mexico – Steel Pipes and Tubes (2007),* Panel Report.
[232] See generally Article 5.9 of the ADA.
[233] ADA, Article 5.8. See also *Mexico – Steel Pipes and Tubes (2007)*, Panel Report, para 7.61; *Argentina – Poultry Anti-Dumping Duties (2003),* Panel Report, para 7.112; and *Mexico – Anti-Dumping Measures on Rice (2005),* Appellate Body Report, para 208.
[234] ADA, Article 6.1. See *Mexico – Anti-Dumping Measures on Rice (2005),* Appellate Body Report, para 251.
[235] ADA, Article 6.1. See *US – Oil Country Tubular Goods Sunset Review (2005),* Appellate Body Report, para 241.

the investigation.[236] Once the exporter receives the request, they are bound to furnish those information within 30 days. However, the ADA allows the parties to seek for an extension till when practicable, and the authority must grant them once the parties show reasonable cause for the extension[237] - this requirement is included to ensure due process. While the authorities are required to protect all confidential information given for the purpose of Anti-dumping investigation, they are bound to promptly release any information that is requested, in writing, by any of the participating parties.[238] Also, Article 6.2 directs the authorities to give interested parties full opportunity to defend their interest. The authorities can ensure this by creating platforms whereby concerned parties exercise their right to meet, present and argue their case.[239]

Article 6.4 imposes a disclosure obligation on the investigating authorities to afford the concerned parties 'timely opportunities' to see all information that are, namely, important to the presentation of their cases; not confidential; and are used by the authorities in the Anti-dumping investigation.[240] While fulfilling this obligation they must comply with the confidentiality requirement for dealing with business information which is to preserve the confidentiality of sensitive business information concerning both exporting firm and the domestic industry of the importing country.[241] Also, that the parties requesting the confidential treatment shows 'good cause' for such treatment. That is, demonstrate sufficient reason that justify withholding their information from the public and interested parties.[242] In addition, during the course of the investigation, Article 6.6 of the ADA directs the "authorities to satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based". However, where an interested party refuses to cooperate with the authority concerning information required for conducting the investigation "within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available".[243] Lastly, the ADA directs the

[236] See *EC – Fasteners (China) (2011),* Appellate Body Report, para 612-613.
[237] ADA, Article 6.1.1. See *US – Hot Rolled Steel (2001),* Appellate Body Report, paras 73-75.
[238] ADA, Article 6.1.2. see also *EC – Fasteners (Article 21.5 – China) (2016),* Appellate Body Report, para 5.153.
[239] See *EC – Fasteners (China) (2011),* Appellate Body Report, paras 610-611.
[240] See *EC – Fasteners (Article 21.5 – China) (2016),* Appellate Body Report, paras 5.107-5.109.
[241] ADA, Article 6.5. See *EC – Fasteners (2011),* Appellate Body Report, para 536; and *EC – Fasteners (Article 21.5 – China) (2016),* Appellate Body Report, paras 5.36-5.40.
[242] *Ibid*; *China – HP-SSST(EU)/China – HP-SSST (Japan) (2015),* Appellate Body Report, para 5.97; and *Korea – Pneumatic Values (Japan) (2019),* Appellate Body Report, paras 5.284-5.443.
[243] ADA, Article 6.8. See *EC – Salmon (Norway) (2008),* Panel Report, paras 7.31-7.32; *Mexico – Anti-Dumping Measures on Rice (2005),* Appellate Body Report, para 288; *US – Hot Rolled Steel (2001),* Appellate body Report, paras 77-84.

authorities to ensure transparency of the investigation procedure and decision reached by informing all interested parties of the essential facts on which the decision, whether to apply definitive measures, is based.[244] Likewise, they must afford interested parties sufficient defense opportunities.[245] Thus, these detailed rules on the conduct of Anti-dumping investigation are an attempt at ensuring that the investigating authorities exercises their power in accordance with the twin principle of natural justice – *nemo judex in causa sua* ("no man is a judge in his own case") and *audi alteram partem* ("hear the other side").

2. 4.3 Implementation of Anti-Dumping Measures

The ADA provides for three kinds of Anti-dumping measures which the WTO Members can impose on foreign products to remedy the de-industrialisation of their domestic industries. These measures will be briefly highlighted in this subsection.

2.4.3.1 Provisional Anti-Dumping Measure

Once an initial affirmative determination of dumped import, injury and causation are made, the WTO Member may impose provisional Anti-dumping measures as prescribed in Article 7 of the ADA to remedy the market imbalances caused by the unfair trade practices of foreign firms or producers of industrialised nations. It is an alternative or an interim measure that is only applicable during the course of Anti-dumping investigation as an interim measure that is necessary to prevent further injury. Also, it can only be on the sixtieth day after the initiation of the Anti-dumping investigation.[246] Although the interim measure must be in place not longer than four months, but it can be extended up to six month only if the authorities agreed to the request to extend.[247] In applying the measure, it can take the form of either provisional duty or, preferably, security (cash or bond) equal to the amount of the preliminarily determined dumping margin.[248]

2.4.3.2 Price Undertaking

The WTO framework also recognised price undertaking as another alternative remedy to the imposition of Anti-dumping duties. This alternative measure may take the form of revised price

[244] See Article 6.9 and 12 of the ADA.
[245] *Ibid*.
[246] See generally Article 7.3 of the ADA.
[247] ADA, Article 7.4
[248] ADA, Article 7.2

or ceasing export at the dumped price. Also, it can only be sought by interested parties after a positive initial determination of dumping, injury and causation has been made by the investigating authorities.[249] Also, its application is based on the voluntary participation of the interested parties. Thus, where the undertaking lacks consensus of the interested parties the investigating officers may proceed to impose Anti-dumping duties.

2.4.3.3 Definitive Anti-Dumping Duties

Article 9 of the ADA lays down the rule for the imposition and collection of definitive duty after making a final affirmative determination of dumped import, injury, and causation regarding the importing country's domestic industry. The provision confers the sole decision of whether or not to impose Anti-dumping duties on the importing countries' investigating authorities.[250] Thus, it is the choice of the importing country to either elect to impose Anti-dumping duties or not. This itself is detrimental to the trade interest of the low-middle-income Global South countries that lack the political strength and capacity to control the market-distorting practice emanating from firms of highly industrialised countries. For instance, the Nigeria-China lending relation is one of the influential factors that deters the Nigerian authorities from investigating the unfair trade practices of the Chinese firms in Nigeria. Besides, it is one of the contributory factors alongside the lack of a function Anti-dumping regime in the country that has prevented the Nigerian authorities from conducting investigations into the various dumping complaint laid against Chinese firms, which emanated from Nigeria-China trade relations and the accompanying trade concessions that were granted to Chinese investors.[251] Ultimately, the debt-trap practice has bred fertile grounds for Sino-imperialism and the de-industrialisation of Nigeria's manufacturing industry. The Nigerian Anti-dumping regime, and the failure of its authorities to commence and conduct Anti-dumping investigations into the various dumping complaint laid against foreign producers will be discuss later in Chapter 3 of this thesis.

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[249] ADA, Article 8.

[250] ADA, Article 9. See *EC – Bed Linen,* Appellate Body Report, para 123; *Mexico – Antidumping Measures on Rice,* Appellate Body Report, para 345.

[251] See generally Gregory Mthembu-Salter, "Elephants, Ants and Superpowers: Nigeria's Relations with China", (2009) South Africa Institute of International Affairs (SAIIA), Occasional Paper No 42, 20-21, online: <https://africaportal.org/wp-content/uploads/2023/05/SAIIA_Occasional_Paper_42.pdf> (accessed 25 November 2023); Alabi Ogunsanwo, "A Tale of Two Giants: Nigeria and China", in Ampiah K & S Naidu, eds, *Crouching Tiger, Hidden Dragon?* (Scottsville: University of KwaZulu-Natal Press, 2008); Anudu, "Nigeria's Giant Industries are Silently Disappearing", *supra* note 218; Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two", *supra* note 218.

While Article 9.1 encourages the investigating authorities to impose duties that are lesser than the dumped import margin only if it would be adequate to remedy the injury occasioned to the domestic market, Article 9.2 directs the authorities not to impose and collect the duties in a discriminatory manner. The imposition and collection of Anti-dumping duties must comply with the non-discriminatory principles of the WTO[252] - based on the most favoured nation (MFN) treatment and the national treatment (NT) obligation. Furthermore, the investigating authorities are directed not to collect Anti-dumping duties that exceed the margin of dumped imports.[253] Article 10 of the ADA makes provision for the imposition of Anti-dumping duties retroactively to remedy the impact of additional dumped imports that might have occurred during the course of the Anti-dumping investigation.

2. 4.4 Duration and Review of Anti-Dumping Duties

Article 11 of the ADA prescribes the discipline for the duration of, and review for continuing imposition of Anti-dumping duties. It provides that an Anti-dumping duty shall remain in force for as long as it is necessary to redress the injurious impact of dumped imports. Once the injury caused to the domestic industry has been removed, the duties automatically cease to continue.[254] Thus, there is the likelihood of Anti-dumping duties being in existence perpetually because of the time it might take for the duties to countered the dumping that caused the injury, as well as remove the injury on the domestic market. Nonetheless, Article 11.3 capped the life span of Anti-dumping measures at five years unless, except review is initiated before the expiration of the term to maintain the duties. Article 11.2 sets out the rules that direct investigating authorities to conduct periodic reviews. It requires the authorities to conduct reviews on the existence of Anti-dumping duties upon request by interested parties – to determine whether it is no longer warranted. Thus, the fulfilment of this obligation is based on the condition of, namely: (i) passage of reasonable since imposing the definitive duty; and (ii) submission of application to review with 'substantial information substantiating the need for a review'.[255] It is important to emphasise that the investigating authorities cannot self-initiate the review, but must be requested by interested parties.[256] In *Mexico – Anti-Dumping Measures on Rice,* the Appellate Body held that the importing countries' investigating authorities are not

[252] ADA, Article 9.2. See *EC – Fastener (2011),* Appellate Body Report, para 338; and *US – Zeroing (Japan) (2007),* Appellate Body Report, para 162.
[253] ADA, Article 9.3. See *EU – Biodiesel (2016),* Appellate Body Report.
[254] ADA, Article 11.1. See also *US – Anti-Dumping Measures on Oil Country Tubular Goods (2005),* Appellate Body Report, para 114; and *US – Stainless Steel (Mexico),* Appellate Body Report, para 93.
[255] ADA, Article 11.2.
[256] *US – Drams,* Panel Report.

permitted to impose any additional conditions to the granting of review apart from those ed in Article 11 of the ADA.[257] That is, the conditions contained in Article 11.2 are exhaustive.

Article 13 of the ADA disciplines the judicial review mechanism that must be maintained in the national legislation of WTO Members concerning anti-dumping duties. It specifically requires Member States to maintain 'independent judicial, arbitral or administrative tribunals or procedures for the purpose of prompt review of administrative final and review determinations' to be maintained where Anti-dumping legislation is adopted.'[258]

2. 4.5 Anti-Dumping Provision for Developing-Country Members

Article 15 of the ADA sets out the consideration that must be given to the special situation of developing countries. It provides that "special regard must be given by developed country Members to the special situation of developing country Members when considering the application of Anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying Anti-dumping duties where they would affect the essential interests of developing country Members". The provision contemplates the application of Anti-dumping measures on exports from developing countries. Hence, the provision is limited in scope as it does not contemplate 'special regards' being given during the course of an investigation, but when the investigation has been completed and Anti-dumping measures are to be imposed.[259] Also, the implementation of the 'constructive remedies' concept imposed on the developed countries is not mandatory, but advisory.[260]

It is important to emphasise that the provision does not cover special situations that would enhance the institutional resources of the developing countries in utilizing the WTO framework to counter the market-distorting practice that continuously destroys the industrial capability of their manufacturers, considering that majority of them are primary manufacturing nations.[261] Thus, developing countries such as Nigeria, with poor record of regulatory and institutional framework, has since 1995 found it difficult to adopt and initiate the WTO's Anti-dumping

[257] *Mexico – Anti-Dumping Measures on Rice,* Appellate Body Report, para 315. See also *US – Shrimp II (Viet Nam)*, Appellate Report para 7.389.
[258] ADA, Article 13.
[259] See *EC – Tube or Pipe Fitting (2003),* Panel Report; Bosche & Zdouc, *supra* note 1 at 835; De Baere et al, *supra* note 8 at 442-444.
[260] *EC – Bed Linen,* Panel Report, para 6.228
[261] See generally Karl Aiginger & Dani Rodrik, "Rebirth of Industrial Policy and an Agenda for the Twenty-First Century", (2020) 20 J Ind Competition & Trade 189.

regime to counter the unfair trade advantages of foreign producers in its domestic market.[262] Moreover, since the inception of the WTO rules, developed countries have initiated the highest numbers of Anti-dumping measures compared to the developing countries (which recently started recording an increasing use of the trade measures).[263] The imbalance can be attributed to the stronger institutional capacity that exists in developed countries compared to the constrained institutional resources that are evidenced in most developing countries.[264] For instance, a total of 6658 Anti-dumping investigations were initiated from 1995 till 2023. From 1995 to 2022 about 48 countries initiated a total of 1,670 Anti-dumping investigations, whilst India (379), US (322), Argentina (103), China (98), Canada (81), Australia (79), and EU (69) – in that order – constitute the highest initiator during that period.[265] With regards to Anti-dumping measures imposed from 1995 to 2023, India was the most frequent user with 780 measures alongside the US with 628 measures and the EU with 363 measures out of the total 4521 measures in place.[266] Also, although there has been increase in use of the trade remedy in the Global South, but it is highly concentrated in dozen few emerging economies from the group.[267] Thus, the lack of specific provision in the ADA to address this unique circumstances of the developing country – i.e. in terms of deploying the Anti-dumping mechanism and not just developed counties targeting them for the measures – contributes to the factors undermining the equitable use of the Anti-dumping measures.

2. 4.6 Dispute Settlement for Anti-Dumping Duties

The WTO dispute settlement system was often referred to as the crown jewel of the WTO until the recent crisis beset the system.[268] It has been in operation for over two decades settling

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[262] WTO, *Trade Policy Review Body: Report By the Secretariat on Nigeria*, WTO Doc WT/TPR/S/356 (9 May 2017), online <www.wto.org/english/tratop_e/tpr_e/s356_e.pdf> (accessed 13 January 2024) (herein referred as WTO 2017 Report on Nigeria); Temitope Adeyemi, "Panaceas: Dumping and Trade Remedies in Nigeria", *Mondaq* (4 June 2020), online: https://www.mondaq.com/nigeria/export-controls--trade--investment-sanctions/947900/panaceas-dumping-and-trade-remedies-in-nigeria-> (accessed 1 May 2024). See also Chapter 3 of this thesis.

[263] For detailed update record of the number Anti-dumping measures by the developed countries as against developing countries see the WTO, *Anti-Dumping Initiations by Reporting Member 01/01/1995-30/06/2023*, WTO (1995-2023), online: <www.wto.org/english/tratop_e/adp_e/ad_initiationsbyrepmem.pdf> (accessed 3 May 2024); WTO, "Anti-Dumping Measures by Reporting Member 01/01/1995 – 30/06/2023", *supra* note 224. See also Bossche & Zdouc, *supra* note 1 at 758-759; and Khan, *supra* note 8 at 45-46.

[264] See Busch et al, *supra* note 223.

[265] WTO, *Anti-Dumping Initiations by Reporting Member 01/01/1995-30/06/2023*, WTO (1995-2023), online: < www.wto.org/english/tratop_e/adp_e/ad_initiationsbyrepmem.pdf> (accessed 3 May 2024)

[266] WTO, "Anti-Dumping Measures by Reporting Member 01/01/1995 – 30/06/2023", *supra* note 224.

[267] *Ibid*; WTO, "Anti-Dumping Initiations by Reporting Member 01/01/1995 – 30/06/2023", *supra* note 256. See also Bossche & Zdouc, *supra* note 1 at 759-760.

[268] See Bossche & Zhouc, *supra* note 1 at 173-174; A H Shoyer, "The First Three Years of WTO Dispute Settlement: Observations and Suggestions WTO Dispute Settlement System", (1998) 1:2 J Intl Eco L 277. See

disputes between Members concerning their rights and obligations under the multilateral trading rules.[269] It is usually the case that Members do not always agree on the state of laws and practices constituting infringements of rights or obligations under the multilateral trading rules.[270] Hence, they resort to the multilateral dispute settlement for adjudication of such disputes.[271] From 1995 till 2020, the dispute settlement system recorded a total of 596 disputes submitted to it. Out of those submitted dispute only 248 adjudicated cases resulted into panel report of dispute settlement, while 170 were recorded as Appellate Body report.[272] Although the adjudicatory system has been used by both global north and Global South countries, it uses have been asymmetrical due to constrain in the developing countries' legal capacity and other socio-political or economic factor. The use of the system has been mostly confined to a small number of countries such as US, Europe, Canada, Brazil, India, Mexico, Korea, Japan Thailand and Argentina.[273] In most case, the active user of the system are usually the traditional economic powers – the US and the UK.[274]

The WTO dispute settlement system is a State-to-State dispute settlement mechanisms that is established under the Understanding on Rules and Procedures Governing the Settlement of Disputes, known as the Dispute Settlement Understanding (DSU).[275] It has specialised subject-matter jurisdiction over the disputes between WTO Members arising under the DSU.[276] There are three institutions involved in the WTO dispute settlement process, namely the Dispute Settlement Body (DSB) (a political-type of institution), and the panels and Appellate Body (both judicial-type institutions). The DBS is established to exercise supervisory oversight over the WTO dispute settlement process.[277] It consist of delegates that represent each Members of the WTO in the administration of the dispute settlement system.[278] Its functions include,

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generally B Hoekman, "The WTO: Functions and Basic Principles", in Hoekman B, Mattoo A & English P, eds, *Development, Trade, and the WTO: A Handbook* (2002).

[269] Bossche & Zhouc, *supra* note 1 at 173-174.

[270] *Ibid*; J H Jackson, "The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligation", (1997) 91:1 Ame J Intl L 63.

[271] *Ibid*; E D Mansfield & E Reinhardt, "Multilateral determinants of regionalism: The effects of GATT/WTO on the formation of preferential trading arrangements", (2003) 57:4 Intl organization 841.

[272] Bossche & Zhouc, *supra* note 1 at 174

[273] *Ibid*. See generally Busch et al, *supra* note 218; B Wilson, "Compliance by WTO Members with adverse WTO dispute settlement rulings: the record to date", (2007) 10:2 J Int'l Eco L.

[274] Bossche & Zhouc, *supra* note 1 at 174

[275] Article of the Dispute Settlement Understanding (DSU). See *Saudi Arabia – Intellectual Property Rights (2020),* Panel Report, para 7.51; *US – Shrimp (1998),* Appellate Body Report, para 101.

[276] DSU, Article 1.1

[277] DSU, Article 2. See Bossche & Zhouc, *supra* note 1 at 224; J Cameron & K R Gray, "Principles of international law in the WTO dispute settlement body", (2001) 50:2 Intl Comp L Quarterly; T J Schoenbaum, "WTO dispute settlement: praise and suggestions for reform", (1998) 47:3 Intl Comp L Quarterly 648.

[278] *Ibid*.

establishing and adopting or rejecting the panel and Appellate Body reports; monitoring the implementation of ruling and recommendation, appointing the members of the panel and Appellate Body, authorizing suspension of concession and other obligations, retaliatory decisions amongst others.[279] Decisions reached in the DSB are always made by a consensus-based system.[280] That is, the representative of the WTO Members present during a settlement must all agree with the decision.[281] The reference is that where a WTO Member representative present during the meeting objects to the passing of a decision, such a decision would not be adopted due to lack of consensus. However, there are three exceptional situations where decisions can be made without consensus.[282] The consensus-based requirement applies as 'reverse' or 'negative' requirement – where the DSB would be assumed to have taken a decision unless there is a consensus amongst the members not to take the decision. It is important to emphasise that the consensus-based system of the decision-making process is the sole cause for the recent crisis the WTO dispute settlement mechanism is experiencing. Currently, the Appellate Body of the WTO dispute settlement system is not functioning as the US single-handedly continues to block the appointment of its members. In turn, it has caused most appealed panel reports to be in vacuum and left those disputes unresolved.[283] Also, it has been difficult for members to enforce, and address the violation of their WTO obligation through complaint.

In the context of Anti-dumping mechanism, the WTO dispute settlement system has received a significant number of complaints, and adjudicated a fair number of those complaints concerning the procedure and practices of dumping and Anti-dumping law.[284] The process WTO dispute settlement mostly entails four steps, namely: (a) consultation; (b) panel stage; (c) appeal – Appellate Body; (d) enforcement – all of which apply to Anti-dumping dispute cases. Article 17 of the ADA together with the DSU regulates the consultation and settlement of disputes that arise concerning the consistency of an Anti-dumping measure with rights and obligations under Article VI of the GATT and ADA. Both the ADA and DSU requires

[279]See generally Article 2 and 3 of the DSU. See Bosche & Zdouc, *supra* note 1 at 224 & 225; S Saleem et al, *Environment for Business: Strictly as per requirements of the Gujarat Technological University*, (2010) 125.
[280] See generally Article 2.4 and 17.4 of the DSU.
[281] See generally Bossche & Zdouc, *supra* note 1 at Chapter 3.
[282] See generally the DSU; and WTO, *A Handbook on the WTO Dispute Settlement System*, (2017) for full discussion on this.
[283] Simon Lester, "Ending the WTO Dispute Settlement Crisis: Where to from here?", *IISD Blog* (2 March 2022), online: < https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis> (accessed 3 May 2024) [Lester, "Ending the WTO Dispute Settlement"]; De Clerq, *supra* note 17 at 60-61; Maldonado, *supra* note 1 at 11
[284] See generally Bossche & Zdouc, *supra* note 1 at Chapter 11

Members to assign a considerable amount of time for, and allow Member States adequate opportunity for consultations regarding any matter affecting the ADA's operation.[285] Article 17.3 of the ADA (similar to Article 3.3 of the DSU) sets out the legal basis for requesting consultation under the ADA.[286] Article 17.4 of the ADA prescribes certain limitations to the ability of a member to have recourse to dispute settlement during the Anti-dumping investigation. In *US – 1916*, the Appellate Body held that the idea behind the restricted right of recourse to dispute settlement in the context of Anti-dumping investigation is to prevent 'multiplicity of dispute settlement proceedings arising out of the same investigations, leading to repeated disruption of the investigation'.[287] Whilst Article 11 of the DSU prescribed the 'objective assessment' standard as the applicable standard of review for panels, Article 17.6 of the ADA provides for two special rules concerning the standard of review to be used by the panel for resolving disputes that touch on Anti-dumping measures, namely: (i) investigating authorities are to make factual evaluations that are pertinent to their overall determination of dumped and injury, whilst the panel is to review the authorities establishment and evaluations of those facts;[288] and (ii) the panel to apply the customary rules of interpretation of public international law to the relevant provision to the ADA and afterward determine whether the interpretation falls within the range of 'permissible interpretation'.[289] Additional rules and procedures concerning disputes under the ADA are set out in Article 17.4-17.7.

The consensus-based requirement of the DSB is also applicable to setting up the panel to adjudicate disputes related to Anti-dumping and adopting or rejecting the panel report on such disputes.[290] While the consensus-based system of decision-making offers the Global South countries an equal voice with highly industrialised and powerful countries, it has nonetheless been poisonously misused throughout the history of the multilateral trading system.[291] In

[285] See ADA, Article 17.2; and DSU, Article 4.2.
[286] *Guatemala – Cement I*, Appellate Body Report, para 64; *US – 1916 Ac*t, Appellate Body Report, para 67.
[287] *US – 1916 Act*, Appellate Body Report, para 74
[288] ADA, Article 17.6(i). See *Mexico – Corn Syrup (Article 21.5 – US) (2001),* Appellate Body Report, para 84, where it was explained that the first condition requires the panel not to engage in a new independent fact-finding exercise or to conduct a de novo review of the of the evidence of the investigating authority.
[289] ADA, Article 17.6(ii). See the interpretations of these preconditions in *US – Hot-Rolled Steel (2001),* Appellate Body Report, para 59; *US – Continued Zeroing (2009),* Appellate Body Report, para 271.
[290] See generally the DSU and Article 17 of the ADA.
[291] See generally Alessandrini, *supra* note 1; Thanh Nguyen et al, "Decision-Making By Consensus in the WTO", (2012), online: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122948> (accessed 3 May 2024); Keith Rockwell, "E-Commerce Deal at the WTO is suddenly Back in Play", *Hinrich Foundation* (07 May 2024), online: < https://www.hinrichfoundation.com/research/article/wto/e-commerce-deal-at-the-wto-is-back-in-play/?utm_campaign=article-rockwell-wto-e-commerce-deal-back-to-play&utm_medium=email&_hsenc=p2ANqtz-9mjcSy3dC67K-jFElGFLjNJJR-HsBckQ1jqJDOT85Hs2UbHFzbS1GjTPjQPipt0Y6X-ShKzbLVZAY7oQzc_BvTBI3c94wGl4mWp5--

particular, it has been used to undermine the trade interest of the Global South. In the words of Thanh Nguyen et al,

> The goal of consensus has often been used by some developed countries to practice small group consultations that exclude many developing countries and further exercise bilateral pressures on them outside the WTO forum in the name of reaching the multilateral consensus in WTO meetings. Many developing country delegations claimed that consensus means little more than steamrolling of smaller powers by the dominant interests at the WTO.[292]

This reflects the power imbalance that exists within the multilateral trading system, how its rules favour the wealthier countries to the detriment of the poor and vulnerable Global South countries. It also speaks to the low engagement from the low-middle-income Global South countries that are experiencing undue trade restrictions, market-distorting practices (from powerful firms of highly industrialised countries), de-industrialisation amongst others.[293] This systematic inequality often constrains their legal capacity to utilise the benefit of the multilateral trading rule compared to the developed country.[294] The inequalities, *inter alia,* speaks to the distrust that currently exist within the WTO. In this regard, the WTO framework fails to provide a level playing field between the Global South and Global North countries.

2.5 Rethinking the Challenges of the WTO Framework in Contemporary Era

An analysis of the WTO framework on Anti-dumping reveals that it contains detailed rules that can safeguard the interest of the low- and lower-middle-income Global South countries against the market-distortion practice of powerful foreign firms from highly industrialised countries. It also provides their domestic industries with protection that can level the playing field for fair competition both within the local market and international market. Thus, the framework does contain basic distributional principles that can redress the power imbalances between the developed and underdeveloped countries via the implementation of crucial measures needed to protect domestic industries from unhealthy foreign competition. If properly implemented, it is pivotal to the attainment of socio-economic development of the Global South countries – the

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[292] Nguyen et al, *supra* note 291 at 14. See also WTO, *Internal Transparency and the Effective Participation of all Members, Main Points raised by Delegations*, (2000).

[293] See generally Maldonado, *supra* note 1.

[294] See generally Busch et al, *supra* note 223.

reasons there are increasing numbers of developing countries using the measures.[295] It will enhance and preserve the industrial capability of their local manufacturing sector toward contributing to economic growth needed to overcome premature industrialization and inequality income trap. For instance, India and China makes efficient use of the WTO framework to boost their economies and protect their domestic markets from exposure to unhealthy foreign imports.[296] Also, Global South countries such as India, South Africa, Pakistan, Viet Nam etc., have successfully employed Anti-dumping measures against China's insistent dumping activities.[297]

Notwithstanding, there are significant loopholes and discretions within the framework to the extent that these interpretations leeway can be used to undermine the fairness of the Anti-dumping mechanism as an instrument to level the playing field in the international community. That is, the ambiguities and vagueness of some of the ADA's provisions on the determination of dumping, injury and causation have the potential to prompt an inefficient use of the measure thereby strengthening the systemic asymmetries that exist within the multilateral trading system.[298] The loophole and ambiguities can be traced to the historical antecedent of the discontent between the developed and developing countries during the negotiation of the Agreement. Particularly, the US's attempt to promote American values forestalled disciplines that would enable developing countries' competitive trade and ensure full understanding of their rights and obligations under the WTO Anti-Dumping rules.[299] For instance, the ADA does not contain any provision on public interest that would aid fairness in Anti-dumping investigations and imposition of Anti-dumping measures.[300]Also, the measures have often being used to perpetuate negative discrimination against developing countries' trade – by displacing their competitiveness within the domestic market and the international competition

[295] See Bossche & Zdouc, *supra* note 1 at 758-759.
[296] *Ibid*; Maldonado, *supra* note 1 at 10. See World Report 2023, *supra* note 1.
[297] See WTO, *Anti-Dumping Initiations by Reporting Member 01/01/1995-30/06/2023*, WTO (1995-2023), *supra* note 224; Bossche & Zdouc, *supra* note 1 at 759-760; Mwanyisa, *supra* note 188 at 23-34.
[298] See the discussion in section 2.4.1 – 2.4.6 of this thesis. See also Lekfuangfu, *supra* note 2 at 306-308; G Horlick & E Vermulst, "The 10 Major Problems with the Anti Dumping instrument: An Attempt at Synthesis", (2005) 39 J World Trade 67.
[299] See Section 2.2 of this thesis. See generally Alessandrini, *supra* note 1 at Chapters 3-6; De Baere et al, *supra* note 8.
[300] See generally O S Sibanda, "Public Interest Considerations in the South African Anti-dumping and Competition Law, Policy, and Practice", (2015) 14(5) Intl Bus & Eco Research J 735; V Kotsiubska, *Public Interest Consideration in Domestic and International Antidumping Disciplines*, (LLM in International Law and Economics Thesis: World Trade Institute, 2011) 12 [unpublished]; P H Lloyd, 'Anti-Dumping and Competition Law' in A E Appleton & M G Plummer, eds, *The World Trade Organization: Legal, Economic and Political Analysis Volume I* (2007).

scene.[301] Most importantly, there is a lack of provision on the enlightenment program in the ADA that would empower Global South countries such as Nigeria with the legal capacity to optimise the benefit of the WTO Agreements to curb the de-industrialisation of her local industries.[302] As such, some WTO Global-South Members tabled the negotiation and proposals for improvement of the ADA.[303] This was to ensure that the major trade interest of the developing countries that were already facing substantive trade barriers from developed countries does not continue to experience restriction from the world market due to dumped imports or discriminatory Anti-dumping measures.

The institutional capacity of the WTO Members to employ the Anti-dumping mechanism against unfair trade practices also speaks to the effectiveness of the WTO Agreement. It shows the participatory level of the two competing interests (i.e. the Global North and Global South countries) in the multilateral trading community. Already, the history of the multilateral trading system reveals the systemic inequalities that exist amongst the countries to warrant the unequal basis on which they compete.[304] Although GATT 1994 and Article 15 of the ADA infused the principle of equity fairness into the Anti-dumping regime via special and differential treatment ("SDT") to ensure developed countries accord developing countries preferences that accommodate their special situation or limited capacity, the current SDT regimes lack legal force and are far from being effective realistically.[305] Hence, developing countries such as Nigeria still remain constrained by limited institutional resources and other factors required to introduce and implement the WTO-complaint Anti-dumping mechanism in her trade policy that would help the country overcome premature deindustrialization inflicted by dumped import of low-qualities and cheap products. It is also why the developing countries' participation is confined to small numbers of emerging economies.[306] Several factors have been set forth for this dormant participation of the majority of the developing countries ranging from

[301] Alessandrini, *supra* note 1 at 165-170.
[302] Lekfuangfu, *supra* note 2 at 309-310. See generally S Hutton and M Trebilcock, "An Empirical Study of the Application of Canadian Anti-Dumping Laws: A Search for Normative Rationales", (1990) 24 J World Trade 125.
[303] These group consist of 15 Global South participants and Two Global North participants, namely: Brazil, China, Chinese Taipei, Colombia, Costa Rica, Hong Kong, Israel, Japan, Korea, Mexico, Norway, Singapore, Chile, Thailand, Turkey plus EU and Switzerland. See "Friends of Anti-Dumping Negotiations" (FANs) has called for the reform of the current Anti-Dumping Agreement", online: <www.wto.org/english/tratop_e/dda_e/status_e/rules_e.htm > (accessed 3 May 2024); Khan, *supra* note 8 at 79-80; Kazeki, *supra* note 75 at 931-965.
[304] See 2.2 of this thesis. See also Bossche & Zdouc, *supra* note 1 at Chapter; Lekfuangfu, *supra* note 2; Alessandrini, *supra* note 1 at Chapters 3-6.
[305] Alessandrini, *supra* note 1 at 174-179; Lekfuangfu, *supra* note 2 at 304
[306] Bossche & Zdouc, *supra* note 1 at 758-759; Busch et al, *supra* note 223.

lack of awareness of their rights and obligations under the WTO system; unequal bargaining power; inadequate capacity in monitoring import and export trends of the domestic market; governance challenges; dearth of coordination between the governments and the private sector; paucity of financial and human resources; lack of political will or 'fear factor' amongst others.[307] The fear factor is a common deterring factor that has discouraged many developing countries – especially low- and lower-middle-income countries - from pursuing Anti-dumping measures against their advanced or emerging economies trade partners for fear 'that trade preferences or other forms of assistance will be withdrawn, or some form of retaliatory action will be taken'.[308] For instance, the Nigerian government has often demonstrated the fear factor in its trade relationship with China. This has played out in the inability of the government to address the unfair trade practices of the Chinese firm in her domestic industry which has contributed to premature de-industrialization of sectors such as the textile and steel sectors.[309] The capacity constraint, *inter alia,* makes it difficult for them to utilize the supposed benefit of the WTO Anti-dumping regime, and fully participate in the WTO system.

In addition, there are contemporary challenges such as the deadlock of the Doha Round on Anti-dumping measures; the destabilization of the WTO dispute settlement system by the US administration, the Sino-America trade war, and the rise of industrial policies that serve to impede the effectiveness of the WTO Agreement and undermines multilateralism in recent time.[310] The Doha Round of trade negotiation started on a high note with a mandate to address the inequalities arising from the Uruguay round. However, the unpreparedness of the global north countries, in particular, the US and EU to compromise their objective, and the level of pressure exerted on the developing countries exposed the WTO reality on free trade, level playing field, and multilateralism.[311] The US continuous blockage of the appointment of Appellate Body members also put in danger the working of the WTO, and the effectiveness of

[307] For more context on this see generally Busch et al, *supra* note 223; and Lekfuangfu, *supra* note 2.
[308] *Ibid*.
[309] Iyabo, *supra* note 90; Anudu, "Nigeria's Giant Industries are Silently Disappearing", *supra* note 218; Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two", *supra* note 218; Innocent Ocholi & Nnamdi Okonkwo, "China-Nigeria Bilateral, Political and Economic Engagement: Strategic Partnership or Sino-Imperialism", (2020) 3:1 Zamfara J Pol & Dev 1, 8-9; Osimen & Micah, *supra* note 217.
[310] See generally De Clerq, *supra* note 17; Ayesha Fatima & Nalin Bharti, "Perception vs Reality: Understanding the US-China Trade War", (2019) 11:4 Transntl Corporations Rev 270; Mohamad Zreik, "US-China Relations in the Era of Multi-Polarism: Trade War Between the Two Economic Giants", (2022) 4:2 Eurasian Research J 43-65, online: < https://doi.org/10.53277/2519-2442-2022.2-03> (accessed 3 May 2024); Alessandrini, *supra* note 1 at Chapter 6; WTO Trade Report 2023, *supra* note 1; Albertoni & Wise, *supra* note 91; Braga et al, *supra* note 91; Jame, *supra* note 91; Aiginger & Rodrick, *supra* note 261.
[311] Alessandrini, *supra* note 1 Chapter 6.

the GATT 1994 and its Agreement.[312] It ultimately undermines multilateralism concept in contemporary times considering that the US decoupling from the multilateral trading system may prompt other powerful economies to follow suit.[313] Also, as the US-China trade tension drags on, the situation creates trade tension and market access dilemma for developing countries as both countries turn inward to address concerns about over-dependency and dwindling national self-sufficiency.[314] Moreover, the rise of industrial policies sees the Biden Administration place emphasis on 'buy America' policy to reinstate and strengthen its global economic position. In particular, the US feels threatened by the increasing importance of the developing countries in the multilateral trade system and seek to enhance the strength of the US market power.[315] The America First policy is prejudicial to developing countries' competitive trade as it has potential to increase the number of unfair trade practices and undue trade restrictions.[316] In turn, this trade tension strains the age-long sustained cooperation that exist within the multilateral trading system. It also amplifies the distrust amongst the WTO Members[317] and leaves room for the powerful developed countries to undermine the fair international competitive process to the detriment of the low- and lower-middle-income Global South countries.

The challenges highlighted above reveal how each factors undermine the effectiveness of the WTO framework in contemporary times. It identifies the inequalities that are inherent in the legal and institutional framework of the multilateral trading system. To address most of these issues, the WTO needs to reform and enhance trade policy integration amongst members that would ensure complementary global income gain, economic development, and poverty reduction within the multilateral trading system.[318] Foremost, the system must address the

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[312] Lester, "Ending the WTO Dispute Settlement", *supra* note 283; De Clerq, *supra* note 17 at 60-61; Maldonado, *supra* note 1 at 11; WTO Trade Report, *supra* note 1.
[313] See generally Crosignani et al, *supra* note 87; WTO Trade Report 2023, *supra* note 1. For the historical E-Commerce deal that is about to threaten the fundamental tenets of the WTO see Rockwell, *supra* note 291.
[314] See generally WTO Trade Report 2023, *supra* note 1; De Clerq, *supra* note 17; Fatima & Bharti, *supra* note 309; Zreik, *supra* note 310; Albertoni & Wise, *supra* note 91; Braga et al, *supra* note 91; Aiginger & Rodrick, *supra* note 261.
[315] *Ibid*. Inu Manak, "A Return to Reciprocity in US Trade Policy", *Hinrich Foundation* (16 January 2024), online: < https://www.hinrichfoundation.com/research/article/trade-policy/a-return-to-reciprocity-in-us-trade-policy/?utm_campaign=article-manak-return-to-reciprocity-us-trade-policy&utm_medium=email&_hsmi=290123431&_hsenc=p2ANqtz-_-sYO2N9pbdXSeICowEbr22DqU-B2p7Pv-b1bJlNvWN64AOfWUgGgZrYL9fI-hRQ3nEpsjx5Y6Pm8oDfAio8ObTHDLQQ&utm_content=20240116-weekly-research-&utm_source=hinrich-thought-leadership> (accessed 25 February 2024).
[316] *Ibid*; Gita Gopinath et al, *supra* note 87; Rotunno & Ruta, *supra* note 87.
[317] Maldonado, *supra* note 1 at 4-11; WTO Trade Report 2023, *supra* note 1; De Clerq, *supra* note 17; Rockwell, *supra* note 290.
[318] WTO Trade Report, *supra* note 1 at 44-45.

defects in its decision-making process that would enable members to negotiate, clarify, and improve the rules of Anti-dumping regime to address its loopholes and ensure its effectiveness. Also, the institutional body must empower the low- and lower-middle-income developing countries beyond the existing initiative (such as SDT, consensus, single undertaking principle) to address the power imbalance and distrust within the institution – considering that 117 Members out of the total number of 164 WTO Members are developing countries.[319] Thus, the multilateral trading system needs to increasingly integrate more mandatory equitable fairness into the system that would cater for the unique circumstances of the poor countries. This would promote inclusive economic growth amongst the members. Furthermore, the institution can introduce effective criteria for determining the developing member status so as to identify the countries that would be entitled to special rule under the WTO framework. [320] It will resolve the concerns of advanced nations as to abuse of the system.

The WTO cannot afford to continue on the same ramshackle path of administration. Recent events have revealed the shortcoming of the path the organization has tolled for the past three decades. Hence, it must show a new determination to address the shortcomings that have characterised its history, making its few powerful Members to hold the rest of its members to ransom. This can be done by ensuring all the WTO Members work harmoniously to achieve a middle ground that is highly required to address them. The continuous alternative means of operation being sought by its members – such as the recent extreme Plurilateral Agreement being sought in the e-commerce deal that threatens the fundamental tenet of the organization[321] - might derail the WTO towards irrelevance.

2.6 Conclusion

This Chapter discussed the multilateral framework on the Anti-dumping mechanism and its effectiveness in terms of the equitable application of the framework. In achieving this, this Chapter gave a historical account of the Anti-dumping regime, and the competing interests that featured throughout its negotiations. Afterward, it analysed the substantive requirement of the WTO Anti-dumping framework through detailed consideration of dumped import, injury and causative links. In turn, it identifies the loopholes and flaws within the substantive requirement

[319] WTO, "WTO in Brief", *sura* note 224; De Clerq, *supra* note 17 at 67-68.
[320] See Presidential Memoranda, "Memorandum on Reforming Developing-Country Status in the World Trade Organization", *White House* (26 July 2019), online: < https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-reforming-developing-country-status-world-trade-organization/> (accessed 7 May 2024).
[321] Rockwell, *supra* note 284

of the regime, and how its weighed against the trade interest of the low- and lower-middle-income Global South countries. Also, the Chapter briefly discussed the procedural requirements of the WTO Anti-dumping regime including the rules and principles guiding the initiation and procedure for conducting the Anti-dumping investigation. The analyses disclosed that the WTO framework recognised the ability of the investigating authorities to impose alternative measures such as provisional Anti-dumping measures and price undertaking to prevent further injury being inflicted on importing countries' domestic markets during investigation. Conversely, the importing countries can hold off until final affirmative determination of dumped import, injury, and causation to impose definitive Anti-dumping duties. In addition, the special provision on Anti-dumping was briefly highlighted. In the course of this analysis, this Chapter identifies the weaknesses of these provisions, and how they serve to undermine the trade interest of the low-middle-income Global South countries as against the emerging and developed economies.

Furthermore, the Chapter explored the WTO dispute settlement system in the context of Anti-dumping regimes in a changing world. It examines the benefit of the system, the current crisis affecting the effectiveness of the system, and what it means for the developing countries. Additionally, it briefly investigates the impact of the loopholes. In an attempt to address the systemic inequalities that exist within the multilateral trading system affecting the effectiveness of the WTO Agreement, this Chapter highlighted the constraints of limited institutional resources on the participation of the developing world with the trade remedy; contemporary issues and chart a new course for ensuring the effectiveness of WTO framework.

CHAPTER 3

NIGERIA'S ANTI-DUMPING POLICY AND PRACTICE IN A CHANGING WORLD

3.1 Introduction

Since the inauguration of the multilateral trading system, in particular the World Trade Organisation (WTO) system, there has been an increased reality of global integration of economies, trade, and services until recent multilateral challenges.[1] Despite being hailed for its integration successes, the disproportionate engagement of the Member States in the administration of trade - illustrated in Chapter 2 - contributed to the structural inequalities and disparities in global value chains that exist between the Global North and Global South countries till date. For instance, the liberalization scheme helped advance the economic development of powerful Western States and a few East Asian countries. Whilst it failed to deliver similar economic growth, and it facilitated, inter alia, de-industrialization in less-opportune, ill-prepared and vulnerable Global South countries that were still in the process of developing economically.[2] Moreover, the competitiveness of many of the Global South countries that deal in primary products such as oil, gas, minerals, iron ore etc., have been

[1] Edalio A Maldonado, "Managing Free Trade under the WTO in an Era of Rising National Tensions", (2023) Old Dominion University Model United Nations Society & ODU Graduate Program in Intl Studio, ODUMUNC 2024 Issue Brief at 2-3, online: < https://ww1.odu.edu/content/dam/odu/col-dept/al/docs/2nd-wto.pdf> (accessed 12 May 2024); WTO, "World Trade Report 2023: Re-globalization for a Secure, Inclusive and Sustainable Future", (2023) WTO Doc WT/WTR/23, online: < https://www.wto.org/english/res_e/booksp_e/wtr23_e/wtr23_e.pdf> (accessed 21 October 2023) [WTO Report 2023]. See generally Nam-Ake Lekfuangfu, "Rethinking the WTO Anti-Dumping Agreement from a Fairness Perspective" (2009) 4:2 Cambridge Student L Rev 30; Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission*, (Oxford: Hart, 2010).

[2] For example, countries such as (United Kingdom (UK), United State of America (USA), Canada, China and India experienced exponential growth through strategic pursuit of progressive trade liberalization policies, whilst majority of African countries were unable to meet their anticipated economic growth target under the trade liberalization strategy. See Uchechukwu Innocent Duru et al, "Trade Liberalization and Economic Growth: An Assessment of Nigerian Experience", (2020) 8:3 Asian Dev Pol'y Rev 194, 195-200, online: < https://www.researchgate.net/publication/344339476_Trade_Liberalization_and_Economic_Growth_An_Assessment_of_Nigerian_Experience> (accessed 8 August 2024); Nicolas Albertoni & Carol Wise, "International Trade Norms in the Age of Covid-19 Nationalism on the rise", (2021) 14 Fudan J Human & Soc Sci 41-66, online: <https://doi.org/10.1007/s40647-020-00288-1> (accessed 8 August 2024); Karl Aiginger & Dani Rodrik, "Rebirth of Industrial Policy and an Agenda for the Twenty-First Century", (2020) 20 J Ind Competition & Trade 189-207, online: <https://link.springer.com/article/10.1007/s10842-019-00322-3> (accessed 7 December 2023). See generally Heather-Leigh Kathryn Ba & Tyler Coleman, "Deindustrialization and the Demand for Protection", (2021) 23:2 Bus & Politics 264; Maldonado, *supra* note 1; Lekfuangfu, *supra* note 1; Dani Rodrik, "Premature deindustrialization." (2016) 21:1 J Eco Growth 1–33.

overtaken by intermediate products in light of the increasing economic diversification of the industrialised countries within the multilateral community.[3]

The inherent "unfairness" of the multilateral trading system as well as the premature de-industrialization experience of the Global South world disproportionally affected the manufacturing sectors in countries like Nigeria. In particular, it made the Nigerian state dependent on imported intermediate products.[4] Hence, the country suffered and continues to record a low industrial base and value addition in manufacturing sectors such as the textile, steel, and automobile sectors.[5] Nigeria's import-dependency status also affected her export

[3] Ba & Coleman, *supra* note 2 at 267-268

[4] *Ibid*; Maxwell Chibundu, "Africa's Economic Reconstruction: On Leapfrogging, Linkages, and the Law" (2023) 16:2 Third World Legal Studio 17-41; Ifesinachi Okafor-Yarwood & Ibukun Jacob Adewunmi, "Toxic Waste Dumping in the Global South as a Form of Environmental Racism: Evidence From the Gulf of Guinea", (2020) 79:3 Afri Stu 285-304, online: <https://doi.org/10.1080/00020184.2020.1827947> (accessed 20 January 2024); Sola Akinrinade & Olukoya Ogen, "Globalization and De-Industrialization: South-South Neo-Liberalism and the Collapse of the Nigerian Textile industry", (2008) 2:2 Afri Glo Age 159-170, online: <www.jstor.org/stable/40339266> (accessed 20 January 2024); T R Pressu & F Agboma, "Dwarfed Giant: Impact of Trade and Related Policies on SMEs in the Nigerian Textile Industry", (2018) 8:6 Intl J Academic Research Bus and Soc Sci 602-629, online: <https://hrmars.com/papers_submitted/4260/Dwarfed_Giant_Impact_of_Trade_and_Related_Policies_on_SMEs_in_the_Nigerian_Textile_Industry.pdf> (accessed 20 January 2024)

[5] Odinaka Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two", *International Centre for Investigative Reporting* (22 March 2022), online: <https://www.icirnigeria.org/nigerias-giant-industries-are-silently-disappearing-part-two/> (accessed 5 January 2024) [Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two"]; Odinaka Anudu, "Nigeria's Giant Industries are Silently Disappearing", *International Centre for Investigative Reporting* (21 December 2021), online: <https://www.icirnigeria.org/nigerias-giant-industries-are-silently-disappearing/> (accessed 5 October 2023) [Anudu, "Nigeria's Giant Industries are Silently Disappearing", Part 1]; Adaora Osondu-Oti, "China's Market Expansion and Impacts on Nigeria's Textile Industry", (2021) 2:1 J of Contemporary Intl Relations & Diplomacy 192, 203-218; Anumita Roychowdhury et al, "Clunkered Combating Dumping of Used Vehicles: A Roadmap for Africa and South Asia", (2018) Centre for Science and Environment, online: < https://www.researchgate.net/profile/Vivek-Chattopadhyaya/publication/327861813_CLUNKERED_COMBATING_DUMPING_OF_USED_VEHICLES_A_ROADMAP_FOR_AFRICA_AND_SOUTH_ASIA/links/5baa1983a6fdccd3cb70ef9b/CLUNKERED-COMBATING-DUMPING-OF-USED-VEHICLES-A-ROADMAP-FOR-AFRICA-AND-SOUTH-ASIA.pdf> (accessed 18 January 2024); Festival Godwin Boateng & Jacqueline Klopp, "Beyond Bans: A Political Economy of Used Vehicle Dependency in Africa", (2022) 15:1 J Transport and Land Use 651-670, online: < https://www.jtlu.org/index.php/jtlu/article/view/2202/1662> (accessed 18 January 2024); Goddy Uwa Osimen & Ezekiel Eiton Micah, "Nigeria-China Economic Relations: Matters Arising", (2022) 10:3 Global J Pol Sci & Admin 42, 49, online: <www.researchgate.net/profile/Goddy-Osimen/publication/363634201_Nigeria-China_Economic_Relations_Matters_Arising/links/632626ce70cc936cd3161647/Nigeria-China-Economic-Relations-Matters-Arising.pdf> (accessed 26 January 2024); News Agency of Nigeria, "Automobile Council Advocates Ban on Imported Used Cars Above 20 Years", *People Gazette* (20 December 2023), online: < https://gazettengr.com/automotive-council-advocates-ban-on-imported-used-cars-above-20-years/> (accessed 18 January 2024); Akinrinade & Oghen, *supra* note 4; "Product Dumping: How Asians are Killing Made-In-Nigeria Goods", *Vanguard* (2 April 2012), online: <www.vanguardngr.com/2012/04/product-dumping-how-asians-are-killing-made-in-nigeria-goods/> (accessed 21 January 2024); Margaret Egbula & Qi Zheng, 'China and Nigeria: A Powerful South-South Alliance', (2011) 5 West African Challenges 3-19, 65; Franklin Alli & Providence Obuh, "Nigeria Gats Anti-Dumping Relief from WTO – Minister", *Vanguard* (22 February 2016), online: <www.vanguardngr.com/2016/02/nigeria-gets-anti-dumping-relief-from-wto-minister/> (accessed 21 January 2024)

revenue generation, livelihood, economy, and sustainability in contemporary times.[6] Besides, the lack of effective trade defense structure makes it impossible for the country to initiate or conduct investigatory proceedings against various foreign products alleged to be dumped imports (either due to their poor design low-standards, faultiness, or obsolete state in the exporting country or country of origin) by different stakeholders.[7] Most Thus, these trade hazards have made it imperative for Nigeria to develop functional trade remedy mechanisms, such as Anti-dumping measures, to be employed as a corrective instrument for levelling the field against unfair trade practices like dumping activities that are injurious or threaten to cause injury to her domestic industries. Importantly, an effective Anti-dumping regime is essential in this era of increasing trade fragmentation that presents a major risk of widening the inequalities in economic strength between the Global North and Global South countries.[8] In particular, developing economies such as Nigeria stand to lose more due to dependency on oil and foreign intermediate products.[9] Thus, Anti-dumping measures can be used to defend local producers

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[6] See generally National Bureau Statistics, "Labor Forces Statistics: Unemployment and Underemployment Report", (2021) NBC, online: < https://africacheck.org/sites/default/files/media/documents/2022-07/Q4_2020_Unemployment_Report_compressed%20%282%29.pdf> (accessed 21 January 2024) [NBS 2021 Report on Unemployment]; National Bureau Statistics, "Nigeria Multidimensional Poverty Index", (2022) NBS, online: <https://nigerianstat.gov.ng/elibrary/read/1241254> (accessed 21 January 2024) [NBS 2023 Report on Poverty Index]; Wilson Erumebor, "Nigeria in 2023: Bridging the Productivity Gap and Building Economic Resilience", *Brooking* (6 February 2023); and See National Bureau of Statistics, "Foreign Trade in Goods Statistics: Q3 2022" (2022) NBC, online: <https://nigerianstat.gov.ng/elibrary/read/1241262> (accessed 21 January 2024) [NBS 2022 Report on Foreign Trade]

[7] Bright Nwachukwu, "Nigeria, to be the World's Car Dump", *LinkedIn* (12 May 2022), online: < https://www.linkedin.com/pulse/nigeria-worlds-car-dump-bright-nwachukwu/> (accessed 16 May 2024); WTO, *Trade Policy Review Body: Report By the Secretariat on Nigeria*, WTO Doc WT/TPR/S/356 (9 May 2017), online <www.wto.org/english/tratop_e/tpr_e/s356_e.pdf> (accessed 13 November 2023) [herein referred as WTO 2017 Report on Nigeria]; Nigeria's AFCFTA Strategy and Implementation Plan, "Development of AfCFTA Strategy and Implementation Plan – 007 MITI-NACJU", (2021) p 168, online: < https://www.pdfnigeria.org/rc/wp-content/uploads/2021/03/210302AfCFTA-Implementation-Strategy-and-Plan-Final-007-MITI-NAC-JU-vs-0.1.pdf> (accessed 16 May 2024) [Nigeria's AfCFTA Strategy and Implementation Plan]; Ajoje Olufunke Iyabo, *South-South Cooperation and the Prospects of Global Economic Balancing: A Study Framework of Nigeria-China Relations* (PhD Dissertation, North-West University, 2018) 78 [unpublished]; See generally Godfrey George, "How Cheap Chinese Goods Killed Nigeria Textile Factories – Ahmed, MAN President", *PUNCH* (22 August 2021), online: < https://punchng.com/how-cheap-chinese-goods-killed-nigerias-textile-factories-ahmed-man-president/> (accessed 29 November 2023); "Product Dumping: How Asians are Killing Made-In-Nigeria Goods", *supra* note 5; Temitope Adeyemi, "Panaceas: Dumping and Trade Remedies in Nigeria", *Mondaq* (4 June 2020), online: <www.mondaq.com/nigeria/export-controls--trade--investment-sanctions/947900/panaceas-dumping-and-trade-remedies-in-nigeria-#_ftn5> (accessed 16 May 2024); Olu Fasan, "Nigeria's Import Restrictions: A Bad Policy that Harms Trade Relation", *LSE Blog* (27 August 2015), online: <https://blogs.lse.ac.uk/africaatlse/2015/08/17/nigerias-import-restrictions-a-bad-policy-that-harms-trade-relations/> (accessed 13 November 2023); Janet Ogundepo, "Second-hand Clothes from West Pose Environmental Challenges in Africa – Experts", *Punch* (27 November 2022), online: < https://punchng.com/second-hand-clothes-from-west-pose-environmental-challenges-in-africa-experts/> (accessed 16 May 2024); Osondu-Oti, *supra* note 5.

[8] For details on the impacts of trade fragmentation see WTO Report 2023, *supra* note 1.

[9] See generally Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7; and Ismail Muftau, *Overview of the African Continental Free Trade Area (AfCFTA) And Challenges of Implementation: Nigeria and South Africa's Implementation as Case Studies*, (LL.M Thesis: University of British Columbia, 2023) 134-137 [unpublished].

from the unfair practice of their foreign counterparts as well as restructure the Nigerian economy which would enable it utilize the greater market opportunity presented under the African Continental Free Trade Agreement (AfCFTA) as a liberalizing regional trade regime. It will also increase her manufacturing output and reposition her industries for improved intra-African trade as well as global trade.[10] In essence, the Anti-dumping measure is not only a crucial tool for revitalizing the Nigerian domestic industries, but also for advancing her intra-African trade and other regional integration.

As discussed in Chapter 2, Article VI of the General Agreement on Tariffs and Trade, 1994 (Article VI of the GATT 1994) and the Agreement on the Implementations of Article VI of GATT 1994, also known as the Anti-Dumping Agreement ('ADA') lay down the contemporary discipline on dumped import and Anti-dumping measures under the auspice of the WTO. These multilateral rules on Anti-dumping measures do not regulate the actions of private organizations involved in unfair trade practices, but focus on measures which Member States may take against such unfair trade behaviour. Also, the WTO Members are not required to domesticate the multilateral framework on Anti-dumping or enact Anti-dumping legislation. However, once a member chooses to do so, it is mandatory for such member to draft and implement its legislation to be compatible with the provision of the WTO law.[11] It is important to note that the AfCFTA also adopts the WTO model on trade liberalization. While the AfCFTA recognises Anti-dumping measures as a trade remedy for levelling the playing field, it also relies on the WTO rules on Anti-dumping to regulate the application of the trade remedy within the context of intra-African trade and regional economic integration.[12] In this context, Nigeria has been an original Member of the WTO and a signatory to its Agreement since 1995. Hence, it is expected that her Anti-dumping regime will be WTO-compliant. However, this is not the case as I argue later in this Chapter that the process of transposing WTO's Anti-dumping framework into the Nigerian trading environment has been characterised by shortfalls that made it near impossible for Nigeria to establish and operate an Anti-dumping regime.[13] These

[10] Nigeria's AfCFTA Strategy and Implementation Plan; and Michael Ogunremi, "AfCFTA, Dumping and Nigeria", *Utopianomics* (14 January 2022), online: < https://utopianomics.com.ng/2021/01/14/afcfta-dumping-and-nigeria/> (accessed 16 May 2024).

[11] See Agreement on the Implementation of Article VI of GATT 1994, 1868 UNTS 201 (also known as Anti-Dumping Agreement) (ADA), Article 1.

[12] Agreement Establishing the African Continental Free Trade Area (AfCFTA) Protocol on Trade in Goods, Articles 17; and Annex 9 on Trade Remedies, Articles 2- 5, 11. See also Muftau, *supra* note 9 at 74; and Nigeria's AfCFTA Strategy and Implementation Plan, *supra* note 7.

[13] WTO 2017 Report on Nigeria, *supra* note 7; WTO, "Case Study 32: Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *WTO Centre* (8 July 2020), online: <https://wtocenter.vn/chuyen-

shortfalls have created issues and legal uncertainties that makes its essential to examine the Anti-dumping framework and practice in Nigeria in light of the new intra-African trade and economic development.

Against this background, this Chapter will analyse the trend in Nigeria's trade policy and practice towards resolving the market-distortion practices that have stifled the industrial development of the local producers and increased the trade deficit in the country's trade relations. Also, it will explore the consistency or otherwise of Nigerian trade defense approach against dumped imports within the context of her commitment under the rule-based multilateral trading system and the regional trade agreement. Furthermore, the Chapter will highlight the potential impact of trade protection under the AfCFTA, and the implication of the Agreement for Nigeria's industrial growth. Following this introduction, the sections will address the issues raised thus: section 3.2 will explore the post-colonial industrial policy in Nigeria from a historical and contemporary perspective with the goal of determining the compatibility of the Nigerian trade policy and defense under the WTO rules and the AfCFTA. Section 3.3 will examine the dumping activities and its impact on Nigeria's local industries within the context of the textile, steel and automobile industry. In view of the damning effect of dumped imports, section 3.4 will briefly examine the Nigeria's Anti-dumping campaign and legislative framework with the aim of teasing out the shortfall of the regime in bolstering the competitiveness of her local industries on the global and regional market. The section would lay the foundation for drawing lessons from the Anti-dumping approach and experience of other Global South countries that have successfully employed the trade remedy to restructure their economy and increase their manufacturing input – which would be studied in Chapter 4 of this thesis. Recognizing the potential opportunities and threats which the newly introduced AfCFTA presents for Nigeria's economy or trade, section 3.5 will briefly highlight the trade protection under the regional trade agreement, its impact and implication for the Nigerian economy. Section 3.6 will conclude the findings of this Chapter.

de/15799-case-study-32-import-prohibition-as-a-trade-policy-instrument-the-nigerian-experience> (accessed 19 May 2024). See also Adeyemi, *supra* note 7.

3.2 Understanding Nigeria's Post-Colonial Trade Policy: Historical and Contemporary Perspective

Nigeria became a post-colonial state after her political independence on October 1, 1960. The country is located in the Gulf of Guinea West Africa and has been designated as Africa's largest economy, owing to her large population and economy.[14] The size of her economy in the region made the country's national trade policies and their impact on economic growth generate substantial international interest. Like many of the countries in the Global South, Nigeria is a primary production economy whose contributions to the global supply chain are mainly situated in raw commodities such agricultural products and oil exploration.[15] In particular, Nigeria's economy has since the 1980s become overly dependent on oil production and export by over 90 percent to the detriment of agricultural production (which was primary source of export revenue prior to oil exploration) and other non-oil sector.[16] This has left the country's reserve depleted, and her market an outlet for dumping cheap and low-quality non-oil semi-finished and finished products such as processed agricultural products, used-vehicles, second-hand clothes amongst others.[17] Accordingly, Nigeria's trading arrangement has historically been characterised by low industrial base and limited economic growth.[18] It has also subjected

[14] Ruth Olurounbi, "Africa's Largest Economy, Nigeria, Tops Growth Forecasts" *Aljazeera* (17 February 2022), online: <www.aljazeera.com/economy/2022/2/17/africas-largest-economy-nigeria-tops-growth-forecasts> (13 November 2023); Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 8 at 37; "The World Bank in Nigeria: Context", (2 October 2023) The World Bank, online: <www.worldbank.org/en/country/nigeria/overview#1> (accessed 13 May 2024); Lade Bandele, "China and Nigeria: Consolidating Over Five Decades of Enduring Partnership" *Premium Times* (28 July 2023), online: <www.premiumtimesng.com/opinion/612533-china-and-nigeria-consolidating-over-five-decades-of-enduring-partnership-by-lade-bandele.html> (accessed 25 May 2024); WTO 2017 Report on Nigeria, *supra* note 12.

[15] Amaka Metu et al, "Overview of the Structure of the Nigerian Economy", (2019) 23, online: <https://dx.doi.org/10.2139/ssrn.3605453> (accessed 8 August 2024); Muftau, *supra* note 9 at 134-137; and Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7 at 52.

[16] Momodu Itua Kingsley, *The Impact on Economic Growth of Nigeria's Oil Dependency,* (MA Thesis: Erasmus University, 2017) 10-13 [unpublished], online: < https://thesis.eur.nl/pub/41611/Momodu-Itua-Kingsley.pdf> (accessed 8 August 2024); Dissertation, North-West University, 2018); Augustine Okeke, "Dependence on oil: What do Statistic from Nigeria Show?", (2017) 2:1 J Eco & allied Research 110, 111-120, online: < https://pure.manchester.ac.uk/ws/portalfiles/portal/92683580/Dependency_on_Oil_.pdf> (accessed 8 August 2024); Keneth Mohammed, "A wealth of Sorrow: Why Nigeria's Abundant Oil Reserves are Really a Curse", *The Guardian* (9 November 2021), online: < https://www.theguardian.com/global-development/2021/nov/09/a-wealth-of-sorrow-why-nigerias-abundant-oil-reserves-are-really-a-curse> (accessed 8 August 2024); Nafi Chinery & Tengi George-Ikoli, "Ending Nigeria's Oil Dependency: Not if, But When and How", *Natural Resourse Governance Institute* (9 March 2022), online: < https://resourcegovernance.org/articles/ending-nigerias-oil-dependency-not-if-whenand-how#:~:text=Continued%20dependence%20on%20oil%20revenues,of%201.8%20percent%20in%202020.> (accessed 8 August 2024).

[17] *Ibid*; WTO 2017 Report on Nigeria, *supra* note 12; L N Chete et al, "Industrial Development and Growth in Nigeria: Lessons and Challenges" (2014) Nigeria Institute of Social & Economic Research, Brooking Institution and Learning to Compete, Working Paper No 8, 5-6, online: < https://www.brookings.edu/wp-content/uploads/2016/07/l2c_wp8_chete-et-al-1.pdf> (accessed 16 May 2024).

[18] Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7 at 52 & 58

the country to varying experiences of economic stagnation as trade liberalization fails to produce beneficial outcomes for the country.[19] Nigeria's trade policy has over the past six decades been laced with protectionism allure which has featured an increasing restrictive measures - particularly in the face of economic crisis – geared toward industry protection against dumped imports.[20] Therefore, an historical analysis of Nigeria's trade policy within the context of foreign economic policy is critical to understanding the impact of trade liberalization on contemporary trade issues in the country. Against this backdrop, this section will briefly review the evolution of trade policy in Nigeria within the context of foreign economic policies and trade defense mechanisms for the Nigerian domestic industries.

The review period has been divided into three phases of – (i) First Period – Immediate Post-Independence Era; (ii) Second Period – Structural Adjustment Programme Era; (iii) Third Period – Neo-Liberal Era. It is important to note that the aim of this section is not to provide a 'watertight compartment' interpretation of these historical moments or to argue the accuracy of the periodization; other studies have undertaken these exercises.[21] Instead, the point is to provide a simplified understanding of the evolution of Nigeria's foreign economies.

3.2.1 First Period – Immediate Post-Independence Era

This period is also known as the decolonization era and it covers years immediately after the country attained political independence from 1960 to 1985. During this period, Nigeria's foreign economic policies were characterized by anti-colonial developmental struggles and the essentiality of collective racial identity of post-colonial Third World States. As such, the country's foreign policy during this period was Afro-centric and altruistic in nature. [22] The

[19] Uchechukwu Innocent Duru et al, "Trade Liberalization and Economic Growth: An Assessment of Nigerian Experience", (2020) 8:3 Asian Dev Pol'y Rev 194 at 196 online: < https://www.researchgate.net/publication/344339476_Trade_Liberalization_and_Economic_Growth_An_Assessment_of_Nigerian_Experience> (accessed 18 January 2024).
[20] Fasan, "Nigeria's Import Restrictions: A Bad Policy that Harms Trade Relation", *supra* note 7; WTO, "Case Study 32: Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *supra* note 13; Folarin Alayande, "Understanding Shifts in Nigeria's Trade Policy: From Realism to Protectionism", (2020) 1 Afr Dev L 149-162, online: <www.jstor.org/stable/10.2307/26936568> (accessed 13 November 2023)
[21] Obi Iwuagwu, "Development Albatross: A Historical Analysis of Nigeria's Economic Development Planning Experience 1960-2015", (2020) 1:2 KIU Int'diciplinary J Humanities & Soc Sci 335, 338-341, online: < https://www.researchgate.net/profile/Obi-Iwuagwu/publication/343775099_Development_albatross_a_historical_analysis_of_Nigeria's_economic_development_planning_experience/links/5f3ee78da6fdcccc43ddadbd/Development-albatross-a-historical-analysis-of-Nigerias-economic-development-planning-experience.pdf> (accessed 9 August 2024); Jeremiah I Dibua, "The Post-Colonial State and Development Planning in Nigeria, 1962-1985", (1994) 24J Eastern African Research & Dev 212-228, online: < https://www-jstor-org.ezproxy.library.dal.ca/stable/24326321?read-now=1&seq=2#page_scan_tab_contents> (accessed 9 August 2024).
[22] Alayande, *supra* note 20 at 151-152. See generally Chibundu, *supra* note 4.

early part of this era witnessed the implementation of import-oriented policies that were informed by the institutional and planning structures bequeathed on the country by the colonial administrator.[23] The re-adaptation of the rules inherited from the West were thought would propel the country's industrial growth and enhance her development. However, the outward looking national development plans of this era lacked clear determined objectives that aims to diversify Nigeria's beyond oil exploration, but facilitated the continued exploitation of the country's resources by Western capitalism.[24] Moreover, the oil prosperity of the 1970s shifted the government focus solely to petroleum exploration, which led to the de-marketization of the non-oil sector, particularly the agricultural sector (which was the cornerstone of Nigeria's economy before independence) and placed more emphasis on importation that raised the government consumption of both intermediate and capital good.[25] Hence, the Nigerian market and the local industries became less competitive and dependent on imported products (attributable to low industrialization base, failure of agricultural development, neglect of the manufacturing sector, and resultant effect of oil price challenges and debt crisis of this period) that caused significant economic underperformance, which prompted various military coups d'état (one of which end-up in a 30-month civil war) that disrupted the civilian rule of this period.[26] Thus, the economic policy and industrialization strategy of this period were unsustainable toward achieving a stellar economic performance given that they were rooted in Western imperialism and only benefitted the elite in the country.[27]

In addressing the economic mismanagement of this era, the import-oriented policy of the 1960s gave way to the protectionism policy of the 1970s. The economic welfare and developmental approach of the 1970s were pursued through adoption of the import substitution industrialization (ISI) and protectionist policies aimed at ensuring adequate protection for local industries and employment. In particular, the Nigerian government placed restrictions on the importation of 82 essential items.[28] The objectives of those restrictions were directed at stimulating Nigeria's industrial development, boosting economic performance, and enhancing

[23] Dibua, *supra* note 21 at 213-217; Olabisi Akinkugbe, "Theorizing Developmental Regionalism in Narratives of Africa Regional Trade Agreements (RTAs)", (2020) 1:1 African J Intl Eco L 293, 310-312, online: <https://digitalcommons.schulichlaw.dal.ca/scholarly_works/486/> (accessed 13 November 2023) [Akinkugbe, "Theorizing Developmental Regionalism in Narratives of Africa Regional Trade Agreements (RTAs)"].
[24] Kingsley, *supra* note 16 at 16-17; Dibua, *supra* note 21 at 214.
[25] Dibua, *supra* note 21 at 218; Kingsley, *supra* note 16 at 16-17; Okeke, *supra* note 16 at 110-114.
[26] Dibua, *supra* note 21 at 220-223; Iwuagwu, *supra* note 24 at 340-341; Kingsley, *supra* note 16 at 16.
[27] *Ibid*; Chibundu, *supra* note 4; Chete et al, *supra* note 17 at 1.
[28] See O J Umoh & E L Effiong, "Trade Openness and Manufacturing Sector Performance in Nigeria", (2013) 7:2 J Applied Eco Research 151-152.

indigenous participation through the restoration of local manufacturing capability, reduced reliance on foreign finished goods, and protection of employment.[29] These economic pursuits were all state-led and conducted during the oil boom of 1970s. Also, the focus of Nigeria's foreign policies in the 1970s was Africa-centred. This informed the country's attempt at trade and regional integration with neighbouring countries based on Pan-African vision - as part of the third world shared value against inequality. [30] As such, during this period the country championed and financed regional hegemonistic organisation such as the Economic Community of Western African States (ECOWAS) and Organisation of African Unity (OAU).[31] The country also projected her economic ideology onto the regional trade platform. Thus, it was unsurprising that the assumptions on ISI and protectionism were a fundamental aspect of regionalism in Africa in the 1970s.[32] In spite of the regionalism trend, Nigeria heavily relied on technical and financial support from the West, and this confined the country's economic and trade policies within the orbit of Western imperialism. The dependency on Western financial aid affected her regionalism agenda, and in turn, her regional integrations and formal trading with neighbouring countries were minimal during this period.[33] Nigeria's dependency on Western countries can be traced to the aid diplomacy practice of the West – that has long been used to subjugate and shape the economic sovereignty of States in the Global South.[34]

The return of civilian rule informed the advent of the second republic in 1979, and it was accompanied by economic challenges that were escalated in the early 1980s. Thus, the early part of the 1980s was fraught with protectionist policies and strategy, which were implemented to protect the economic interest of the country due to the decline in her oil revenues, increased foreign debt, and the apparent disinterest of the West in Africa's economic crisis.[35] For

[29] Emmanuel Obuah et al, "Trade as an Instrument of Diplomacy: An Assessment of Nigeria's Version of Protectionist Trade", (2017) 4:1&2 J Afri Foreign Affairs 5 at 16; Chete et al, *supra* note 17 at 2-3 & 16; Chibundu, *supra* note 4 at 1-2.
[30]Akinkugbe, "Theorizing Developmental Regionalism in Narratives of Africa Regional Trade Agreements (RTAs)", *supra* note 23.
[31] Alayande, *supra* note 20 at 149-162; Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7; Chete et al, *supra* note 17.
[32] Akinkugbe, "Theorizing Developmental Regionalism in Narratives of Africa Regional Trade Agreements (RTAs)", *supra* note 23 at 311. See generally Chibundu, *supra* note 4.
[33] Said Adejumobi, "Economic Issues and Nigeria's Foreign Policy in the Emergent of New World Order: Some Consideration on the Next Decades", (1993) Afr J Pol Eco 95, 97-98, online: <www.jstor.org/stable/45401905> (accessed 14 May 2023) [Adejumobi, "Economic Issues and Nigeria's Foreign Policy in the Emergent of New World Order: Some consideration on the Next Decades"]; Alayande, *supra* note 20 at 152; and Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7 at 52.
[34] See Chibundu, *supra* note 4 at 24-26.
[35] Chete et al, *supra* note 17 at 16.

instance, in 1982, the county outrightly banned the importation of 'non-essential' items.[36] These restrictive measures were specifically employed to control the import from Western countries. Moreover, nationalism policy and unilateral readjustment of tariffs were implemented in disregard of her commitment under the General Agreement on Trade and Tariff, 1947 (GATT 1947).[37] Essentially, Nigeria's foreign policies during this period made mockery of the colonial institutions bequeathed to the country as lasting legacies of the Britain civilization missions.[38] According to Ike Nwachukwu (the then-Minister of Foreign Affairs), it is the 'responsibility of the Nigeria's foreign policy apparatus to advance the course of Nigeria's national economic recovery'.[39] Hence, laws such as Economic Stabilization (Temporary Provision) Act, 1982 and the Customs Duties Order, 1982 were enacted to reduce reliance on imports and to support the nationalist agenda of the Nigerian state.[40] In turn, these policies put a strain on Britain-Nigerian trade relations. It also affected the Afro-centric basis of Nigeria's foreign policy and breached the ECOWAS Trade Liberalization Scheme (ELTS) and Common External Tariff Agreement - the tariff and non-tariff barriers contained in those policies contradict Nigeria's free movement commitment under the ELTS.[41] These events laid the foundation for the structural programme the country underwent in mid-1980s. Although the nationalism phase was successful in diverting trade inflow from private beneficiaries to the public sector, it failed to reorientate the focus of Nigeria's trade and investment policies toward achieving outstanding economic performance.

3.2.2 Second Period – Structural Adjustment Era

From the mid-1980s to 1993, Nigeria witnessed the commencement of the Structural Adjustment Programme (SAP). The Western-dominated Bretton Woods Institutions packaged

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[36] See The Economic Stabilisation (Temporary Provisions) Act, 1982. The Act was enacted principally for curtailment of foreign import.

[37] Olumide Victor Ekande, "The Dynamics of Forced Neoliberalism in Nigeria Since the 1980", (2014) 1:1 J Retracing Afr 1 at 7-8, online: <https://encompass.eku.edu/cgi/viewcontent.cgi?article=1010&context=jora> (accessed 15 November 2023); Adebayo Olukoshi, "The Management of Nigeria's External Debt: Issues and Problems" in Nigerian External Debt Crisis: Its Management, ed. Adebayo Olukoshi (Lagos: Malthouse,1990), 31, 95-96.

[38] Chibundu, *supra* note 4 at 25.

[39] "Nigeria's economic Diplomacy: Some Contending Issues" in U J Ogwu & Olukoshi, eds, *The Economic Diplomacy of the Nigerian State*, (Lagos: NIIA, 2002) 12-27.

[40] Obuah et al, *supra* note 29 at 16.

[41] Olabisi D Akinkugbe, *Revisiting the Economic Community of West African States: A Socio-Legal Analysis* (LLM Thesis, University of Ottawa, 2017) [forthcoming in *Law, Economics and Regionalism in Africa: A Socio-Legal Analysis of the Economic Community of West African States* ('Routledge Research in International Economic Law' series)] 87-89; Alayande, *supra* note 20 at 152; Adejumobi, "Economic Issues and Nigeria's Foreign Policy in the Emergent of New World Order: Some Consideration on the Next Decades", *supra* note 33 at 99

the economic SAP to tackle economic crisis, and control the unprecedented rising foreign debt profile of the country.[42] This was also an era of neo-liberalism and globalism that emerged as the dominant economic practice for global integration.[43] As TWAIL scholars have argued, the global economic system is a neocolonial tool that furthered the income gap and hardship both between and within States.[44]

The economic decline of the 1970s and 1980s precipitated the financial assistance Nigeria sought from the Bretton Woods Institutions to halt economic stagnation and revitalize her economic growth. The internal reorientation of the IMF and the World Bank as well as the mismanagement of African debt profile resulted in high deficit financing and increased foreign debt for Nigeria.[45] Thus, the government sought debt rescheduling from the Bretton Woods Institutions to manage her foreign debt portfolio. Between 1986-1993, the country adopted the policies and conditions imposed by the institution through introduction of the SAP into the economy to meet her debt rescheduling.[46] Hence, wide-range of economic reforms including measures such as trade liberalisation; currency devaluation; reduction of subsidies on petroleum and essential services; privatization of state-owned enterprises; deregulation of interest rates amongst others were issued and implemented.[47] The SAP primary focus was on trade liberalization and readjustment of the pricing system.

Accordingly, the SAP reforms marked the beginning of neoliberalism in Nigeria's trade regime given that the country was encouraged to open up her market for integration into the global economic system through free trade and implementation of liberal economic rules.[48] Under the SAP scheme, the import and export licensing were abolished, and free license were given for importation of both primary and intermediate products without import duties and other

[42] Chete et al, *supra* note 17 at 17.
[43] Ekande, *supra* note 37 at 2.
[44] See generally James Thou Gathii, "TWAIL: A brief History of its Origins, its Decentralization, Network, and a Tentative Bibliography" (2011) 3:1 Trade L & Dev 26 [Gathii, "TWAIL: A brief History of its Origins, its Decentralization, Network, and a Tentative Bibliography"]; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge University Press, 2005) [Anghie, *Imperialism, Sovereignty and the Making of International Law'*]; Chakravarthi Raghavan, *Recolonization: GATT, the Uruguay Round & the Third* World (London: Zed Book, 1990); Antony Anghie, "Rethinking International Law: A TWAIL Retrospective" (2023) 34:1 Eur J Intl L 7, 64 at 77-112 [Anghie, "Rethinking International Law: A TWAIL Retrospective"]
[45] Ekande, *supra* note 37 at 5.
[46] *Ibid*, 5-7.
[47] Chete et al, *supra* note 17 at 17-18; Olu Ajakaiye & Afeikhena Jerome, "Economic Development: The experience of Sub-Saharan Africa" in Bruce Currie-Alder et al, eds, *International Development: Idea, Experience & Prospects* (Oxford, United Kingdom: OUP, 2014) 736;
[48] Jonathan Bashi Rudahindwa, *Regional Developmentalism through Law: Establishing an African Economic Community* (Routledge, 2018) 19.

indirect taxes and charges.[49] Moreso, exporters were allowed to retain 100% of their earnings in domiciliary accounts without restrictions from the Central Bank of Nigeria.[50] According to Said Adejumobi, the trade policy implemented in this era supported "the interest of foreign capital and their control over the Nigerian economy".[51] In particular, L N Chete et al noted thus:

> All these policy instruments were applied in the implementation of SAP in Nigeria especially between 1986 and 1993. The implementation of SAP had controversial economic and social consequences. While the painful effects of the conditions imposed by the IMF were immediate especially as evidenced by a sharp deterioration in living standards, the developmental impacts of SAP were slow... The impact of SAP on the productive sectors of the economy was mixed. Industry had to devise strategies to cope with the various aspects of the new regime as well as a slump in effective demand. Tariff reduction cut duties on finished goods more than on intermediate inputs and raw materials thereby reducing effective rates of protection and increasing competition with foreign producers.[52]

Thus, the SAP enabled the expansion of foreign import base and business activities in the country. Also, transnational corporations enjoyed buoyant growth in profit compared to the growth decline experienced by Nigeria's macro-economy. In essence, the SAP reform subjugated Nigerian economy to the dictate of Western imperialism.

Furthermore, the country implemented an export-led trade policy through the elimination of the restrictive measures that adorned the ISI era. The country also introduced measures that promoted free trade such as time-bound tax holidays and the removal of tariffs on industrial raw material and equipment amongst others.[53] Besides, bilateral agreements were signed to

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[49] Chete et al, *supra* note 17 at 20-21; Obi Iwuagwu, "The Cluster Concept: Will Nigeria's New Industrial Development Strategy Jumpstart the Country's Industrial Takeoff?", (2011) 2:2 Afr Asian J Soc Sci 1 at 13, online: < https://www.onlineresearchjournals.com/aajoss/art/75.pdf> (accessed 9 august 2024) [Iwuagwu, "The Cluster Concepts"]. See also Yusuf Bangura, "Structural Adjustment and De-industrialisation in Nigeria: 1986-1988", (1991) 16:2 Afr Dev 5, 11-18, online: < https://www.jstor.org/stable/43657841?read-now=1&seq=7#page_scan_tab_contents> (accessed 9 August 2024).

[50] Chete et al, *supra* note 17 at 21.

[51] Adejumobi, "Economic Issues and Nigeria's Foreign Policy in the Emergent of New World Order: Some Consideration on the Next Decades" *supra* note 33 at 100.

[52] Chete et al, *supra* note 17 at 18. See generally Bangura, *supra* note 49; A O Adeoye, "Of Economic Masquerades and Vulgar Economy: A Critique of the Structural Adjustment Program in Nigeria", (1991) 16:1 Afr Dev 23, 39-40, online: < https://www.jstor.org/stable/43657876> (accessed 9 August 2024).

[53] Obuah et al, *supra* note 29 at 17.

deepen Nigeria's Western ties.[54] In addition, the Export Incentives (Miscellaneous Provisions) Act[55] and the Customs, Excise and Tariff (Consolidation) Decree, 1988[56] were promulgated to guarantee the competitiveness of Nigeria's exports. Thus, the country relaxed her protectionist policies to normalise her strained relationship with Britain. In the same context, Western-Nigeria trade ties were also regularised, which in turn deepened her dependence on Western countries.[57] This strategy aligned with the contention of neoliberalism policies that the industrial development and economic growth of the Global society can only be actualised through trade liberalization contrary to state-led development.[58] Thus, the SAP preference for global dependency as against 'neighbourhood dependency' further escalated Nigeria's shift from a Pan-Africanism policy to a globalised policy.

In essence, Nigeria was pressured into the Bretton Woods Institutions backed SAP, which caused her to industrialize sooner than her premature economy could withstand, this in turn undermined her local manufacturing capability.[59] As a result, the country was unable to achieve the projected economic growth targets under the SAP reforms. It also placed the country at the mercy of having to compete with more industrialized countries, such as the advanced countries and the emerging industrialized East Asian Countries on the global scene.[60] Thus, considering that Nigeria was forcefully encouraged to embrace SAP reforms in 1986 without an effective export-oriented growth plan to replace her protectionist strategy, the country started recording premature de-industrialization from the late-1980s. Also, her economy remained stagnant whilst the unemployment and poverty rate rapidly increased.[61] Thus, due to the poor and inchoate trade ecosystem, inadequate infrastructure, low industrial base, and lack of technology and skilled labour needed to exploit the globalization scheme, the SAP reform resulted into, and escalated the poor economic strength of the Nigerian state during this era. Hence, there were high manifestation of de-industrialization in the country under the IMF/World Bank's packaged SAP. Eventually, in 1994, the SAP reform was discontinued by General Abacha

[54] *Ibid*, 20.
[55] Cap 118, LFN, 1990, as amended by Act No 65 of 1992.
[56] Now The Custom, Excise and Tariff (Consolidated) Act 1988.
[57] Kunle Amuwo, "The Relevance and Irrelevance of Nigeria's Economic Diplomacy", (1991) 15:1 & 2 Nigerian J Intl Studies 81 [Amuwo, "The Relevance and Irrelevance of Nigeria's Economic Diplomacy"].
[58] James Thuo Gathii, "Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law", (1999) 5 Buff HRL Rev 107 [Gathii, "Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law"].
[59] See Iwuagwu, "The Cluster Concepts", *supra* note 49; Bangura, *supra* note 49 at 19-32; Adeoye, *supra* note 52 at 30-42. See generally Chete et al, *supra* note 17.
[60] Ajakaiye & Jerome, *supra* note 47; Maldonado, *supra* note 1.
[61] *Ibid*; Obuah et al, *supra* note 29 at 18.

Sanni's administration. Notwithstanding, a vicious cycle of debt-trap was borne out of the structural program as Nigeria's debt portfolio continued to cumulate, whilst it guarantees continuous dominance of private capitalist and imperialist interests in the country's political economy till present date.[62] Moreso, many of the plan programs and policies launched afterward were not significantly different from the SAP model, such as the National Economic Empowerment Development Strategy ('NEEDS') under the Obasanjo regime (which was funded by the Bretton Woods Institution).[63] Thus, the era of SAP perpetuated Nigeria's economic regression and her continuous subservience to imperialism, as the program was used by powerful Imperialist States to intensify the opening up process of third world economies for further exploitation within the multilateral system.

3. 2.3 Third Period – Neo-Liberal Era

The emergence and the entrenchment of neoliberalism ideology in the previous historical moments had enormous implications for Nigeria's industrial growth. It undoubtedly influenced the modification of Nigeria's foreign policy and trade strategy towards guided deregulation and privatization agenda from 1994 till date.[64] Both the WTO and Bretton Woods Institutions, being at the heart of the new global economic order, encouraged the country to pursue global economic integration through a neoliberal agenda.[65] In fulfilment of international commitment, Nigeria pursued an extended frontiers of neoliberal trade strategy without an effective safeguard under General Sani Abacha's regime. In turn, it opened the Nigerian market to all sort of semi-finished and finished foreign products that were dumped into the country by foreign capitalists and firms.[66] Hence, Nigeria became a dumping site for cheap, frivolous and condemned intermediate and finished products such as steel, textile, used cars and second-hand clothes from Global North countries, which eventually stifled the growth of local producers in

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[62] Brian-Vincent Ikejiaku, "Africa Debt Crisis and the IMF with a Case of Nigeria: Towards Theoretical Explanations" (2008) 1:4 J Pol & L 2, 5-6; Adeoye, *supra* note 52 at 40; Bernhard Dossier N63, "Life or Debt: The Stranglehold of Neocolonialosm and Africa's Search for Alternatives", (2023) Tricontinental: Institute for Social Research, online: < https://thetricontinental.org/dossier-63-african-debt-crisis/> (accessed 9 August 2024)

[63] Ikeanyibe Okey Marcellus, "Development Planning in Nigeria: Reflections on the National Economic Empowerment and Development Strategy (NEEDS 2003-2007", (2009) 20:3 J Soc Sci 197, 203, 205-207 online: < https://www.researchgate.net/publication/247770039_Development_Planning_in_Nigeria_Reflections_on_the_National_Economic_Empowerment_and_Development_Strategy_NEEDS_2003-2007> (accessed 9 August 2024). See Chete et al, *supra* note 17 at 19; Alayande, *supra* note 20 at 152-153;

[64] Ekande, *supra* note 37 at 12; Kunle Amuwo, "Transition as democratic regression," in Kunle Amuwo et al, eds, *Nigeria during the Abacha Years: 1993 – 1998: The Domestic and International Politics of Democratization*, (Ibadan: IFRA, 2001) at 5

[65] *Ibid*.

[66] Ekande, *supra* note 37 at 12-13.

the country.[67] In particular, the textile industry was the most affected as no less than one-hundred and thirty-five percent (135%) of textile firms were forced to shut-down few years after the country embraced neoliberal policy.[68] According to Olumide Ekande,

> The negative effect of unbridled importation subsequently led to a drastic decline in the contribution of the manufacturing sector to Nigeria's GDP... This unbridled importation of textiles impoverished cotton farmers and brought untold hardships on textile industry workers who were subsequently laid off because locally produced textiles could not favorably compete with [them].[69]

Also, Nigeria's increased debt portfolio made her foreign policies subservient to Western influence. Thus, the country continued to pursue pro-Western trade policy in the post-SAP era[70] until the policy shift to Asia in the early 2000s.

In 1999, the country transitioned into civilian rule under Olusegun Obasanjo's administration. The administration ushered in comprehensive reform programs that focused on international trade and investment.[71] The administration also practiced export substitution strategy until it was replaced with restrictive measure later on[72]. The neoliberal reforms were driven by economic exigencies and excruciating indebtedness of the country – triggered by decades of poor governance characterized by, *inter alia,* low capital income, high inflation, corruption, staggering unemployment rate, dysfunctional state of the federal parastatal, deteriorated industrial capacity, dependence on oil and energy trade embroidered in crisis.[73] In an attempt to rebuild the economy, the administration adopted neoliberal policies which further shifted Nigeria's foreign policy from Afro-centric approach of the immediate post-independent era

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[67] *Ibid*, 10-13; Fasan, *supra* note 7; Samson Echenim, "Nigeria Auto Policy: A Timeline of Inconsistency", *Ships & Ports* (12 December 2016), online: < https://shipsandports.com.ng/nigeria-auto-policy-a-timeline-of-inconsistency/> (accessed 16 May 2024); Anudu, "Nigeria's Giant Industries are Silently Disappearing, Part 1", *supra* note 5; Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two", *supra* note 5; Adeyemi, *supra* note 7.

[68] Ekande, *supra* note 37 at 12-13. See also Lara Eviota, "The Cultural Impact of Colonialism From Production to Disposal", *Remake* (14 March 2023), online: < https://remake.world/stories/colonialism-and-fashion/> (16 May 2024).

[69] Ekande, *supra* note 37 at 12.

[70] The pro-Western foreign policy was characterised with Western expansion and absolute subjugation to forces of Western Imperialism. See Chibuzo Nwoke, "The Origins and Dimensions of Nigeria's External Debt" in Adebayo Olukoshi, ed, *Nigerian External Debt Crisis: Its Management* (Lagos: Malthouse, 1990) 42-61; Adejumobi, "Economic Issues and Nigeria's Foreign Policy in the Emergent of New World Order: Some Consideration on the Next Decades" *supra* note 33 at 103.

[71] Alayande, *supra* note 20 at 152

[72] *Ibid*; Fasan, *supra* note 7.

[73] Ekande, *supra* note 37 at 14.

towards neoliberalism.[74] The neoliberal approach under the Obasanjo administration was that of gradual liberalization of the country's trade regime through employment of neoliberal policy which encouraged trade with selected foreign capitalist without conducting a full deregulation of the Nigerian economy. For example, the Obasanjo administration from 1999 to 2007 employed 'shuttle diplomacy' to drive strategic relations with powerful Western countries such as the US, Britain, Germany Australia, Switzerland amongst others to revitalise Nigeria's economy and industrialization through foreign direct investment (FDI), strategic trade policy, debt cancellation, image repackaging as well as partial deregulation of public enterprises.[75] Hence, the neoliberal ideology led to the privatization of all public enterprise in Nigeria.[76] The neoliberal agenda as well as the 'shuttle diplomacy' was championed and handled by economist technocrats such as Ngozi Okonjo Iweala, Oby Ezekwesili, Charles Soludo, Shamsuddeen Usman (proponent of the neoliberal agenda) engaged under the regime. The policy reforms of the administration were packaged as the NEEDS (a medium-term plan strategy for development of Nigeria's economy and trade policy), and was funded by the Bretton Woods Institutions.[77]

The privatization program opened up Nigeria's economy and trade policy to Western influence as demonstrated in the administration of the oil sector - whereby the program created a kleptocracy regime whereby foreign companies that operated in the Niger Delta were able to monopolize the country's natural resources.[78] This was also the case in the power sector and the steel industry.[79] Needless to say, that the privatization program under the NEEDS without an active export promotion strategy exposed the Nigerian market and local industries to influx of dumped imports that injured the manufacturing sectors, and undermined industrial development of the country.[80] Consequently, the administration thus, introduced restrictive

[74] Alayande, *supra* note 20 at 152.
[75] Eyitayo Adewunmi & Jacob Babajide, "An Appraisal of Democratic Governance and Nigeria's Foreign Policy, 1999-2019", (2021) 7:2 KIU J of Soc Sci 77, 81-82, online: < www.researchgate.net/publication/355911276_An_Appraisal_of_Democratic_Governance_and_Nigeria's_Foreign_Policy_1999-2019> (accessed 9 August 2024); Alayande, *supra* note 20 at 157-160.
[76] Ekande, *supra* note 37 at 14. See also Alayande, *supra* note 20 at 153-154; Grace Eshiet, *Nigeria's Foreign Policy from 1960 – Global Era: What Went Wrong*, (Master Thesis, Palacky University in Olomouc, 2018) [unpublished] 52-56, online: <https://theses.cz/id/bib5zq/Final_Thesis_-_Grace_Eshiet.pdf> (accessed 16 May 2024)
[77] Chete et al, *supra* note 20 at 19; Obiora Chinedu Okafor, "The Precarious Place of Labour Rights and Movement in Nigeria's Dual Economic and Political Transition, 1999-2005", (2007) 51:1 J Afri L 77; and Alayande, *supra* note 17 at 152-3
[78] See generally Lucy Baker, "Facilitating Whose Power? The IFI Policy Influence in Nigeria's Energy sector," (2008), online: < https://www.brettonwoodsproject.org/update/60/bwupdt60_ai.pdf> (accessed 16 May 2024); and Ekande, *supra* note 37 at 15-17.
[79] Ekande, *supra* note 37 at 18-19.
[80] *Ibid*, 19-20.

measures – under which importation of certain products were banned, and import tariffs were increased – to discourage importation dependency and to combat smuggling.[81] Also, it was embraced to encourage consumption of local goods, and ultimately to improve the operation of local production. Accordingly, the control measure became imperative "to protect our local industries and boost our manufacturing capability substantially".[82] Therefore, to ensure industry protection, unilateral restrictive measures became an essential feature of the Nigerian trade regime in this era, as it became clear that the NEEDS was not significantly different from the SAP.

The privatization-led development of the Obasanjo administration was built upon under President Umaru Musa Yar'dua and President Goodluck Ebele Jonathan's administration through the Seven Point Agenda (SPA) policy, which focused on economic reform.[83] The SPA witnessed renewed bilateral relations that boosted Nigeria's trade relationship with China and India, which informed the gradual shift in policy toward Asia.[84] Although the trade policy aspect of the SPA had various incentives for export-oriented growth, import prohibitions were still used to protect the manufacturing and agricultural sector in order to ensure their competitiveness, and to create self-sufficient internal market.[85] The list of prohibited imports issued during this period covered numbers of foreign intermediate and agricultural products which are locally produced in the country. The import ban was put in place to protect local productions from competitive pressure, and to safeguard the domestic industries and livelihood of people in the country.[86] Nonetheless, the restrictive measures were ineffective in ensuring a downward trend of import demand contrary to the reduced export earnings of the country.

In 2017, the Nigerian government merged together the Federal Ministries of Industry with that of Trade and Investment to establish the Nigerian Office for Trade Negotiations (NOTN). The

[81] Alayande, *supra* note 20 at 157.
[82] See Fasan, "Nigeria's Import Restrictions: A Bad Policy that Harms Trade Relation", *supra* note at 7. See also WTO, "Case Study 32: Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *supra* note 13.
[83] The Seven-Point Agenda, which was the major thrust of Yar'dua administration, constitute of important strategic element such as (a) development of critical infrastructural project such as power and energy, transportation amongst others to facilitate industrialization and movement of goods and service; (b) provision of infrastructure and empowerment program for the people of Niger Delta; (c) revitalisation of the agricultural sector to ensure food security; (d) human capital development; (e) Land reform and home ownership; (f) national security and intelligence (g) wealth creation through diversification if the nation's economy. See Robert Dode, "Yar'dua 7-Point Agenda, the MDGs and Sustainable Development in Nigeria", (2010) 10:4 Global J Human Soc Sci 2-8. Eshiet, *supra* note 56-59.
[84] Eshiet, *supra* note 63 at 57-59.
[85] *Ibid*. See also Alayande, *supra* note 17 at 157
[86] Chete et al, *supra* note 17 at 21-22; and Alayande, *supra* note 20 at 157

NOTN is the institutional framework and foundation for Nigeria's trade policy infrastructure. It is charged with the responsibility of developing and periodically updating Nigeria's trade policy, as well as aligning the country's domestic trade policy to changing global realities for the purpose of maximizing the nation's gain from trade. [87] In accordance with these objectives, minor organisational alignment was conducted in 2018 by merging the erstwhile National Planning Commission with the Budget Office to form the Ministry of Budget and National Planning, as an independent member of Nigeria's Economic Management Team and Trade Policy.[88] Notwithstanding, Nigeria's trade policies grew more restrictive under Muhammadu Buhari's administration. In particular, the national trade policies issued during this period were skewed towards indigenization, promotion of exports, and reduced import demand. The actualization of these policies led to the closure of the land border in 2019 for more than a year to curb smuggling and to protect local manufacturers or producers. The border closure hindered regional integration and reduced formal trading between Nigeria and the neighbouring countries in clear violation of the commitments under the ELTS.[89] Moreso, the Buhari's administration delayed signing the AfCFTA Agreement (a liberalizing regional trade regime) up until 2021 - for fear that the Agreement would further undermine the competitiveness of the already beset domestic manufacturing sector, as well as make Nigeria a dumping ground for finished products from other African countries.[90] It was also reluctant in approving ratification of the Economic Partnership Agreement ("EPA") between the European Union and the ECOWAS on the premise that the Agreement would jeopardize Nigeria's industrialization and further open the political economy of the country to Western imperialist interest – the EPA

[87] See "Nigerian Office for Trade Negotiations", online: < https://www.notn.gov.ng/> (accessed 10 August 2024); Alayande, *supra* note 20 at 157.
[88] See Nigerian Office for Trade Negotiations (NOTN), "Trade for Modernization, Growth and Job Creation: 2017 Nigerian Annual Trade Policy Report", (2018) NOTN, online: <https://nesgroup.org/download_policy_drafts/National%20Trade%20Policy%20Review%20%282018%29_1661866748.pdf > (accessed 10 August 2024).
[89] *Ibid*, 157-158.
[90] Daniel Mumbere, "Nigeria's Buhari Explains Failure to Sign Continental Free Trade Agreement", *Africanews* (9 December 2019), online: < https://www.africanews.com/2018/03/23/nigeria-s-buhari-explains-failure-to-sign-continental-free-trade-agreement//> (accessed 18 May 2024); Ajifowoke Michael Gbenga, "Why President Buhari is Still Reluctant To Sign the AfCFTA", *Ventures Africa* (23 June 2019), online: < https://venturesafrica.com/why-president-buhari-is-still-reluctant-to-sign-the-afcfta/> (accessed 19 May 2024); Yinka Kolawole, "AfCFTA: Concern Over Dumping Mounts as Trade Deficits Widens", *Vanguard* (5 April 2021), online: < https://www.vanguardngr.com/2021/04/afcfta-concern-over-dumping-mounts-as-trade-deficit-widens/#google_vignette> (accessed 19 May 2024); Ogunremi, *supra* note 10; Nigerian Economic Summit Group, "Economic Implications of the African Continental Free Trade Agreement (AfCFTA) on the Nigerian Industrial Sectors", (2020), online: <www.nesgroup.org/download_resource_documents/AFCFTA%20on%20Industrial%20Sector_1576844589.pdf> (accessed 16 May 2024) ["Nigerian Economic Submit Group Report 2020"].

remains unsigned till date.[91] In essence, Nigeria's reluctancy was based on concerns that both Agreements as well as the structural and institutional deficiency of the Nigerian state would expose the country to increased dumped import and unfair trade practices that would undermine the competitiveness of local producers.[92] Thus, aside the subsisting 41 categories of imported products banned from accessing foreign exchange from CBN, the administration also unilaterally increased Nigeria's list of prohibited products, tariff rate and non-tariff barriers in contradiction of her multilateral and regional trade liberalisation commitments.[93] Furthermore, the regime pursued nationalism policies that resonated with restrictive measures of other countries across the globe, particular the Global South countries – whose strategies have been to pushed back against WTO's trade liberalization in contemporary times due to its failure fulfil the projected beneficial outcome of the multilateral trading system.[94] Thus, there has been an increasing withdrawal from multilateralism which has raised the concerns of de-globalisation in light of the rising structural inequalities between the poor and the rich.[95] The unilateral protectionist measure under the Buhari administration thwarted the possible industrial development and economic growth projected under Nigeria's neoliberal agenda.

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[91] Jacques Berthelot, "The EU Caught in the Trap of Nigeria's Refusal to Sign the West Africa Economic Partnership Agreement and the Continental Free Trade Area", *CADTM* (9 May 2018), online: <www.cadtm.org/The-EU-caught-in-the-trap-of > (accessed 10 August 2024); "Why Nigeria Won't Sign Economic Partnership Agreement with EU – Buhari", *Premium Times* (5 April 2018), online: <www.premiumtimesng.com/news/top-news/264118-why-nigeria-wont-sign-economic-partnership-agreement-with-eu-buhari.html > (accessed 10 August 2024); Alayande, *supra* note 20 at 150.

[92] See generally Doyin Olagunju, "The Long Road to Free Trade in Nigeria – and Beyond", *Foreign Policy* (2021), online: <https://foreignpolicy.com/2021/02/11/the-long-road-to-free-trade-in-nigeria-and-beyond/> (accessed 16 November 2023); Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7; Mumbere, *supra* note 90; Nigerian Economic Summit Group Report 2020, *supra* note 90; Yewande Olapade & Chukwuka Onyekwena, "Quantifying the Impact on Nigeria of the African Continental Free Trade Area", *Brookings Institute* (22 September 2021), online: < https://www.brookings.edu/articles/quantifying-the-impact-on-nigeria-of-the-african-continental-free-trade-area/> (accessed 16 May 2024); Alayande, *supra* note 20 at 153-154.

[93] Jonathan Lain & Jakob Engel, "Barriers to Trade, Barriers to Poverty Reduction? How Nigeria can harness Trade to Lift People out of Poverty", *World Bank Blog* (2022), online: <https://blogs.worldbank.org/africacan/barriers-trade-barriers-poverty-reduction-how-nigeria-can-harness-trade-lift-people-out> (accessed 16 November 2023).

[94] See generally Maldonado, *supra* note 1 at 3-11; World Trade Report 2023, *supra* note 1; Giorgio Sacerdoti & Leonardo Borlini, "Systematic Changes in the Politicization of the international Trade Relations and the Decline of the Multilateral Trading System", (2023) 24 German LJ 17-44, online: <https://doi.org/10.1017/glj.2023.10> (accessed 8 May 2023).

[95] See generally WTO Trade Report 2023, *supra* note 1; Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 5th ed (Cambridge, UK: Cambridge University Press, 2022) Chapter 1; Nicolas Albertoni & Carol Wise, "International Trade Norms in the Age of Covid-19 Nationalism on the rise", (2021) 14 Fudan J Human & Soc Sci 41-66, online: <https://doi.org/10.1007/s40647-020-00288-1> (accessed 8 May 2024); Carlos Primo Braga et al, "Confronting Deglobalisation in the Multilateral Trading System", (2022) 14:1 Trade, L & Dev 1-38, online: <www.tradelawdevelopment.com/index.php/tld/article/view/215/237> (accessed 7 December 2024); Harold James, "Deglobalization: The Rise of Disembedded Unilateralism", (2018) 10 Ann Rev Fin Econ 219-237, online: <https://doi.org/10.1146/annurev-financial-110217-022625> (accessed 8 May 2024).

Given the poor industrial base, increasing import-dependency, and low technological capability of the Nigerian state, her trade protectionism policies for the past few decades have been unsuccessful in boosting and preserving the manufacturing capacity of the country. Importantly, it has proven inefficient in controlling dumping and smuggling activities within the country which have continued to stifle local production and healthy competitiveness in the Nigerian market – which in turn increases the dependency state of the country, and thereby makes it a dumping ground for import from Global North countries and other industrialised nation.[96] The restrictive measures are also incompatible with the WTO trade remedy rules. Hence, the frailties of the Nigerian economy – caused by decades of burgeoning industrial and technological infrastructure deficit, undiversified production base, epileptic power supply, weak border enforcement, and poor trade policies amongst others – as well as her protectionist strategies are ineffective safety net against the market-distorted practices of current times. Besides, the lack of effective trade defense mechanism poses a great risk to Nigeria's industrial growth compared to other countries with functional trade remedy mechanisms. All these contribute to Nigeria being susceptible to domination by neocolonialism and imperialism forces.

3.3 Dumping Imports in Nigeria's Domestic Market

The historical events discussed above show the policies that made Nigeria become an outlet for the dumping of foreign intermediate products, given the frailties of her economy and low level of industrialization. The inadequacies of those policies alongside poor implementation plan, lack of political will, as well as lack of functional trade defense infrastructure made Nigeria's economy be regarded as an import-dependent economy;[97] I would discuss evidence of its impact on the manufacturing sectors such as textile, steel and automobile later in this section. Nigeria's import-dependency status can be traced to the incessant trade deficit in her trade relations – her major trading partners are China, India, Singapore, Netherlands, United State of America (USA), Spain, France, Canada, United Kingdom (UK) and Italy.[98] For

[96] See generally Eviota, *supra* note 68; Obuah et al, *supra* note 29 at 18-20; Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7; Lain & Engel, *supra* note 93; Fasan, "Nigeria's Import Restrictions: A Bad Policy that Harms Trade Relation", *supra* note at 7; WTO, "Case Study 32: Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *supra* note 13.

[97] See generally Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7 at 52; Iyabo, *supra* note 7 at Chapter 3.

[98] See National Bureau of Statistics (NBS), "Foreign Trade in Goods Statistics - Q4 2023", (2024) NBS, online: < https://nigerianstat.gov.ng/elibrary/read/1241466> (accessed 16 May 2024) [NBS Q4 2023 Report on Foreign Trade in Goods Statistics]; Aghogho Udi, "Nigeria' Top Ten Foreign Trade Partners in 2023", *Nairametrics* (10

instance, Nigeria's foreign trade in goods for the fourth quarter (Q4) of 2023 was NGN26, 801.95 billion; while exports stood at NGN 12,693.62 billion, imports was valued at N14,108.33 billion - leaving a trade deficit of NGN 1.41 billion as the value of Nigerian import was higher than the exports during Q4 2023.[99] The traded imports were mainly intermediate products, refined oil products and processed agricultural goods.[100] On the rising deficit in manufactured products traded for Q4 2023, the National Bureau of Statistics (NBS) reported that while Nigeria's export was valued at ₦234.96 billion, her import stood at "₦9,026.46 billion showing an increase of 128.12% and 268.76% when compared to the value recorded in Q3, 2023 (₦3,956.81 billion) and the value recorded in Q4, 2022 (₦2,447.76 billion) respectively.[101] In essence, the NBS reports corroborates the historical events that portrayed Nigerian market as a dumping ground for foreign intermediate goods, due to low level of industrial activities in the country.

The country's low industrial base has continuously positioned her markets for importation of industrial goods from both Global North/Western and Asian countries. The Western-Nigeria trade relation has traditionally been disproportionate and exploitative in nature.[102] Thus, the growing demand for globally balanced economy prompted a shift in Nigeria's foreign policy towards Asia. The Sino-Nigeria policy shift was widely embraced by Nigerians as a mutually beneficial partnership and an alternative towards attaining trade balance, considering that South-South cooperation (on the face of it) would promote trust and reciprocity compared to Global South-Global North relationship.[103] In reality, the Sino-Nigeria trade relations is no different from the Western, considering that it has manifested the highest amount of trade deficit in Nigeria's economy.[104] Besides, the Sino-Nigeria's trade value for the entire period of

March 2024), online: < https://nairametrics.com/2024/03/10/nigerias-top-ten-foreign-trade-partners-in-2023/> (accessed 16 May 2024) [Udi, "Nigeria' Top Ten Foreign Trade Partners in 2023"].

[99] NBS Q4 2023 Report on Foreign Trade in Goods Statistics, *supra* note 81.

[100] *Ibid*; and Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 8 at 52.

[101] This increase was largely due to the import of 'Tanks and other armoured fighting vehicles, motorised, whet' worth ₦5,061.25 billion." See NBS Q4 2023 Report on Foreign Trade in Goods Statistics, *supra* note 81.

[102] See generally Ehichanya Ngozi, "Localization of Textile Industry in Nigeria", (2022) 25:4 Intl J L Politics & Humanities Research 131, 133; Innocent Ocholi & Nnamdi Okonkwo, "China-Bilateral, Political and Economic Engagements: Strategic Partnership or Sino-Imperialism", (2022) 3:1 Zamfara J Political & Dev 1; Edgar Agubamah, "Bilateral Relations: Periscoping Nigeria and China Relations" (2014) 10:14 Europe Scientific 149; Pamela Tom-Jack, *The Evolving Geographical Relations of Nigeria and China: What is the Impact of the Nigeria-China Trade and Direct Investment on the Nigerian Economy?*, (MSc Dissertation: University of Ottawa, 2016) at 51-53 [unpublished]; Iyabo, *supra* note 7; Eviota, *supra* note 57; Boateng & Klopp, *supra* note 5.

[103] Iyabo, *supra* note 7 at 92; Pat Utomi, *China in Nigeria* (Washington, DC: Centre for Strategic and International Studies, 2008), Online <http://csis.org/publication/china-nigeria> (accessed 23 April 2024); Egbula & Zheng, *supra* note 5 at 65.

[104] For instance, the NBS Q4 2023 reported that Nigeria's major import trading partners that contributed the nations trade deficit for that period were "Singapore with goods valued at ₦5,092.36 billion or 36.09%, China

2023 was NGN 28.65 trillion with import valued at NGN 19.07 trillion and exports recorded at NGN 9.58 trillion.[105] Thus, Nigeria's Sino trade relation has so far widened the income inequality between the countries, rather than bridge the gaps.

The disadvantageous position of Nigeria's trade relations has been attributed primarily to a lack of diversification from primary production, inadequate institutional and policy implementation structure, and low industrialization 'which is inadequate to meet the consumption demand of Nigeria's large population'.[106] Conversely, her trading partners have diversified their economies, improved their industrial space with strategic trade policies and put in place strong institutional and implementation structure.[107] These contributed to making the country attractive for dumping and smuggling practices that continue to undermine the industrial performance of her local industries. For instance, Nigeria is currently China's largest export destination in Africa.[108] It exports intermediate products ranging textile, steel machines, metals etc into Nigeria market.[109] It also exports mechanical, human and investment capital

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with ₦2,060.59 billion or 14.61%, Belgium with ₦1,140.97 billion or 8.09%, India with ₦908.59 billion or 6.44% and The United States of America with goods valued at ₦512.99 billion or 3.64%. The values of imports from the top five countries amounted to ₦9,715.50." See NBS Q4 2023 Report on Foreign Trade in Goods Statistics, *supra* note 98.

[105] In Particular, China was Nigeria's trading partner for the period of 2023 with a trade volume of NGN 7.49 trillion - NGN 5.709 trillion of the trade value was recorded as trade deficit for Nigeria during the period, given that NGN 6.60 trillion value of goods were imported into the country whilst NGN 891.37 value of product were to China.[105] Moreover, the Nigeria-China trade volume has persistently recorded an asymmetrical increase from the 1990s till date. From 1995 to 2021 (26 years of bilateral trade), China's export to Nigeria increased at an annual rate of 21.1%, from $151 million to $21.9 billion, while Nigeria's export to China have only increased at an annual rate of 17%, from $52 million to $3.05 billion.[105] This translates into $18.85 billion trade deficit for Nigeria, and as such China has had more comparative advantage over Nigeria for the past 26 year. See NBS Q4 2023 Report on Foreign Trade in Goods Statistics, *supra* note 98.

[106] Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 8 at 12 & 52.

[107] See generally Chibuike Victor Obikaeze, "Nigeria-China Bilateral Relations: Re-examining the trajectory of the Nigerian Manufacturing Sector", (2023) 4:1 J Contemporary Intl Relations & Diplomacy 673, 677-678, online: <https://doi.org/10.53982/jcird.2023.0401.03-j> (accessed 24 November 2023); I Opusunju et al, "Nigeria-China Trade: The Coronavirus Challenges and Benefits", (2020) 8:4 Intl JM & Soc Sci 113-129; E R Adigbuo, "Nigeria-China Relations: The Contemporary Challenges", (2019) 5 J Soc Sci Research 923-930.

[108] Dickson Omobola, "Nigeria, China's Second-Largest Trade Partner in Africa, Says Consul-General", *Vanguard* (7 November 2023), online: < https://www.vanguardngr.com/2023/11/nigeria-chinas-second-largest-trade-partner-in-africa-says-consul-general/> (accessed 10 August 2024); KPMG, "KPMG Analysis: Nigeria China Bilateral Trade Relations", *KPMG in Nigeria* (18 November 2023), online: < https://assets.kpmg.com/content/dam/kpmg/ng/pdf/macroeconomics-snapshot-13-november-2023%20-%20.pdf> (accessed 10 August 2024); NBS Q4 2023 Report on Foreign Trade in Goods Statistics, *supra* note 98.

[109] George, *supra* note 7; "Product Dumping: How Asians are Killing Made-In-Nigeria Goods", *supra* note 5; Ejiroghene Oghuvbu, "Nigeria-China Bilateral Relations: The Current Challenges, 2015-2020", (2022) 22:1 Annals of Spiru Haret U Econ Series 283 at 288-291, online: <https://doi.org/10.26458/2210> (accessed 23 April 2024). See generally Adigbuo, *supra* note 107; B T Akinterinwa, "Africa Today's Conference on Nigeria-China Relations and Implications for Nigeria's Foreign Policy Concentricism" *This Day* (8 May 2016), Online: < https://www.thisdaylive.com/index.php/2016/05/08/africa-todays-conference-on-nigeria-china-relations-and-implications-for-nigerias-foreign-policy-concentricism/> (accessed 24 May 2024; B A Akintarinwa, "Nigeria: Covid 19 Pandemic and Nigeria-China Relations – Critical Issues and China's International Responsibility" *This Day* (3 May 2020), online: <https://allafrica.com/stories/202005030067.html> (accessed 24 May 2024).

with over 200 Chinese companies operating in Nigeria's domestic space. These Chinese companies boost China's economy with the expansion of their market and raw material access in Nigeria, whilst only about 20 of the companies contribute to the infrastructural development in Nigeria.[110] In contrast, Nigeria traded in limited export of raw materials such as agricultural products, mineral and vegetable products with China. [111]

Also, Nigerian market has been inundated with influx of cheap and obsolete vehicles primarily from Global North countries such as USA, Europe and Canada for decades,[112] which the Nigerian government has never bothered to investigate due to ineffective trade defense infrastructure.[113] For instance, from the trade value of manufactured goods trade in Q4, 2023, about NGN 8984.27 billion used vehicles were imported from USA into Nigeria – i.e. the highest volume of used vehicle were imported from USA.[114] This dumping practice has prompted a near extinction of the local automobile industry in Nigeria considering that it undermines the industrial growth and competitiveness of the sector as well as prolong the cycle of dependency on foreign markets.[115] In essence, the disparities in trade value of Nigeria's trade relations have perpetuate an unequal trading strength between Nigeria and industrialised nations. This in turn has a far-reaching implication on the attainment of industrial development, economic security and prosperity in the country. It also has the tendency of sustaining the structural inequalities that continues to characterize the multilateral trading system.

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[110] *Ibid*; H E Cui Jianchun (Chinese Ambassador to Nigeria), "China-Nigeria Cooperation in the New Era", *Ministry of Foreign Affairs of the People's Republic of China* (1 January 2023), online: < https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/202301/t20230120_11012882.html> (accessed 16 May 2024).

[111] *Ibid*.

[112] Bayo Akomolafe, "Six Countries Dump N1.7trn Used Vehicles in Nigeria", *New Telegraph* (4 April 2022), online: < https://newtelegraphng.com/six-countries-dump-n1-7trn-used-vehicles-in-nigeria/> (accessed 16 May 2024); Echenim, *supra* note 67; Leadership News, "NADDC Seeks Ban on Importation of 20-yr-old Used Vehicles", *Leadership News* (20 January 2024), online: < https://leadership.ng/naddc-seeks-ban-on-importation-of-20-yr-old-used-vehicles/> (accessed 16 May 2024); Aghogho Udi, "Nigeria's Vehicle Imports Increased by 22.64% in 2023", *Nairametrics* (25 March 2024), online: < https://nairametrics.com/2024/03/12/nigerias-vehicle-imports-increased-by-226-4-in-2023/#:~:text=The%20total%20value%20of%20Nigeria's,over%20a%20one%2Dyear%20period.> (accessed 16 May 2024) [Udi, "Nigeria's Vehicle Imports Increased by 22.64% in 2023"].

[113] *Ibid*; WTO 2017 Report on Nigeria, *supra* note 7; Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 8 at 52-168; Adeyemi, *supra* note 8; Iyabo, *supra* note 7 at Chapter 3. See generally, Anugbum Onuoha, "Appraising the Current Legal Framework for Regulating Dumping Into Nigeria: Need for Legislative Reforms and Intervention", (2020) 8:5 Global J Pol & L Research 64-80.

[114] NBS Q4 2023 Report on Foreign Trade in Goods Statistics, *supra* note 98.

[115] "Nigeria's Automobile Industry: A shadow of itself", *Proshare* (25 April 2023), online: < https://www.proshare.co/articles/nigerias-automobile-industry-a-shadow-of-itself?menu=Finance&classification=Read&category=Travel%20%26%20Tours> (accessed 16 May 2024).

3.3.1 Dumping Practice and Impact on the Nigerian Domestic Market

The lopsidedness of Nigeria's trade relations has created an imperfect competitive market for its local producers to the detriment of the Nigerian economy. Also, the fast-growing presence of cheap and sub-standard products in Nigeria's market has enabled an environment and a cycle for continuous dependency on importation.[116] Thus, it does not only threaten and displace indigenous producers, but also undermines livelihood of Nigerians – despite the fact that foreign authority such as the Chinese government alleged that the choice of foreign import is dictated by the impoverished state of the Nigerian economy.[117]

In spite of the restrictive measures and the negative reactions the import-dependency status has elicited from Nigerian producers, there has been a continuous rise in the trade volume of cheap, obsolete and low-standard products without cogent and effective trade defense mechanism.[118] As previously mentioned, most of the imported products are either of low-standard, poorly designed, faulty or declared obsolete in their countries of origin. They are also affordable compared to the local products - given the low earning power of most Nigerians.[119] Hence, the relative preference of the masses for those foreign imported products. Although the masses benefit from dumping activities by paying lesser amount, it is done at the detriment of the country's industrial and economy growth.[120] In particular, it has prompted an imbalance in Nigeria's trade relations as well as given the continual de-industrialization of distressed local industries in the country whilst enriching the industrialization of the foreign producers.

Consequently, Nigeria's import-dependency status has positioned her local industries, particularly the textile, steel and automobile industries as a victim of dumped imports. These

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[116] *Ibid*. See generally NBS Q4 2023 Report on Foreign Trade in Goods Statistics, *supra* note 98; Anudu, "Nigeria's Giant Industries are Silently Disappearing", *supra* note 5; Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two, *supra* note 5; Nwachukwu, *supra* note 7.
[117] *Ibid*; Alabi Ogunsanwo, "A Tale of Two Giants: Nigeria and China", in Ampiah K & S Naidu, eds, *Crouching Tiger, Hidden Dragon?* (Scottsville: University of KwaZulu-Natal Press, 2008); Akinterinwa, *supra* note 93.
[118] *Ibid*. See generally Fasan, *supra* note 7; Ogundepo, *supra* note 7; Kenechi Afunugo & Kenechukwu Sam-Obi, "An Ethical Interrogation of The Standard of Chinese Products in Nigeria's Market System", (2024) 8:1 OWIJOPPA 71-78, online: < www.acjol.org/index.php/owijoppa/article/view/4554/4426> (21 May 2024); NBS Q4 2023 Report on Foreign Trade in Goods Statistics, *supra* note 81; Adeyemi, *supra* note 12; Iyabo, *supra* note 7 at Chapter 3; Comfort Oseghale, "Between Nigeria's $1.2bn Smuggled Textiles and China's $2bn Investment", *Ships & Ports* (7 January 2019), online: <https://shipsandports.com.ng/between-nigerias-1-2bn-smuggled-textiles-and-chinas-2bn-investment> (accessed 20 May 2024); Justice Okamgba, "Stakeholders divided over proposed Import Ban on Used Vehicles", *Punch* (3 January 2024), online: < https://punchng.com/stakeholders-divided-over-proposed-import-ban-on-used-vehicles/> (accessed 16 May 2024); Leadership News "NADDC Seeks Ban on Importation of 20-yr-old Used Vehicles", *supra* note 112.
[119] *Ibid*.
[120] *Ibid*; Ogunremi, *supra* note 10.

three industries suffered the most from the market-distortion practices of foreign producers. Importantly, the availability of cheap and low-quality import products has continued to undermine industrial growth of these industries as many production firms have had to either shut-down at some point or struggle to survive.[121] In light of these, the impact of dumped import on Nigeria's textile, steel and automobile industries will be briefly highlighted below.

3.3.1.1 Textile Industry

The textile industry is one of the well-known industrial sectors in Nigeria that has suffered tremendously, and continues to deteriorate from the onslaught of foreign imports in the country. Its existence traces back to the pre-Western imperialism and colonialism era. Prior to its de-industrialization, the industry was a prosperous one which was ranked as the third largest in Africa. It, however, started recording a declining growth rate from the advent of colonial economic policies in the country – which focused on the importation of Western industrial textiles.[122] Notwithstanding, during the decolonization era, the industry recorded a lot of success as an export market given that it served markets in the West African region and Global North countries.[123] Also, it was the second largest employer of labour in Nigeria before the 1990s.[124] Thus, the immediate post-colonial era witnessed the establishment of domestic textile firms such as the Kano Trading company (1952), Kaduna Textiles Mills (1956), United Nigerian Textile Limited (1964), and many more were established towards the end of 1960s.[125] As of mid-1980, over 175 local textile firms were operating in Nigeria, while towards the end of 1980s, the Nigerian textile industry had about 200 local textile firm.[126] This shows the success rate of the textile industry prior to its current redundancy state due to low industrial base caused by injurious dumping activities in the country.

Also, Nigeria's dependency on oil exportation alongside other contributory factors such as the influx of cheap foreign textiles, neoliberal reforms, and poor trade policies escalated the decline

[121] Ekande, *supra* note 37 at 15; Oseghale, *supra* note 118; Anudu, "Nigeria's Giant Industries are Silently Disappearing", *supra* note 5; Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two, *supra* note 5; Adeyemi, *supra* note 12; Nwachukwu, *supra* note 7; Leadership News, "NADDC Seeks Ban on Importation of 20-yr-old Used Vehicles", *supra* note 112; Afunugo & Sam-Obi, *supra* note 118; Okamba, *supra* note 118; Eviota, *supra* note 68; "Nigeria's Automobile Industry: A shadow of itself", *supra* note 115; Echenim, *supra* note 67; Boateng & Klopp, *supra* note 5; Osimen & Micah, *supra* note 5; News Agency of Nigeria, *supra* note 5.
[122] Ngozi, *supra* note 102; Osondu-Oti, *supra* note 5 at 202; Oseghale, *supra* note 100.
[123] Osondu-Oti, *supra* note 5 at 203.
[124] See Akinrinade & Ogen, *supra* note 4 at 159-170; Ngozi, *supra* note 102 at 135.
[125] Osondu-Oti, *supra* note 5 at 203.
[126] *Ibid*. See Akinrinade & Ogen, *supra* note 4.

of the sector's industrial output from the mid-1980s till date.[127] Moreover, the mid-1980s were identified as a period of 'mass redundancy in the history of textile development in Nigeria'[128] due to the premature exposure of the textile industry to the trade liberalization scheme of the Bretton Woods Institutions packaged SAP. Thus, the textile industry experienced a near collapse in the early 2000s with over 35 textile industrial firms shut-down. In 2000, there was a widespread scale-down of the local firms to 89, which was further reduced to 32 factories in 2005. The continuous dumping of cheap and low-quality textiles from affluent countries such as China and Europe - whose countries suffered from massive overproduction and market saturation[129] - worsened the state of Nigeria's textile industry. It also informed the scale-down of its active firms to 25 and 16 in 2010 and 2015, respectively.[130] Moreover, finished textile products from China currently account for over 80% of the textile materials in the country, with about $1.2 billion of the textile articles smuggled into the country.[131] In 2021, it was estimated that over 95% of Nigeria's textile market is dominated by low-cost and second-hand foreign imported textile products.[132] Hence, the importation rate of textiles and textile products more than doubled given its 100.3% rise from N182.5 billion in 2020 to N365.5 billion in 2022.[133] In essence, the influx of low-cost textile materials through unfair trade practices such as dumping and smuggling from foreign producers greatly undermined the competitiveness of locally produced textile materials in Nigeria. As a result, no more than 3 full-fledged textile mills currently exist in the country.[134]

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[127] Ngozi, *supra* note 102 at 133-134, & 136; and Osondu-Oti, *supra* note 5.
[128] Amina Abubakar Ismail, "The Impact of Trade Liberalization Policy on Nigerian Textile Industries: Evidence from Comparative and Descriptive Method of Analysis", (2019) 3:1 Lapai J Eco 108 at 115.
[129] Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two", *supra* note 5; Osondu-Oti, *supra* note 5 at 203-218; "Product Dumping: How Asians Are Killing Made-In-Nigeria Goods", *supra* note 5.
[130] Ngozi, *supra* note 102 at 136. See generally Osondu-Oti, *supra* note 5; and Ogundepo, *supra* note 7.
[131] Oseghale, *supra* note 118.
[132] "Nigeria's Textile Industry May Lose Millions of Jobs on Further Decline, Warn Experts", *Fashionating World* (3 June 2022), online: < https://www.fashionatingworld.com/new1-2/nigeria-s-textile-industry-may-lose-millions-of-jobs-on-further-decline-warn-experts> (accessed 25 May 2024); "The Demise of Nigerian Textile Industry", *This Day* (2 May 2022), online"< https://www.thisdaylive.com/index.php/2022/05/02/the-demise-of-nigerian-textile-industry/> (25 May 2024); Ogundepo, *supra* note 118.
[133] National Bureau Statistic (NBS), "Foreign Trade in Goods Statistic: Q4 2022", (2023) NBS, online: < https://nigerianstat.gov.ng/elibrary/read/1241297#:~:text=In%20the%20fourth%20quarter%20of,amounted%20to%20N5%2C362.83%20billion.> (accessed 16 may 2024); and "Nigeria's Textile Imports rise 100.3% in 2 years to N365.5 Bn in 2022", *Fibre2Fashion* (20 April 2023), online: < https://www.fibre2fashion.com/news/textile-news/nigeria-s-textile-imports-rise-100-3-in-2-years-to-n365-5-bn-in-2022-287043-newsdetails.htm> (accessed 16 May 2024).
[134] Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two", *supra* note 5.

3.3.1.2 Steel Industry

Nigeria's steel industry is another sector that has suffered premature de-industrialization from dumping practice. Despite being blessed with vast mineral resources (such as iron ore) for steel production and the huge capitals investment in the sector, Nigeria's steel demands still are constantly being met by substandard foreign imports from affluent Western and Asian countries.[135] For instance, the 2.2 million tons produced annually in Nigeria is based on foreign importation of scraps and billet from China.[136] As a result, steel production in Nigeria has been monopolised by Chinese and Western exporters to the detriment of the local firms within the sector.[137] The foreign monopolization is partly influenced by Nigeria's indebtedness to those affluent industrialised nations – which has prompted Nigerian government to extend increasing trade concessions to foreign steel producers.[138] All these contributed to the persistent influx of low-cost and low-quality steel from industrialised nations, which keeps stifling the industrial capacity of the steel industry and has created a continuous cycle of import-dependency in the country.

It is important to note that a working steel industry is essential for national security and industrial existence of any country. It has the potential to significantly contribute to industrialization and generate employment, as well as strengthen the national defense of a country. This ideology was part of the factors that influenced the establishment of Ajaokuta Steel in 1958, and many other steel establishments in subsequent years.[139] However, the steel industry has since then been struggling to survive under the unfavourable impact of dumped

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[135] *Ibid*; Odinaka Anudu, "After Spending Over $8BN on Ajaokuta, Nigeria Imports N837BN Steel", *Punch* (5 May 2022), online: < https://punchng.com/after-spending-over-8bn-on-ajaokuta-nigeria-imports-n837bn-steel/> (accessed 16 May 2024) [Anudu, "After Spending Over $8BN on Ajaokuta, Nigeria Imports N837BN Steel"]; Anudu, "Nigeria's Giant Industries are Silently Disappearing", *supra* note 5; Adeyemi, *supra* note 12. See generally Osimen & Micah, *supra* note 5 at 49; "Nigeria Moves to Check Dumping of Substandard Steel", *APA News* (17 April 2019), online: < https://apanews.net/nigeria-moves-to-check-dumping-of-substandard-steel/> (accessed 16 May 2024); Okechukwu Okorie & Nnaemeka Emodi, "Nigeria Hasn't Been Able to Produce Steel: Remanufacturing Could be the Solution", *DownToEarth* (21 July 2022), online: < https://www.downtoearth.org.in/blog/africa/nigeria-hasn-t-been-able-to-produce-steel-remanufacturing-could-be-the-solution-83856> (accessed 16 May 2024).

[136] "Nigeria Moves to Check Dumping of Substandard Steel", *supra* note 135.

[137] *Ibid*; Anudu, "Nigeria's Giant Industries are Silently Disappearing", *supra* note 5; NBS Q4 2023 Report on Foreign Trade in Goods Statistics, *supra* note 81; Ocholi & Okonkwo, *supra* note 85 at 9.

[138] Anudu, "Nigeria's Giant Industries are Silently Disappearing", *supra* note 5.

[139] "The Steel Industry in Nigeria: Current State, Challenges, and Future Prospects", *234intel* (7 August 2024), online: <https://234intel.com/economics/the-steel-industry-in-nigeria-current-state-challenges-and-future-prospects/#:~:text=Nigeria's%20steel%20industry%20has%20long,generation%2C%20and%20the%20overall%20GDP.> (accessed 24 August 2024); Adeyemi, *supra* note 7; Okorie & Emodi, *supra* note 117; C Ocheri et al, *'The Steel Industry: A Stimulus to National Development',* (2017) 6:1 J Powder Metallurgy & Mining at 5

imports.[140] Thus, the country continues to lack a functional steel sector as a result of low-capacity utilization.[141] As of 2023, over $4 billion of foreign steel were imported into the Nigerian market – i.e. about 70% of the steel products traded on Nigerian market were imported steel products.[142] As such, foreign-produced steels are highly patronised by Nigerian consumers - owing to their affordable nature - compared to the locally produced ones.[143] Hence, the continuous presence of foreign steel products in the Nigerian market does not only thwart the utilization capacity of the local steel producers, it also undermine the national security and industrial development in the country. This prejudice exists in spite of steel development being crucial to the industrialization of the country – given that the country cannot fully industrialise or improve her manufacturing sector without a functional steel industry. Thus, it has been noted that 'Nigeria just needs to get its steel industry working' before it can boost local production of her other domestic industries.[144]

3.3.1.3 Automobile Industry

Similar to other Nigerian industries, the automobile industry has suffered immensely from the market-distorted practice of foreign manufacturers since the country attained independence and indulged in motoring production more than six decades ago.[145] The automobile industry's struggle intensified when Nigeria transitioned into an oil-dependent economy during the oil boom of the late 1970s. As a result, her foreign policy became import-oriented due to external pressure, whilst 'automobile manufacturing became difficult and local plants could not bear the growing, high cost of production'.[146] Moreover, Nigerian consumers resorted to the importation of used cars in large volumes as their purchasing power dwindled. Hence, the utilization capacity of the Nigerian automobile industry reduced from 90% to as low as 10% in the 1980s, and almost non-existent in present day.[147] In particular, indigenous automobile plants such as Volkswagen of Nigeria Limited (VWON), Peugeot Automobile Nigeria Limited

[140] Gabriel Ewepu, "FG's Poised to Reduce Annual $4BN Spent on Steel Importation – Minister", *Vanguard* (2 February 2024), online: < www.vanguardngr.com/2024/02/fgs-poised-to-reduce-annual-4bn-spent-on-steel-importation-minister/> (16 May 2024).
[141] Anudu, "After Spending Over $8BN on Ajaokuta, Nigeria Imports N837BN Steel", *supra* note 135.
[142] Ewepu, *supra* note 140; NBS Q4 2023 Report on Foreign Trade in Goods Statistics, *supra* note 98; "Nigeria Imports $4BN Worth of Steel Annually – Minister", *Vanguard* (29 February 2024), online: < https://www.vanguardngr.com/2024/02/nigeria-imports-4bn-worth-of-steel-annually-minister/> (accessed 16 May 2024).
[143] Ewepu, *supra* note 140.
[144] Okamgba, *supra* note 118.
[145] Echenim, *supra* note 67.
[146] "Nigeria's Automobile Industry: A Shadow of Itself", *supra* note 115; Echenim, *supra* note 67.
[147] *Ibid*; Nwachukwu, *supra* note 7.

(PAN), Anambra Motor Manufacturing Company (ANNAMCO), Leyland Nisara Limited, Innoson Vehicle Manufacturing Company (IVM) amongst others have had to shut-down at some point or struggle to operate as they became uncompetitive due to poor patronage and low capacity utilization caused by the uncontrolled influx of foreign new and used cars.[148] Also, it is important to note that the estimated annual vehicular demands of Nigerian consumers in current time are about 720,000 units, while local productions stand at 14,000 units.[149] Considering that the local automobile production are insufficient, the shortfall in the demands is usually met by importation. Thus, Nigeria's automobile industry is heavily reliant on imports to meet all local requests.

Although throughout the historical struggle of the automobile sector the Nigerian government had employed various import restriction measures to discourage dumped imports of foreign used and moribund vehicles from affluent continents such as America, Europe, and Asia. However, those protectionist policies have so far been inadequate in mitigating the incessant importation, and in improving the industrial capacity of the sector.[150] Instead, more than N1.79 trillion used vehicles and motorcycles were imported from six Global North countries between 2020 to 2022.[151] Moreover, between 2022 to 2023, there was a significant increase in the value of foreign used vehicles imported into the country from N325.05 billion to N1.063 trillion – i.e. Nigeria recorded a hike of 226.46% in the value of vehicles imported during this period.[152] Thus, the influx of low-cost and low-quality vehicles into the Nigerian automobile market in just a year was over N736 billion, and there is a tendency for it to increase with each year. These dumping activities contribute to the low-capacity utilization of the industry in contemporary times. It also makes it difficult for indigenous automobile manufacturer such as IVM to compete with foreign manufacturer in the Global North whilst struggling to stay afloat.

The compounding effect of dumped imports on Nigeria's domestic industries includes de-industrialization of the manufacturing sector, weak local productivity and competitiveness, increasing unemployment and poverty rate, dwindling purchasing power, negative economic

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[148] *Ibid*; Adeyemi, *supra* note 7.
[149] U.S. International Trade Administration, "Nigeria – Country Commercial Guide", (2023) ITA, online: < https://www.trade.gov/country-commercial-guides/nigeria-automotive-sector> (accessed 16 May 2024); Akomolafe, *supra* note 112; and Udi, "Nigeria's Vehicle Imports Increased by 22.64% in 2023", *supra* note 112.
[150] Echenim, *supra* note 67; The Chronicles Editorial, "Are Africa's Used Car Import Bans Effective?", *TheChronicles* (22 December 2022), online: < https://www.chronicles.rw/2022/12/22/are-africas-used-car-import-bans-effective/> (accessed 17 May 2024).
[151] Akomolafe, *supra* note 112.
[152] NBS Q4 2023 Report on Foreign Trade in Goods Statistics, *supra* note 98; Udi, "Nigeria's Vehicle Imports Increased by 22.64% in 2023", *supra* note 112.

growth, and low-value addition amongst others.[153] Hence, Nigeria recorded an all-time low economic income in 2020 with over 133 million Nigerians deemed to be into multidimensional poverty.[154] The economic recession was ascribed to a decline in her manufacturing base that situated the share of total exports at 5.2% in 2021.[155] This poor state of the Nigerian economy is a manifestation of the structural inequalities that exist within the multilateral trading system. Therefore, Nigeria's import-dependency status carries a colonial legacy that shows the unequal trading strength in the country's trade relations. It also reflects the exploitative and manipulative stands of the industrialised countries within the multilateral trading system.[156] Hence, the trade relationship between Nigeria and her trading partners is a reflection of the global exploitation and imperialism currently ongoing within the multilateral trading community. In essence, the unfair trade treatment from Nigeria's trade relations further reiterates the fertile ground of imperialism that exists within the WTO.

3.4 Overview of the Anti-Dumping Mechanism in Nigeria

3.4.1 Anti-Dumping Campaign

The historical antecedent of Nigeria's trade policies has shown the country persistently resorts to protectionist policies as trade defense mechanisms against unfair trade practices, and as a means for addressing the imbalances in her trade relationship.[157] Various restrictive measures that either limit or ban importations of certain products are currently being pursued or proposed by the Nigerian government to protect the domestic industries from unhealthy competition; encourage consumption of local products; and to ensure industrial growth of indigenous manufacturers.[158] For instance, a presidential directive issued in 2017 through an Executive Order made provision for preference and priority to be given to local manufacturers, contractors, and service providers in all government procurement. It also provide that at least 40% expenditure for the procurement of items such as uniform and footwear, food and beverages, furniture and fittings, stationery, information technology, construction materials,

[153] Bamidele Bode Balogun, "Analysis and the Impact of Foreign Made Goods on the Nigerian Economy", (2020) 20:7 J Mgt Sci & Entrepreneurship 328 at 340-341; Osondu-Oti, *supra* note 5 at 210; and Adeyemi, *supra* note 7.
[154] See NBS 2021 Report on Unemployment, *supra* note 6; NBS 2023 Report on Poverty Index, *supra* note 6; Erumebor, *supra* note 6.
[155] See NBS 2022 Report on Foreign Trade, *supra* note 6.
[156] See generally Alessandrini, *supra* note 1; Boateng & Klopp, *supra* note 5; Eviota, *supra* note 68.
[157] WTO, "Case Study 32: Import Prohibition as a Trade Policy Instrument: The Nigerian Experience ", *supra* note 13; Obuah et al, *supra* note 29; Fasan, *supra* note 7.
[158] Sahara Reporters, "Nigeria Places Full Ban On Importation of Goods Through Land Borders" (2019) <http://saharareporters.com/2019/10/14/nigeria-places-full-ban-importation-goods-through-land-borders> (accessed 18 May 2024); Okamgba, *supra* note 118.

motor vehicles and pharmaceuticals amongst others shall be on locally manufactured goods.[159] Moreover, the National Automobile Design Council alongside relevant authorities are currently working to propose a protectionist policy that would ban the importation of certain models of used vehicles as a way of protecting and stimulating Nigeria's automotive industry. In addition, the government is also looking at commencing a deletion policy that would enable the country to produce local automobile spare products and ban their importation into the country.[160] These restrictive measures, *inter alia,* are pursued in disregard of the country's multilateral and regional commitments.[161] As an original member of the WTO, Nigeria currently lacks an effective trade defense structure that is WTO-compliant. Thus, the urgency towards achieving a sustainable economy that would address her trade challenges informed the increasing use of trade restrictive policies that have generated a high level of uncertainty in Nigeria's trading environment - this precarious nature has in turn undermined her economic growth.[162] Hence, the country has never initiated nor conducted any investigatory process on the various dumping allegations or concerns raised by different stakeholders, and even the government itself.[163] Many of these complaints remain unheeded to date.

Aside these restrictive measures, there is the Nigeria Customs Service Act, 2023 ('the Act') and the Custom Duties (Dumped and Subsidized Goods) Act, 1958 ('CDA').[164] The Act repealed the Customs and Excise Management Act (CEMA) and other national legislations relating to Custom and Excise matters in the country.[165] It also established the Nigeria Customs Service (NSC) as the sole agency for custom administration in Nigeria, including being the primary enforcer of trade policies. In addition, the Act regulates the importation and

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[159] International Trade Administration, "Nigeria-Country Commercial Guides: Trade Barriers", (2023) ITA, online: < https://www.trade.gov/country-commercial-guides/nigeria-trade-barriers> (accessed 18 May 2024); Adaku Onyenucheya, "Overdependence on Drug importation, Others Kill Local Pharma Industry, threaten medicine Security", *TheGuardian* (24 September 2019), online: < https://guardian.ng/features/overdependence-on-drug-importation-others-kill-local-pharma-industry-threaten-medicine-security/> (accessed 18 may 2024).

[160] See Okamgba, *supra* note 118; Agbogho Udi, "Automotive Council urge FG to Ban Importation of Year 2000 to 2007 Model Car", *Nairametrics* (20 December 2023), online: < https://nairametrics.com/2023/12/20/automotive-council-urge-fg-to-ban-importation-of-year-2000-to-2007-model-cars/> (accessed 18 May 2024); and Leadership News, "NADDC Seeks Ban on Importation of 20-yr-old Used Vehicles", *supra* note 112.

[161] See WTO 2017 Report on Nigeria, *supra* note 7; "Case Study 32: Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *supra* note 13.

[162] See Peterson Ozili, "Source of Economic Policy Uncertainty in Nigeria: Implications for Africa", (2022) 108 Contemporary Studies in Economic & Financial Analysis 37-50.

[163] WTO, "Case Study 32: Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *supra* note 13; Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7 at 168; and Iyabo, *supra* note 7 at 78. See generally George, *supra* note 7; "Product Dumping: How Asians are Killing Made-In-Nigeria Goods", *supra* note 5; Adeyemi, *supra* note 7; Osondu-Oti, *supra* note 5; Okamgba, *supra* note 112; Fasan, *supra* note 7.

[164] Cap C48 Laws of the Federation of Nigeria, 2004.

[165] See Nigeria Customs Service Act, 2023 No. 35, s 280.

exportation of goods to be processed in the country. On the other hand, the CDA - an obsolete subsisting trade defense legislation - provides for the imposition of special duties and sanctions on products dumped into the country by foreign producers, or goods within the country that are subsidized by a foreign government.[166] Many of the CDA provisions have been deemed inadequate and inconsistent with the WTO Anti-dumping rules.[167] To address the inadequacy concerns of the CDA, a few attempts were made by Nigeria's Parliamentary House to align the subsisting trade defense legislation with the current reality of trade-distortion practices of foreign producers within the Nigerian market. Hence, two (2) Anti-dumping Bills (the Anti-Dumping and Countervailing Bill of 2010 and Anti-Dumping and Countervailing Bill of 2015) were proposed and considered by the National Assembly. Unfortunately, they were not passed into law due to the lack of an effective structure and implementation mechanism.[168] Since those legislative attempts failed to materialise into laws, the CDA – dubbed inadequate - is still the subsisting national legislation on dumped imports. As such, the country lacks functional Anti-dumping regulations required to regulate Anti-dumping practices in Nigeria. It also lacks an effective trade remedy infrastructure that would mitigate the various dumping and unfair trade practices concerns that have been raised on numerous occasions till date.[169] Moreso, the CDA does not have any provision on the establishment of a statutory body designated as trade defense department[170] – compared to Brazil, India, South Africa, and Canada's national Anti-dumping legislations.[171] For this reason, the country has never utilized any anti-dumping mechanism nor levied Anti-dumping duties on obvious dumping activities of foreign producers - from USA and China, (the two major trading partners of Nigeria) – in the country.[172] Thus, the country does indeed have a deficient trade defense structure and infrastructure required to discipline her trade relations.

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[166] See Customs Duties (Dumped and Subsidized Goods) Act 1958, Now Cap C48, LFN, 2004, Ss 3 & 4.
[167] See WTO 2017 Report on Nigeria, *supra* note 7, where the country acknowledges in its notification to the WTO Committees on Anti-Dumping Practices; and subsidies and Countervailing Measures, on the country's inability to take any anti-dumping measures till date.
[168] See generally, G A Ikeagwuchi, *"Implementing Effective Trade Remedy Mechanisms: A Critical Analysis of Nigeria's Anti-Dumping and Countervailing Bill 2010"*, (LLM Thesis: University of Pretoria, 2014) [unpublished].
[169] See generally Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7; Adeyemi, *supra* note 7; Onuho, *supra* note 113.
[170] *Ibid*.
[171] These countries statutory bodies that are in charge of Anti-dumping investigation and implementing Anti-dumping mechanism will be briefly study in Chapter 4 of this thesis.
[172] Iyabo, *supra* note 7 at 78; Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7 at 168; and Eviota, *supra* note 68.

Notwithstanding, efforts have been made to set up regulatory institutions such as the Nigeria Customs Service (NCS),[173] Standard Organisation of Nigeria (SON),[174] the National Agency for Food Drug Administration and Control (NAFDAC),[175] Nigeria Industry Standards (NIS) amongst others to curtail product dumping and related issues, the country currently remains a dumping ground for Chinese products.[176] These regulatory institutions emerged due to the concerns and protests of different domestic industries in the country against market-distortion practices.[177] For instance, many of these industries including the textile, steel, automotive, pharmaceutical, aluminium and steel industries have questioned the overall quality and safety of the influx of substandard imported products in the Nigerian market.[178] They have also accused the foreign exporters of exploiting the tariff concession from Nigeria's trade relations with their countries to the detriment of indigenous industries in Nigeria - by flooding the country with low-quality and substandard products and treating her market as a dumping grounds for products considered obsolete in their countries of origin.[179] These dumping activities are injurious to Nigeria's domestic industries considering that it contributes to the great economic disequilibrium that currently characterises the country's trade relations.[180] It is also prejudicial to the industrial growth, health and livelihood of Nigerians, and the economy of the country. Thus, the increasing presence of dumping and other unfair trade practices in the country without an adequate trade defense mechanism currently presents a great threat to Nigeria's industrialization and sustainable economy. Therefore, there is a need for the Nigerian

[173] Established by the Nigeria Custom Service Act, 2023.
[174] Established by the Standard Organization of Nigeria Act.
[175] Established by the National Agency for Food and Drug Administration and Control Act, Cap. NI, LFN, 2004.
[176] Khadijat Kareem, "Is China the Problem with Nigeria's Substandard Imports", *Dataphyte* (24 August 2023), online: <www.dataphyte.com/latest-reports/is-china-the-problem-with-nigerias-substandard-imports/#:~:text=The%20Nigerian%20government%20during%20the,as%20opposed%20to%20what%20China > (accessed 1 May 2024).
[177] Okamgba, *supra* note 118; Udi, "Automotive Council urge FG to Ban Importation of Year 2000 to 2007 Model Car", *supra* note 160; Ewepu, *supra* note 140; Onyenucheya, *supra* note 159; Echenim, *supra* note 67; Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part One", *supra* note 5; Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two", *supra* note 5; Iyabo, *supra* note 7 at 78-79; Afolabi Toye, *China-Africa Relations: The Norther Nigerian Textile Industry*, (MA Thesis: Chapman University, 2021) [unpublished] 24 & 58, online: < https://digitalcommons.chapman.edu/cgi/viewcontent.cgi?article=1007&context=international_studies_theses> (accessed 18 May 2024); Taiwo Ojoye. "Nigeria, Dumping Grounds for Fake Products", *PUNCH* (12 March 2017), online: < https://punchng.com/nigeria-dumping-ground-for-fake-imports/> (accessed 18 May 2024); and Nwachukwu, *supra* note 7.
[178] *Ibid*.
[179] *Ibid*.
[180] NBS Q4 2023 Report on Foreign Trade in Goods Statistics, *supra* note 98; Anudu, "Nigeria's Giant Industries are Silently Disappearing", *supra* note 5; Anudu, "Nigeria's Giant Industries are Silently Disappearing: Part Two", *supra* note 5.

government to enact a working national legislation on Anti-dumping mechanism as well as put in place an effective trade defense infrastructure.

3.4.2 Nigeria's Anti-Dumping Legal Framework

As previously discussed, Nigeria currently lacks a functional Anti-dumping framework. Although the CDA, 1958 regulates dumped and subsidized imports in the country, it is not focused on Anti-dumping measures. It neither stipulates the substantive requirement for imposing Anti-dumping duties nor provides any procedural measures required for implementing the trade remedy mechanism in accordance with the WTO Anti-dumping rule and the AfCFTA rule – the AfCFTA trade remedy rule will soon be examined in this subsection. In essence, Nigeria's subsisting trade remedy legislation is incompatible with multilateral and regional standard. Thus, the CDA provision on dumped imports will be briefly analysed to understand the extent of its inconsistency with the WTO standard.

3.4.2.1 Substantive Procedure

A. Determination of Dumping

The CDA recognised that dumped imports exist when the price of the imported product introduced into Nigeria's domestic market is lesser than the 'fair market price' in the country of origin.[181] Section 9(2) of the CDA defined 'fair market price' as the comparable price in which like products - destined for consumption in the country of origin - are sold in the ordinary course of trade. However, the comparable price must be such that it can accommodate necessary adjustments, such as the difference in taxation, conditions and terms of sale amongst others. Thus, 'fair market price' is similar to 'normal value' provided in the WTO Anti-dumping rules. Also, the CDA imposed four (4) conditions on domestic sales before the same can be used in determination of 'fair market price'. These conditions are, namely: (i) the sale must be 'in the ordinary course of trade'; (ii) the sale must be of identical products; (iii) the products must be destined for consumption in the country of origin; and (iv) the price must be comparable. It is important to mention that the conditions are similar to those imposed by the ADA for determination of 'normal value'.

Notwithstanding, the CDA fails to define or interpret expressions that are crucial to the determination of 'fair market price', namely: (a) 'the ordinary course of trade; (b) identical

[181] CDA, section 9.

product; (c) exporting countries; and (d) comparable price. The lack of clarity on these expressions made it all the more difficult to implement the CDA against foreign exporters found wanting for dumping activities. Also, the CDA does not recognise situations where there are no sales of identical products in the country of origin that would allow for comparable prices, and what may be done in such a situation to determine the 'fair market price'. That is, it fails to provide for situations where the 'fair market price' cannot be determined through comparable price of like product in the ordinary course of trade in the exporting country. All these leave room for ambiguities and inconsistencies in the interpretation and implementation of the CDA.

The 'export price' is the next important step in the determination and investigation of dumped imports. It is fundamental in the calculation of dumping margin – which would be used to establish injurious dumping activities in a market. Although export price is not defined under the CDA, section 8 of the Act makes provisions for the methodology for ascertaining export price. It also recognized its importance in the determination of dumped imports.[182] Thus, it provides that the country of origin shall form the basis for calculating the export price. However, where the importation involves contract of sale, the section acknowledged that the Minister of Trade or Commerce can determine the export price based on prevailing sales prices of the products with any necessary adjustment it may make to the price.[183] Nonetheless, this alternative methodology is limited in scope as it does not cover importation beyond contract of sale which has no export price. Thus, the provision lacks comprehensive alternative bases that could be used to cater to varying transactions with no export price. To this end, it will be difficult for any investigating authority in Nigeria, if any, to successfully calculate margin of dumping talk more of establishing the existence of dumping activities in the country in accordance with the WTO standard.

Calculation of the dumping margin is the last step towards the determination of dumping. In this regard, the CDA provides that the determination of fair market price must be done in such a way that its comparison with export price would produce the 'difference' – known as 'margin of dumping' under the WTO law - between the price of like products in the country of origin and the export price in the importing country.[184] It does not lay down essential rules such as the 'fair comparison rule' amongst other obligations the WTO Anti-Dumping Agreement

[182] CDA, Section 9.
[183] CDA, section 8(2) & (3).
[184] *Ibid*.

imposed on investigating authorities for conducting the comparison between the established 'fair market price' and the 'export price'. Moreso, it fails to provide for methodology concerning calculation of the 'difference' as conceived in the WTO Anti-Dumping Agreement.[185] Furthermore, it fails to define the scope of the 'difference' that must emanate from the comparison. These CDA discrepancies in the determination of dumping are detrimental to the trade interest of the foreign country that might be subject to scrutiny under this legislation.

B. Determination of Injury

Sections 3 and 4 of the CDA permit the imposition of special duties when deemed necessary, on foreign products dumped into the Nigerian market. By making it a discretionary exercise, it vested the power of determining dumped imports, and implementing the special duties on the President, being the Executive Head of the Federal government of Nigeria. However, it mandated that the special duties shall only be imposed upon being satisfied that dumped imports exist and that the same caused or threatened to cause material injury to a potential or established industry in the country. Thus, injury occurs when 'material injury' is inflicted or threatened to be inflicted on Nigerian domestic industries. Also, it requires that such imposition must be consistent with Nigeria's commitment under the multilateral trading system. In particular, Section 3 of the CDA provides thus:

> Where it appears to the President that-
>
> (a) goods of any description are being or have been imported into Nigeria in circumstances in which they are under the provisions of this Act, to be regarded as having been dumped; or
>
> (b) a government or other authority outside Nigerian has been giving a subsidy affecting goods of any description which are being or have been imported into Nigeria; and
>
> (c) having regard to all the circumstances, it would be in the national interest, he may exercise the power conferred on him by this Act to impose and vary duties of customs in such manner as he thinks necessary to meet the dumping or the giving of the subsidy: Provided that where the President is not satisfied that the effect of the dumping or giving subsidy is such as to cause or threaten material injury to an established industry in

[185] See Chapter 2.4.1.1 of this thesis.

> Nigeria, or is such as to retard materially the establishment of an industry in Nigeria, he shall not exercise that power if it appears to him that to do so would conflict with the obligations of the Federal Government under the provisions for the time being in force of the GATT concluded at Geneva in the year 1947.[186]

The provision conceives the president as the sole investigatory authority that can determine the existence of material injury as well as impose an order for dumping duties after establishing that dumped import has occurred. It fails to institutionalise or create an independent trade remedy department as conceived under the WTO Anti-Dumping rule. Moreso, the provision does not define 'domestic industry' for the purpose of determining whether a material injury has been inflicted or threatened to be inflicted. Thus, the CDA is lacking of methodology and detailed rules for establishing material injury, and the obligation to be imposed on the investigatory authority. It does not provide for a causation link between the dumped imports and injury suffered by the domestic industry.

Section 4 of the CDA confers discretionary power on the President to make an Order imposing additional duties on dumped goods at any rate he deems fit after establishing that the good(s) has been dumped. The Order shall describe the goods and make reference to the goods' country of origin. Contrary to the WTO standard, the CDA fails to attach a timeframe to the application of the Order. Nonetheless, prior to imposing the order, the president shall present the order before the Parliamentary House for a vote adopting, amending, or revoking the order.

The analysis so far has shown the discrepancies in the provisions of CDA. The CDA 1958 fails to define or provide a methodology for crucial substantive issues such as 'like product', 'export price', 'material injury', 'dumping margin', 'constructed export price' etcetera as expected under the WTO Anti-Dumping rules. It also fails to provide for procedural issues such as initiation, conducting an Anti-dumping investigation, duration, and judicial review amongst others. It is important to note that under the WTO Anti-dumping rules it is not mandatory for a country to enact Anti-dumping legislation.[187] However, once the country makes the policy choice to do so, it has the obligation to ensure its Anti-dumping legislation is WTO-compliant.[188] In this regard, the discrepancies in the CDA make it inconsistent with the WTO standard on Anti-dumping mechanisms. It also shows the inadequacy and its non-conformity

[186] CDA, section 3
[187] ADA, Article 16.
[188] *Ibid*; Article 1.

with Nigeria's commitment under the multilateral trading system. Hence, Nigeria is deemed to lack an effective Anti-dumping framework and infrastructure. This in itself is a great risk for the country's industrial development. It also speaks to the country's need of developing a working trade defense structure that would enable Nigeria to reposition her economy as well as utilize the opportunities and mitigate the dumping threat embedded in the multilateral trading rule and AfCFTA (regional trading Agreement) – which the country recently signed.

3.5 The Impact of the Trade Remedy under the African Continental Free Trade Area (AfCFTA)

3.5.1 An Overview

As an African trade and regional integration agreement, the AfCFTA came into force on 30 May 2019 to address the low level intra-African trade that has historically characterised the industrial development of the continent, and in turn, created the world's largest free trade area based on the numbers of its participating countries.[189] That is, the Agreement aims to significantly boost African trade as well as elevate the continent's international economic relations in the multilateral trading regime.[190] This objective of the AfCFTA is expected to be achieved through gradual elimination of both tariff and non-tariff barriers – i.e. freer trade movement among African countries under the aegis of the trade liberalization scheme of the Agreement.[191] Thus, it is anticipated that the AfCFTA will offer a 'continent-wide regulatory framework' on critical policy issues such as trade facilitation, services, investment, intellectual property etcetera that would help diversify export, improve the economic growth of the continent, create more employment opportunities and attract foreign direct investment for African countries.[192] For instance, the World Bank estimated that, with full implementation of the AfCFTA, Africa's real income would increase to nearly US$450 billion by 2030.[193] Also, it would improve Africa's export to other countries by 32% come 2035, whilst projecting the

[189] Maryla Maliszewska & Michele Ruta, "The African Continental Free Trade Area: Economic and Distributional Effects", (2020) The World Bank Group Report at 1 & 3, online: https://openknowledge.worldbank.org/server/api/core/bitstreams/ef1aa41f-60de-5bd2-a63e-75f2c3ff0f43/content (accessed 19 May 2024); Nigerian Economic Submit Group Report 2020, *supra* note 75.
[190] Olabisi Akinkugbe, "A Critical Appraisal of the African Continental Free Trade Area Agreement", in Franziska Sucker & Kholofelo Kulger, eds, *International Economic Law: Southern African Perspectives and Priorities,* (South Africa: JUTA Law, 2021) at 283.
[191] *Ibid*; Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7.
[192] *Ibid*; and C M Nwankwo & C C Ajibo, "Liberalizing Regional Trade Regime Through AfCFTA: Challenges and Opportunities", (2020) 64 J Afri L 297-318.
[193] Maliszewska & Ruta, *supra* note 189 at 3-4.

potential to lift 30 million people out of poverty.[194] Similarly, the IMF estimated that upon full implementation of the Agreement, intra-African trade will rise from $50 billion to $70 billion by 2040.[195] Furthermore, it has been projected that a full implementation of the AfCFTA would bring about a combined consumer and business spending of $6.7 trillion by 2030 in Africa.[196] Thus, the consensus narrative is that, with full implementation, the AfCFTA could feasibly improve industrialization in Africa. It also shows that the Agreement is inundated with a lot of prospects that far exceed that of any other subsisting regional trade agreement in the continent.

Nonetheless, the AfCFTA is not without any risks and challenges – which usually accompany trade liberalization scheme embedded in trade agreements. Thus, the AfCFTA being a liberalizing regional trade regime carries potential unfair trade practices threats such as dumped imports – identical to those under the multilateral trade system.[197] Although Global South-South cooperation promotes trust and reciprocity, it also manifests structural inequalities similar to those in Global North-Global South relations.[198] As a result, Nigeria delayed signing the AfCFTA after its initial commitments toward the emergence of the Agreement for fear that the import-to-export ratio would increase disproportionately resulting in increasing dumping activities in the country to the detriment of indigenous manufacturing industries.[199] In particular, the fact that the country lacks an effective trade defense structure makes the 'risk of dumping in Nigeria [evermore] high with the commencement of AfCFTA'[200] – a more reason for Nigeria to develop a functional Anti-dumping regime. Thus, it was not until the Nigerian government assured the indigenous manufacturer of her willingness and effort to establish a trade remedy authority to protect the local industries from unfair trade practices that the country

[194] *Ibid*, 1. See also Hippolyte Fofack, "Commentary: The Future of African Trade in the AfCFTA Era", *Brooking* (23 February 2024), online: < https://www.brookings.edu/articles/the-future-of-african-trade-in-the-afcfta-era/> (accessed 19 May 2024).
[195] Nigerian Economic Submit Group Report 2020, *supra* note 90 at 2.
[196] Hippolyte Fofack, "Making the AfCFTA Work for 'The Africa We Want'", (2020) Brooking Institute Working Paper at 3, online: < https://www.brookings.edu/wp-content/uploads/2020/12/20.12.28-AfCFTA_Fofack.pdf> (accessed 19 May 2024).
[197] See Chapter 2 of this thesis for detail analysis of the unfair trade practices threat embedded in the multilateral trade system.
[198] Akinkugbe, "A Critical Appraisal of the African Continental Free Trade Area Agreement", *supra* note 189 at 298-299; and Katrin Kuhlmann & Akinyi L Agutu, "The African Continental Free Trade Area: Towards A New Legal Model For Trade and Development" (2020) Goergetown Intl L J 753.
[199] Mumbere, *supra* note 90; Ogunremi, *supra* note 10; Gbenga, *supra* note 90; Kolawole, *supra* note 90; A Ehikioya, "National Interest will guide Decision on AfCFTA", *The Nation Newspaper* (19 June 2019), online: < https://thenationonlineng.net/national-interest-will-guide-decision-on-afcfta-says-buhari/#google_vignette> (accessed 19 May 2024).
[200] *Ibid*; Nigerian Economic Submit Group Report 2020, *supra* note 90 at 12-13.

ratified the AfCFTA on 4 November 2020.[201] In all of this context, the AfCFTA does provide for an Anti-dumping mechanism to level the playing field among African countries, and to curtail the possibility of dumping activities that may emanate from the liberalizing regional trade scheme.[202] Thus, the Anti-dumping provision will be highlighted later in this subsection.

The development of the AfCFTA can be traced back to the end of decolonialization era in Africa, whereby the region sought direction for the future to emerge. During that period, the continent found acceptance of its struggle in the Pan-Africanist vision that birthed the Organization of African Unity (OAU) in 1963.[203] The OAU laid the foundation for trade and economic integration in Africa, which since then has recorded many milestones ranging from the Monrovia Strategy of 1979, Lagos Plan of Action (1980-2000), African Economic Community Treaty of 1994, Conference of African Ministers in Charge of Integration of 2006, Protocol on Relations between African Union (AU) and Regional Economic Community (REC) of 2007, Boosting Intra-African Trade Action Plan of 2012 to the emergence of the AfCFTA in 2019.[204] Thus, the Agreement 'represent a Pan African vision that aims at uniting African States as a regional bloc'. In essence, the AfCFTA Agreement codified and actualised the various economic integration attempts of the continent at creating a single market economy in Africa.

3.5.2 The Role of Anti-Dumping Measures under the AfCFTA

The AfCFTA Agreement provides for detailed rules on the implementation of trade remedy and safeguard measures. In so doing, it relies on numerous agreements of the WTO for members to implement trade remedy measures in intra-Africa trade.[205] The AfCFTA Protocol on Trade in Goods (herein referred to as AfCFTA Protocol) recognised Anti-dumping, countervailing and safeguards as trade remedy and safeguard measures that can be taken to protect local industries from injurious impact of unfair trade practices.[206] The methodology

[201] *Ibid*; and Muftau, *supra* note 9 at 133-134. See generally Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 8.
[202] See Agreement Establishing the African Continental Free Trade Area (AfCFTA), Article 4.
[203] L Fioramonti & F Mattheis, "Is Africa Really Following Europe? An Integrated Framework for Comparative Regionalism", (2015) 54 J Common Market Stu 3; Taona Sean Mwanyisa, "The Impact of the African Continental Free Trade Area'" in *Increasing Need For Anti-Dumping Regulating in Africa: A Case Study of Zimbabwe,* (LL.M Thesis: University of Pretoria, 2020) at 35-38 [unpublished].
[204] For detail account of the historical antecedent that informed the emergence of the AfCFTA see Muftau, *supra* note 9 at Chapter 2.
[205] See AfCFTA Protocol on Trade in Goods, Articles 17-20; and Annexure 9 on Trade Remedies, Articles 2- 5, 11 & 12.
[206] *Ibid*.

concerning the implementation of these trade remedies are contained in AfCFTA Annex 9 on Trade Remedies and the Guidelines on Implementation of Trade Remedies.[207]

In this context, Article 17 of the AfCFTA Protocol provides for the ability of State Parties to apply Anti-dumping measures in accordance with the relevant provision of the WTO Agreement. Additionally, Article 2 of the AfCFTA Annexure 9 on Trade Remedies provides that "*State Parties may, with respect to goods traded under the provisions of this Annex, apply anti-dumping .... measures as provided for in Articles 17.. of the Protocol on Trade in Goods, this Annex and the AfCFTA Guidelines in accordance with relevant WTO Agreements*".[208] Thus, the State Parties are expected to adhere to WTO rules on Anti-dumping for effective implementation of the measure.[209] Also, where AfCFTA provisions become inapplicable or ambiguous, the parties must resort to the WTO law for clarification.[210] Notwithstanding, the WTO Anti-dumping rule is not without its own defect and challenges – these challenges have been fully examined in Chapter 2 of this thesis.[211]

The provision for anti-dumping measure under the AfCFTA is tailored toward levelling the playing field among African countries, and mitigating the risk of unfair trade practices such as dumping activities that are embedded in the liberalizing trade regime.[212] Similar to the WTO law, the implementation of the Anti-dumping measure is optional. Nonetheless, when a State Party makes a policy choice to employ the measure, it must do so in accordance with the applicable rules and procedures[213] - which in turn should prevent arbitrariness and discretionary measures in intra-Africa trade. As previously studied, Nigeria's restrictive measures and CDA are not WTO-compliant. Considering AfCFTA's reliance on WTO Anti-dumping rules, Nigeria's trade remedy laws and practices are also not in conformity with the provisions of the Agreement. In this context, Nigeria's trade remedy policy is conflicting with her commitment under the AfCFTA as well as the WTO. In summary, the trade remedy regime in Nigeria is inadequate in light of the benefits and risks embedded in the liberalizing regional trade regime.

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[207] *Ibid*.
[208] Emphasis mine.
[209] See the whole of section 2.4 of this thesis for detailed analysis of the WTO rules on Anti-dumping mechanism.
[210] AfCFTA Annex 9, Article 13(2).
[211] See the whole of Chapter 2 of this thesis for analysis of the deficiencies with WTO Anti-dumping rules.
[212] See generally Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 10; Gerhard Eramus, "Why Does the AfCFTA Provide for Trade Remedies?", *Tralac* (23 November 2021, online: < www.tralac.org/blog/article/15441-why-does-the-afcfta-provide-for-trade-remedies.html> (accessed 19 May 2024).
[213] See AfCFTA Protocol on Trade in Goods, Articles 17; and Annexure 9 on Trade Remedies, Articles 2, 4, 11 & 12.

3.5.3 Implication of the AfCFTA for Nigerian Industrial Growth

The regional trade liberalization scheme under the AfCFTA Agreement has implications for Nigeria's industrial development given the oil and import-dependency status of the country as well as her low industrial base.[214] Although the agreement is cloaked with presumption of positive impact, it could potentially expose Nigeria to increasing dumping and smuggling activities due to the precarious nature of the country's trading ecosystem. This is in light of the fact that the country has historically been attractive for dumping practices. Besides, while the elimination of tariffs could bring about reduction in cost for both producer and consumers, it also could be the cause of being weary for local industries in countries such as Nigeria with poor regulatory institution and inadequate trade defense infrastructure.[215] As a result, the country delayed in approving the ratification of the Agreement[216] as the then President, Muhammadu Buhari, contended that the country lacks the "capacity to effectively supervise and to ensure that our colleagues in the African Union ("AU") don't allow their countries to be used to dump goods on us to the detriment of our young industries and our capacity to utilise foreign exchange for imported goods".[217] In particular, this is true given the current industrial realities of Nigeria's domestic industries, such as the textile, steel and automobile. It also reaffirms the increasing need for effective trade remedy structure, such as the Anti-dumping regime, that is AfCFTA and WTO-compliant to combat unfair trade practices like dumped imports. Thus, Nigeria needs to put in place a working trade defense mechanism that can be used to address the likely unfair trade practices that may emanate from the disparities in economic strength in Africa during the implementation of the AfCFTA.

Notwithstanding, there are potential opportunities for the Nigerian economy under the AfCFTA considering the fact that nearly 90% of African countries suffers the same fate, if not worst, as Nigeria.[218] Also, most African countries lacks functional trade defense mechanism - as only four countries, namely, South Africa, Egypt, Morocco, and Tunisia, currently have an effective trade remedy regime and have successfully employed the regime to protect their local industries from unfair trade practices.[219] So, if the country can strategically reposition and

[214] See generally Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7; Nigerian Economic Submit Group Report 2020, *supra* note 90 at 5.
[215] Nigerian Economic Submit Group Report 2020, *supra* note 90 at 8-14; Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7; Ogunremi, *supra* note 10; Kolawole, *supra* note 90.
[216] *Ibid*; Gbenga, *supra* note 90; Ehikioya, *supra* note 180.
[217] Gbenga, *supra* note 90.
[218] Nigerian Economic Submit Group Report 2020, *supra* note 90 at 5.
[219] Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 7 at 209.

prioritize her industrial sectors for economic integration envisaged under the Agreement, its positioning 'could potentially provide a larger market to support the expansion of production and investment across the industrial sectors'.[220] For those potential to be actualized, the Nigerian government must be willing and ready to tackle the multitude of long-established structural challenges besetting her manufacturing sectors. Considering the potential benefit under AfCFTA, the then Minister of Industry, Trade and Investment, Niyi Adebayo, expressed confidence that the projected benefits under Agreement far outweigh the country's fear of dumped import.[221] However, the potential growth would only be attained if Nigeria address the myriads of structural challenges affecting her economy.

3.6 Conclusion

This Chapter discussed Nigeria's Anti-dumping regime from historical and contemporary perspective, which disclosed the inadequacy of her trade defense mechanism and its inconsistency with her multilateral and regional commitments. The lack of an effective trade defense infrastructure made some strategic domestic industries, such as textile, steel and automobile sectors to be susceptible to the injurious impact of dumping activities – which have historically characterised Nigeria's trading ecosystem. Also, this Chapter discussed the impact of the dumped imports on those highlighted domestic industries. The analysis revealed that the dumping activities were detrimental to the overall industrial growth of the country's manufacturing sector. In particular, the impact was highly felt due to the myriads of long-standing structural challenges besetting the country. In addition, it was pointed out that the detrimental nature of dumped imports has far-reaching implication for the Nigerian economy including low industrialization base and value addition, high unemployment and poverty rate amongst others.

In the same context, this Chapter examined the Nigeria's Anti-dumping campaigns and her subsisting legislation. It was revealed that the trade remedy measures so far implemented by the Nigerian government are inconsistent with her multilateral and regional trade commitments. Particularly, the country has persistently resorted to restrictive measures,[222] and aside the fact that none was WTO-compliant, they were also inefficient in defending the local

[220] Nigerian Economic Submit Group Report 2020, *supra* note 90 at 5.
[221] Matthew Ochei, "AfCFTA'll not lead to Dumping in Nigeria, says Adebayo", *Punch* (5 July 2021), online: < https://punchng.com/afcftall-not-lead-to-dumping-in-nigeria-says-adebayo/> (accessed 19 May 2024).
[222] WTO, "Case Study 32: Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *supra* note 13; Sahara Report, *supra* note 158; Okamgba, *supra* note 118; Fasan, *supra* note 7.

producers from the unfair trade practices of their foreign counterparts. Additionally, this Chapter examined the subsisting trade remedy legislation in the country - i.e. the CDA 1958 - to understand why preference is given to restrictive measure. The analysis disclosed that the CDA contains wide discrepancies that makes its substantively and procedurally inadequate for investigating dumping activities, and imposing Anti-dumping measures.

Lastly, the Chapter considered the AfCFTA - as a liberalizing regional trade regime, and in which Nigeria is a member – within the context of its trade remedy mechanism. The study shows that the Agreement relied on the WTO Anti-dumping rules. Given that Nigeria's trade remedy mechanism does not conform with WTO laws, it is also inconsistent with the AfCFTA Agreement. In the same vein, this Chapter looked at the implication of the AfCFTA for Nigeria's industrial growth to reached a conclusion that the lack of functional trade defense mechanism, and the inability to address the mass structural issues of her economy may denied the country of the possible benefit under Agreement. It may also escalate the chances of dumping activities in Nigeria.

Conclusively, Nigeria is part of the many Global South countries that lack an effective trade defense structure that could be employed to defend her local producers. Moreso, her existing trade remedy practice is incompatible with her commitment under the WTO and the AfCFTA due to the gaps, inconsistencies and incoherence in the CDA 1958. Hence, there is need for the country to take lessons from Global South countries such as Brazil, India and South Africa – with working and WTO-compliant Anti-dumping regimes that have been successfully deployed to protect their local producers – on how to developed an effective trade defense structure. It can also take lessons from Global North country such as Canada that has recorded many successes with its trade defense structure.

CHAPTER 4

ANTI-DUMPING MEASURES IN THE GLOBAL SOUTH-GLOBAL NORTH COUNTRIES: LESSONS FOR NIGERIA

4.1 Introduction

As analysed in Chapter 3, Nigeria's Anti-dumping practices currently fall short of consistency with the spirit and purport of her international obligations under the Multilateral and Regional Trade Remedy regimes. In other words, the existing trade defense structure in Nigeria has areas of irregularities and inconsistencies with the WTO and the AfCFTA rules on Anti-dumping. Hence, this Chapter seeks to briefly examine the Anti-dumping practices in selected Global South countries, such as Brazil, India, and South Africa that have successfully adopted WTO-compliant trade defense measures as well as utilised the same to mitigate the declines in their manufacturing output.[1] The Chapter also explores the Canadian Anti-dumping system, as a Global North country being one of the oldest and prominent users of the measure.[2] Within this context, the focus of this Chapter would be to assess these selected Global South countries' and Global North country's Anti-dumping infrastructures as road map, and draw on the lessons that Nigeria can learn to suit her situation concerning how to reform her trade defense structure and infrastructure to be efficient and usable. Also, the analysis from this Chapter would illustrate the marginalization and struggles of the Global South countries within the global trading system through the TWAIL lens adopted in this thesis.

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[1] Kanika Gupta & Vinita Choudhury, "Anti Dumping & Developing Countries" (2011) 10 Kor U L Rev 117; Anti-dumping Investigations are Strongly Initiated by Many Countries", *Vietnam National Trade Repository* (23 October 2023), online: < https://vntr.moit.gov.vn/news/anti-dumping-investigations-are-strongly-initiated-by-many-countries> (accessed 21 January 2024); Ardhna Aggarwal, "Trade Effects of Anti-dumping in India: Who Benefits?", (2011) 25:1 Intl Trade J 112-153, online: < https://www.tandfonline.com/doi/epdf/10.1080/08853908.2011.532047?needAccess=true> (accessed 22 January 2024) [Aggarwal, "Trade Effect of Anti-dumping in India"]; Taona Sean Mwanyisa, "The Impact of the African Continental Free Trade Area'" in *Increasing Need For Anti-Dumping Regulating in Africa: A Case Study of Zimbabwe,* (LL.M Thesis: University of Pretoria, 2020) at Chapter 3 [unpublished]; Teurai Thirdgirl Dari, "A Critical Assessment of Zimbabwe's Anti-Dumping Laws", (LLD Thesis, University of Western Cape, 2018) at Chapter 3 [unpublished thesis]; World Trade Organization (WTO), WTO, "Case Study 38: The Reform of South Africa's Anti-Dumping Regime", *WTO Centre* (8 July 2020), online: < https://wtocenter.vn/chuyen-de/15805-case-study-38-the-reform-of-south-africas-anti-dumping-regime> (accessed 17 January 2024) [WTO Case Study 38]; Glauco A S Oliveira, "Industrial Determinants of Ant-Dumping in Brazil – protection, Competition and Performance: An Analysis with Binary Dependent Variable and Panel Data", (2014) 15 EconomiA 206-224

[2] Robert M Feinberg, "Patterns and Determinants of Canadian Anti-Cartel and Antidumping Policy: 1990-2019", (2023) 23 J Industry Competition & Trade 309 at 311; Mark Dutz, "Economic Impact of Canadian Antidumping Law", (1998) Brooking Institution Press 99-125; and Dan Ciuriak, "Anti-Dumping at 100 Years and Counting: A Canadian Perspective", (2004), online: < https://fordschool.umich.edu/rsie/Conferences/ADSym/Ciuriak.pdf> (accessed 16 June 2024)

The analysis of the trade remedy practices of the Global South countries noted above is based on the premise that they share similar struggles and common values with Nigeria regarding their experiences within the multilateral trading system.[3] Besides, the countries are among the top ten (10) new Anti-dumping users in today's world,[4] as well as being Nigeria's major trade partners in terms of exports and imports.[5] Whilst, South Africa is one of the four countries in Africa that has in force strong trade defense mechanism and also actively deploys its Anti-dumping infrastructures.[6] Furthermore, these countries alongside other Global South countries have collectively championed the calls for protection of their relatively weak and de-industrialised domestic industries against the exploitation of industrialised countries.[7] While they have been successful toward adopting the protection granted - by the multilateral trade system - into an effective domestic trade defense mechanism, Nigeria has so far been unsuccessful in her various attempts as well as persistently relied on restrictive trade measures as illustrated in the previous Chapter.[8] The brief examination of the Anti-dumping practice in

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[3] See generally Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission*, (Oxford: Hart, 2010); Nam-Ake Lekfuangfu, "Rethinking the WTO Anti-Dumping Agreement from a Fairness Perspective" (2009) 4:2 Cambridge Student L Rev 300

[4] WTO, "Anti-Dumping Measures by Reporting Member 01/01/1995 – 31/12/2023", (2023), online: < www.wto.org/english/tratop_e/adp_e/ad_measuresbyrepmem.pdf> (accessed 3 June 2024) [WTO, "Anti-Dumping Measures by Reporting Member 01/01/1995 – 31/12/2023"]; WTO, *Anti-Dumping Initiations by Reporting Member 01/01/1995-31/12/2023*, WTO (1995-2023), online: < https://www.wto.org/english/tratop_e/adp_e/ad_initiationsbyrepmem.pdf> (accessed 3 June 2024) [WTO, *Anti-Dumping Initiations by Reporting Member 01/01/1995-31/12/2023*]; and Gupta & Choudhury, *supra* note 123-125.

[5] See generally Aghogo Udi, "Nigeria's Top Ten Foreign Trade Partners in 2023", *Nairametrics* (7 March 2024), online: < https://nairametrics.com/2024/03/10/nigerias-top-ten-foreign-trade-partners-in-2023/#google_vignette> (accessed 15 May 2024); Nigeria's AFCFTA Strategy and Implementation Plan, "Development of AfCFTA Strategy and Implementation Plan – 007 MITI-NACJU", (2021), online: < https://www.pdfnigeria.org/rc/wp-content/uploads/2021/03/210302AfCFTA-Implementation-Strategy-and-Plan-Final-007-MITI-NAC-JU-vs-0.1.pdf> (accessed 16 May 2024) [Nigeria's AfCFTA Strategy and Implementation Plan].

[6] Nigeria's AfCFTA Strategy and Implementation Plan, *supra* note 5; and Patrick C Osgode, "*Assessment of the WTO-Consistency of the Procedural Aspects of South African Anti-Dumping Law and Practice", (2003) 22* Penn St Intl L Rev 19 at 32; Welber Barral et al, "The Use of Anti-dumping in Brazil, China, India, and South Africa – Rules, Trends and Causes", (2005) Kommerskollegium National Board of Trade Sweden at 49-62, online: < www.researchgate.net/publication/303406271_The_Use_of_Antidumping_in_Brazil_China_India_and_South_Africa_-_Rules_Trends_and_Causes> (accessed 19 June 2024); Sikhwari Tshivhasa Tshedza & Yende Nsizwazonke Ephraim, "An Analysis of China's Dumping of Cheap Products in South Africa in the Perspective of Import Substitution Policy", (2021) 8:1 J Afr Foreign Aff 115, 120, online: <www.jstor.org/stable/pdf/27159653.pdf?refreqid=excelsior%3A5cb52fdb16706b65aa3ba1a6233a5cbf&ab_segments=&origin=&initiator=&acceptTC=1> (accessed 20 May 2023)

[7] Alessandrini, *supra* note 3 at Chapters 3-6; Barral et al, *supra* note 6; and WTO, "Anti-dumping Investigations are Strongly Initiated by Many Countries", *Vietnam National Trade Repository* (23 October 2023), online: < https://vntr.moit.gov.vn/news/anti-dumping-investigations-are-strongly-initiated-by-many-countries> (accessed 21 May 2024).

[8] See generally G A Ikeagwuchi, *"Implementing Effective Trade Remedy Mechanisms: A Critical Analysis of Nigeria's Anti-Dumping and Countervailing Bill 2010", (LLM Thesis: University of Pretoria, 2014) [unpublished]; WTO,* "Case Study 32: Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *WTO Centre* (8 July 2020), online: <https://wtocenter.vn/chuyen-de/15799-case-study-32-import-prohibition-as-a-trade-policy-instrument-the-nigerian-experience> (accessed 19 May 2024) [WTO Case Study

the Global North vis-a-viz the Canadian Anti-dumping framework will be based on elucidating the difference between the Global North and Global South's application and implementation of the trade remedy. In essence, these countries collectively have the trade defense structure and infrastructure which Nigeria can learn and adapt to the peculiarity of her trading ecosystem.

Against this background, this Chapter is divided into six sections thus: while section 4.1 introduces this Chapter; sections 4.2 to 4.5 will briefly analyse and highlight the trade defense structure and practice of Brazil, India, South Africa and Canada, respectively, within the context of Anti-dumping measure to identify the successes and the shortfalls of their regime. Lastly, section 4.6 will conclude the Chapter.

4.2 Anti-Dumping Practice in Brazil

4.2.1 Overview, Development and Trend

The Brazilian Anti-dumping regime goes back to 1987 when the country enacted and implemented its first national Anti-dumping legislation based on the Tokyo Round Anti-Dumping Code under the aegis of the General Agreement on Tariffs and Trade of 1947 ("GATT 1947")[9] – before its inception into the WTO system. Although the country began using Anti-dumping measures around 1992 (due to its exposure to the neoliberalism ideology in the late 1980s), its heavy usage of the measures did not commence until after joining the WTO in 1995.[10] The Bretton Woods Institutions' packaged neoliberalism ideology of the 1980s prompted Brazil to undertake a series of trade liberalization reforms in the early 1990s. In particular, the country reduced trade barrier commitments under the multilateral and regional agreements - without a complementary export growth strategy to replace her former import-

32; Temitope Adeyemi, "Panaceas: Dumping and Trade Remedies in Nigeria", *Mondaq* (4 June 2020), online: <www.mondaq.com/nigeria/export-controls--trade--investment-sanctions/947900/panaceas-dumping-and-trade-remedies-in-nigeria-#_ftn5> (accessed 16 May 2024). See also Olu Fasan, "Nigeria's Import Restrictions: A Bad Policy that Harms Trade Relation", *LSE Blog* (27 August 2015), online: <https://blogs.lse.ac.uk/africaatlse/2015/08/17/nigerias-import-restrictions-a-bad-policy-that-harms-trade-relations/> (accessed 13 May 2024).

[9] Legislative Decree 22 of 5 December 1986, Decree 93962 of 23 January 1987, and Resolution CPA 1227, 2 June 1987. See International Trade Centre, *Business Guide to Trade Remedies in Brazil: Anti-Dumping, Countervailing and Safeguard Legislation, Practices and Procedures,* (Geneva, Switzerland: International Trade Centre, 2008) at 24-25 [ITC, *Business Guide to Trade Remedies in Brazil*]

[10] Junji Nakagawa, *Anti-dumping Laws and Practices of the New Use*r, (London: Cameron May Ltd, 2006) 283 – 332; Gupta & Choudhury, *supra* note 1 at 123-127; Vera Kanas & Carolina Muller, "The New Brazilian Anti-Dumping Regulation: A Balance of the First Years", (2017) 12:11 Global Trade & Custom J 462 at 463.

substitution-industrialization policy - laid open the Brazilian domestic market to increased importations to the detriment of the weak local industries.[11]

Consequently, the influx of foreign imports occasioned, *inter alia,* poor manufactural productivity, low industrial value-added and inequalities in the Brazilian local industries. It also influenced the demands for trade defense measures against the incidence of unfair trade practices in the country.[12] Hence, upon the establishment of the WTO, Brazil developed a new anti-dumping framework through Presidential Decree No. 1355/1994 (which internalised the WTO Agreement, including the Anti-Dumping Agreement), followed by Law 9019/1995 (which laid down rules for the application of the trade remedies) and Decree 1602/1995 (regulates the administrative procedures for the application of Anti-dumping duties)[13] – these new Anti-dumping regulation is fully modelled after the WTO Anti-Dumping rule. [14] These regulations cumulatively created a new administrative structure, namely, the Brazilian Department of Trade Defense (DECOM) (as a department of the Secretariat of Foreign Trade (SECEX)) and the Chamber of Foreign Trade (CAMEX) – for the administration of the new Anti-dumping regime.[15] It also led to an increased utilization of Anti-dumping measures in Brazil as a major safety valve against unfair trade practices. For instance, between 1995 and 2006, Brazil was ranked the 8th Anti-dumping user among the WTO members whilst it maintained the 4th position among the 'new user' of the measure – the country initiated a total of 134 Anti-dumping investigations during the first decade of the WTO system.[16]

The Brazilian Anti-dumping framework continues to record success as the numbers of investigations initiated and the measures applied by the country increases along the years.[17] For instance, between 1995 and 2023, Brazil had initiated 445 Anti-dumping investigations, which makes it the 2nd new Anti-dumping user among WTO members.[18] Out of the 445

[11] See Oliveira, *supra* note 1 at 212-213; Nakagawa, *supra* note 10 at 283-284; Paulo Roberto de Almedia, "Brazilian Trade Policy in Historical Perspective: Constant Features, Erratic Behaviour", (2013) 10:1 Brazilian J Intl L 11-27

[12] *Ibid*.

[13] Kanas & Muller, *supra* note 10 at 463-465; ITC, *Business Guide to Trade Remedies in Brazil*, *supra* note 9 at 24-25; Helio Henkin et al, "The Reform of the Brazilian Anti-Dumping Regime: A Partial Review of the Determinants and the Implications of Decree 8,059/2013", (2021) 10:19 Brazilian J Strategy & Intl Relations 58-83

[14] *Ibid*.

[15] *Ibid*.

[16] WTO, *Anti-Dumping Initiations by Reporting Member From: 01/01/1995-31/12/2006*, (2006), online: < https://www.wto.org/english/tratop_e/adp_e/adp_stattab2_e.xls> (accessed 1 June 2024). See also Nakagawa, *supra* note 9 at 284.

[17] Helio Henkin et al, *supra* note 13; Kanas & Muller, *supra* note 10 at 463.

[18] WTO, *Anti-Dumping Initiations by Reporting Member 01/01/1995-31/12/2023*, *supra* note 4.

investigations, only 280 Anti-dumping duties were imposed – which makes it the 4th among all the WTO members with the most Anti-dumping measures in force.[19] The numbers of measures so far applied also translate to a success rate of approximately 63%. In addition, the Brazilian government recently opened a new Anti-dumping investigation against importations of titanium dioxide pigment and carbon steel sheet from China, as well as foreign imports of Polyester Staple Fibre from China, India, Vietnam, Malaysia and Thailand upon requests of its domestic industries.[20] These successes and efficient use of the Anti-dumping measure can be attributed to a numbers of reforms that were conducted in the Brazilian Anti-dumping regime to ensure transparency, swiftness and effectiveness of the system in addressing the unfair trade concerns of the local producers.[21] In the words of Kanas and Muller thus:

> The practice by the investigating authority evolved significantly in order to address these claims. In fact, among others, authorities became more rigorous in data collection, verification visits became mandatory for all cooperating exporters, and reports became robust documents describing all facts and arguments in details. In addition to this, more uniform guidance was developed in terms of presentation of public summaries of confidential information, and the authority clarified the meaning of 'most recent period' so as to establish the period of investigation for dumping and for injury. For transparency and celerity reasons, the domestic industry started to be required to present complete and updated data for the analysis of injury in the initial petition, instead of providing additional data after the initiation of the investigation. Regulations about anti-circumvention and false origin were enacted in 2010, in order to address concerns that anti-dumping measures would not be effective. Resolution CAMEX n. 63/2010 and Ordinance Secex 21/2010 regulated the extension of

[19] WTO, "Anti-Dumping Measures by Reporting Member 01/01/1995 – 31/12/2023", *supra* note 4.
[20] See "Brazil: Now Open – Antidumping Investigations on Imports of Titanium Dioxide Pigment from China", *Baker McKenzie* (30 April 2024), online: < https://insightplus.bakermckenzie.com/bm/international-commercial-trade/brazil-now-open-antidumping-investigation-on-imports-of-titanium-dioxide-pigments-from-china> (accessed 14 June 2024); "Brazil Investigates Dumping Behavior of Many Chinese Export Products Since the Beginning of 2024), *ASLgate* (26 March 2024), online: < https://aslgate.com/brazil-investigates-dumping-behavior-of-many-chinese-export-products-since-the-beginning-of-2024/> (accessed 14 June 2024); "Brazil Commences Anti-Dumping Duties Investigation on Imports of Polyester Staple Fibre from China, India, Vietnam, Malaysia and Thailand", *Skrine* (22 March 2024), online: < https://www.skrine.com/insights/alerts/march-2024/brazil-commences-anti-dumping-duties-investigation> (accessed 14 June 2024).
[21] Helio Henkin et al, *supra* note 13 at 67-68; Kanas & Muller, *supra* note 10 at 462; ITC, *Business Guide to Trade Remedies in Brazil, supra* note 9;

anti-dumping (and countervailing) measures in place due to circumvention practices.[22]

The modernization of the Brazilian Anti-dumping legislation came in form of Decree 8058/2013, which replaced Decree 1602/1995. The new law consolidated the practice of DECOM and incorporated the WTO jurisprudence on the practice, whilst it embraced the public interest assessment similar to that of Canada and the European Union (EU).[23] It also makes provisions for the expeditious and efficient use of Anti-dumping measures as an instrument of industrial policy to recapture the competitiveness of the local market and increase the manufacturing output in the country.[24] Furthermore, in ensuring the Anti-dumping policy continues to address industrial exigencies, the Brazilian government modified the legislation in 2017, 2019, 2022 and 2023 via Decree 9107/2017; Decree Nos. 9679, 9745, and 10044/2019; SECEX Ordinance No. 13/2020, SECEX No. 171/2022, and SECEX Ordinance No. 237/2023, respectively.[25] Decree No. 9107/2017 addressed the limited access of fragmented industries to trade remedy systems whilst Decree Nos. 9679, 9745 and 10044/2019 as well as SECEX Ordinance No. 13/2020, SECEX No. 171/2022, and SECEX Ordinance No 237/2023 streamlined and substantial reforms to the institutional design and legal procedure used to conduct public interest inquiry in Anti-dumping assessment.[26] These amendments reflect the continued commitment of the Brazilian government towards providing significant certainty, transparency, and procedural efficiency in its Anti-dumping practices. It also reflects the tendency of the country to comply with the rules of the multilateral trade regime.

Despite the remarkable stride of the Brazilian Anti-dumping system, scholars such as Helio Henkin et al continue to argue that the reform of the legislative and institutional framework on Anti-dumping reveals and reinforces the protectionist stance of the Brazilian trade remedy system.[27] Also, since the reforms came at the height of the local producers' request for

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[22] *Ibid*.
[23] See generally SDCOM, *Procedural and Material Guidelines: Public Interest Analysis in Trade Remedies Investigations Guidelines in Brazil*, (2020) Brazilian Government, online: < https://www.gov.br/mdic/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/arquivos/guias/GuiaIPversolimpratraduorevisadaesiteSDCOM.pdf> (accessed 15 June 2024).
[24] See generally Henkin et al, *supra* note 13 at 70-75; and Kanas & Muller, *supra* note 10.
[25] Kanas & Muller, *supra* note 10 at 467; Simone Cuiabano, "When Anti-Dumping Meets Antitrust: Brazil's Innovative Experience Analyzing Public Interest in Commercial Defense Investigations", (2020) 21:1 J Intl L & Trade Polc'y 41-42; and Pinheiro Neto Advogdos, "In Review: Recent Trade Law Developments in Brazil", *Lexology* (6 September 2023), online: < https://www.lexology.com/library/detail.aspx?g=d25c718c-a51b-4db0-ae5c-50eb5caee7ca> (accessed 14 June 2024).
[26] *Ibid*.
[27] Henkin et al, *supra* note 13 at 80.

protection against increasing foreign exports of intermediate goods such as iron and steel, plastics, chemicals etc., the use of the Anti-dumping system has become quite notorious in the country.[28] As such, the Brazilian system has raised concerns in relation to its impact on the economic well-being of the consumers, whose interest might be prejudiced by the domestic monopolist's benefits – considering that there is no law in place which prevents the foreign producers from increasing its prices.[29]

As far as Anti-dumping practice in the Global South is concerned, Brazil is one of the few countries with an effective Anti-dumping structure in place. The Brazilian Anti-dumping framework is fully consistent with the rules of the WTO, whilst its application has been proven to be effective and efficient in protecting and ensuring the country's industrial productivity and employment.[30] Thus, other developing countries such as Nigeria can learn from Brazil's successful Anti-dumping practice against unfair trade activities. Hence, this study sets Brazil as a model standard for Anti-dumping regulations and administrative procedures in the Global South. As such, an understanding of the Brazilian legislative and institutional framework on Anti-dumping measures is the starting point for proving that Nigeria's Anti-dumping framework is indeed in need of reform.

4.2.2 Legislative and Institutional Framework

4.2.2.1 Laws and Regulations

As previously mentioned, the Anti-dumping regime in Brazil has undergone a series of reforms that brought about the efficiency of the system and its general compliance with the WTO rules on Anti-dumping.[31] The WTO Agreements, including those related to Anti-dumping measures were incorporated in their full text into Brazil's domestic legislation by Legislative Decree No.

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[28] *Ibid*; Sergio Kannebley Junior et al, "Policy Antidumping in Brazil: Determinants and Their Effects in Competition", (2021) 60 Planning & Public Policies 129-159, online: < https://repositorio.ipea.gov.br/bitstream/11058/11819/1/ppp_n60_Artigo5_politica_antidumping_no_brasil.pdf> (accessed 14 June 2024); Oliveira, *supra* note 1.

[29] Junior et al, *supra* note 28; and I Besedes & T J Prusa, "The Hazardous Effects of Anti-Dumping", (2017) 55:1 Economic Inquiry 9-30. See generally Oliveira, *supra* note 1.

[30] See generally Marina Takitani et al, "Is China a Market Economy? An Assessment Based on the Brazilian Anti-Dumping Experience", (2013) at 4-10, online: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4325373> (accessed 14 June 2024); Henkin et al, *supra* note 13; and Kanas & Muller, *supra* note 10; and IBEP, "Streamlining the Anti-Dumping Framework in Brazil", (2021) World Bank Reform Story, online: < https://thedocs.worldbank.org/en/doc/654751616073908906-0130022021/original/ibepcountrysuccessStoriesbrazilantidumpingJan2021.pdf> (accessed 14 June 2024) [IBEP, "Streamlining the Anti-Dumping Framework in Brazil"].

[31] See generally Kanas & Muller, *supra* note 10; Henkin et al, *supra* note 13; ITC, *Business Guide to Trade Remedies in Brazil*, *supra* note 9.

30/1994 and Decree No. 1355/1994. In addition, the country took an extra step to legislate detailed rules on Anti-dumping measures by means of Decree 1602/1995, which governs the Brazilian Anti-dumping system.[32] However, Decree No. 1602/1995 has since been replaced by Decree No. 8058/2013 (which came into force on January 1st, 2014), as the current principal domestic legislation governing the Brazilian anti-dumping system in present day. Thus, Decree No. 8058/2013 currently regulates the administrative procedures relating to the investigation and application of Anti-dumping measures in the country against dumping activities of foreign producers.[33]

As a more comprehensive rule, Decree No. 8058/2013 contains more specific and detailed rules for implementing Anti-dumping measures and investigation, including an order for the council CAMEX, in exceptional circumstances, to suspend, not to apply or accept price undertaking for public interest reasons.[34] It also contains 201 articles compared to the 73 articles in the repealed Decree No. 1602/1995. Furthermore, Decree No. 8058/2013 factored in the public interest inquiry into its Anti-dumping regime – thereby making Brazil one of the few countries that have embraced the public interest inquiry to balance the competing interests of the domestic producers (as private interests) and the consumers (as public interests) in Anti-dumping assessment.[35] In essence, the new Decree reduced the wide discretion that informed Decree 1602/1995 to ensure compliance with the rule of the multilateral trade system, as well as enhance the country's Anti-dumping system.

Subsequently, a few legislations and administrative regulations were enacted to supplement Decree 8058/2013. Between 2017 and 2023, the Brazilian government implemented reforms that modified the Anti-dumping system in the country. The reforms were adopted through Decree No. 9107/2017; Decree Nos. 9679, 9745, and 10044/2019; SECEX Ordinance No. 13/2020, SECEX No. 171/2022 and SECEX Ordinance No. 237/2023. These reforms provided the standard institutional and procedural format for the initiation and application of Anti-

[32] Kanas & Muller, *supra* note 10 at 463.
[33] *Ibid*, 464-465; Henkin et al, *supra* note 13.
[34] Decree No. 8058/2013, Article 3. See generally Helio Henkin et al, *supra* note 13; and Kanas & Muller, *supra* note 10.
[35] See Ashish Chandra & Anupal Dasgupta, "The Pubic Interest Gamble in an Anti-Dumping Inquiry Testing Indian Waters" (2020) 7 GNLU L Rev 42 at 53-60; O S Sibanda, "Public Interest Considerations in the South African Anti-dumping and Competition Law, Policy, and Practice", (2015) 14:5 Intl Bus & Eco Research J 735 [Sibanda (2015)].

dumping measures.[36] In particular, while the more recent SECEX Ordinance No. 171/2022 unified all the rules applicable to Anti-dumping procedures and investigations, SECEX Ordinance No. 237/2023 made the assessment of public interest in the Anti-dumping system optional in contrast to its previous mandatory nature in Brazil.[37] Nonetheless, the basic domestic rules governing the Brazilian Anti-dumping system remain unchanged. Thus, Decree 8058/2013 is the primary source of Anti-dumping regulation in Brazil, but where the Decree has no specific rules the provisions of the WTO rules on Anti-dumping will become applicable.

4.2.2.2 Institutional Authorities

The Brazilian government has also conducted reforms of its institutional authorities on Anti-dumping measures since the late 1980s. Under Decree No. 93962/1987, the Commission of Custom Policy (CPA) of the Ministry of Finance was made the institutional authority for conducting both dumping and injury investigations. However, there was paucity of Anti-dumping cases during this period because of the country's restrictive trade policies.[38] As such, the CPA was under-utilised as an administrative agency. In 1993, the Ministry of Industry, Trade and Tourism (MICT) as well as the SECEX were created. These two institutions laid the foundation for the administrative reforms conducted in 1995 in relation to Anti-dumping measures. Consequently, the issuance of the Decree 1602/1995 prompted the establishment of the Foreign Trade Chamber (CAMEX), namely, to provide 'a high level forum for consultation and discussion aimed at coordinating and formulating a wide range of foreign trade policy.'[39] In addition, the Department of Trade Defense (DECOM) was created as a department of SECEX, and charged with the implementation of Anti-dumping and other trade defense proceedings[40] amidst Brazil's increasing trade liberalization reforms.

The modification of the Brazilian anti-dumping process in 2013 - through Decree 8058/2013 - marked a new era in the decision-making process of the country's Anti-dumping system. Prior to the supplementary regulation, Decree 8058/2013 created technical groups, namely, the Trade

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[36] See Lucy Braz Moreira, "International Trade Comparative Guide", *Mondaq* (24 April 2024), online: https://www.mondaq.com/brazil/international-law/1269972/international-trade-comparative-guide > (accessed 15 June 2024).
[37] *Ibid*. see also Paulo Casagrande et al, "Brazil Public Interest Assessment Becomes Optional for Original Trade Defense Investigations and Sunset Review", *Global Compliance News* (23 March 2023), online: <www.globalcompliancenews.com/2023/03/22/https-insightplus-bakermckenzie-com-bm-international-commercial-trade-brazil-public-interest-assessment-becomes-optional-for-original-trade-defense-investigations-and-sunset-reviews_03152023/> (accessed 15 June 2024); and Advogdos, *supra* note 25.
[38] Nakagawa, *supra* note 10 at 289.
[39] *Ibid*, 290.
[40] *Ibid*.

Technical Group (GTDC), and Public Interest Analysis Technical Group (GTIP), that were charged with analyzing the suspension, modification or withdrawal of definitive Anti-dumping duties, as well as non-deployment of provisional measures – these responsibilities were removed from the ambit of CAMEX's responsibility.[41] Therefore, while the SECEX initiates and reviews the Anti-dumping cases (upon application by or on behalf of a domestic industry), the DECOM as a department conducts the investigation and make recommendations to the CAMEX. Whilst CAMEX is the authority that makes final decisions on the application and imposition of Anti-dumping measures, the GTDC and GTIP have exclusive jurisdiction over such decisions concerning public interest assessment in the Anti-dumping system.[42]

With the supplementary administrative regulations came changes to the institutional design of the Brazilian Anti-dumping system. In particular, the Undersecretariat of Trade Defense and Public Interest (SDCOM) was created as a new department of the SECEX, of Special Secretary for Foreign Trade and International Affairs (SECINT), under the Ministry of Economy. It charged the SDCOM with the responsibility of conducting both Anti-dumping investigation and public interest assessment in Brazil, upon initiation of the SECEX.[43] Additionally, the CEMEX was restructured to create a separate collegiate of Minister (Commercial Strategy Council of Ministers named GECEX), as the executive branch of the body charged with the obligation of making decision on whether or not to apply Anti-dumping duties based on SDCOM recommendation.[44] In essence, the SDCOM now oversees the functions previously conducted by the DECOM, GTDC and GTIP, whilst CAMEX makes the decision concerning application of Anti-dumping duties (which was formerly overseen by CEMEX).

Thus, there is currently only one authority, the SDCOM, responsible for conducting all technical evaluations in Anti-dumping investigation and public interest analysis in Brazil – with the deliberation of the Special Secretary for Foreign Trade and International Affairs (SECINT). This responsibility becomes due after SECEX's determination to initiate or review

[41] Luciana Dutra de Oliveira Siveira & Ricardo Inglez de Souza, "The Public Interest Analysis in Trade Remedies Investigations in Brazil", (2014) 2:1 Latin America J Intl Trade L 245 at 249
[42] *Ibid*; Takitani et al, *supra* note 30 at 4-5.
[43] *Ibid*; Advogdos, *supra* note 25; Cuiabano, *supra* note 25 at 42-47; Moreira, *supra* note 36; IBEP, "Streamlining the Anti-Dumping Framework in Brazil", *supra* note 30; and Junior et al, *supra* note 28; SDCOM & SECEX, "2021 External Guidelines: Government Practices in Supporting Brazilian Exporters Investigated by Other Trade Remedies Investigating Authorities" (2021) Brazil Government at 22-23, online: <www.gov.br/mdic/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/arquivos/guias/GuiaApoioExportadortraduo.pdf> accessed 15 June 2024) ["2021 External Guidelines: Government Practices in Supporting Brazilian Exporters"]. See also Articles 37 & 44 of Decree 8058/2013
[44] *Ibid*.

the application of Anti-dumping. After completion of the Anti-dumping investigation, the SDCOM makes report of its findings with a recommendation of imposition or non-imposition of duty to the CAMEX. Whilst GECEX is the decision-making body responsible for enforcing the Anti-dumping measures under the recommendation of SDCOM.

4.2.3 Dumping and Anti-Dumping Methodology

4.2.3.1 Substantive Procedure

Dumping in Brazil takes place when there is a price difference between the goods imported into Brazil and like products sold in the country of origin or exporting country, whereby the prices of the foreign products are lesser than the amounts they are sold for in the exporting country.[45] That is, where the imported goods are sold at a price 'less than normal values'.[46] However, for the dumping activities to attract Anti-dumping measures the SDCOM must have concluded its determination of dumping and injury to the domestic industry and causality. Also, it must have made a finding on the causality between the dumped imports and the injury suffered by the Brazilian domestic industry – this is because the practice of dumping alone is not enough to warrant the imposition of Anti-dumping measures.[47] To achieve such determination, the SDCOM must take into consideration all the substantive procedure recognised under Brazil's Anti-dumping system. Thus, this subsection will briefly examine the substantive procedure on Anti-dumping measures in Brazil.

A. Determination of Dumping

In Brazil, the determination of dumping is administered in a manner similar to the approach envisaged in the multilateral trade system. As such, in determining whether or not dumping has occurred, the SDCOM would first establish the normal value of the goods being investigated. Article 8 of Decree 8058/2013 defined 'normal value' as the price charged for the 'like product in the ordinary course of trade destined for consumption in the exporting country", similar to the definition under Article 2.1 of the WTO Anti-dumping Agreement. The definition embodied fundamental elements similar to the WTO rule for assessing the normal value thus: (a) the sale must be in the normal trading conditions;[48] (b) the sale must be of the like product;

[45] Section 7 of Decree No. 8058/2013.
[46] *Ibid*.
[47] See generally Decree No. 8058/2013.
[48] Article 12 of Decree No. 8058/2013 defined ordinary course of trade to 'include all sales of the like product by the producer or exporter under investigation in the domestic market of the exporting country or to a third country"

(c) the product must be for internal consumption in the domestic market of the exporting country;[49] and (d) the normal price must be comparable with the export price. To ascertain the 'normal value', it is fundamental that the term such as 'like product' is defined in order to determine the selling price of the product sold in the country of origin or the exporting country.[50] 'Like product' is the identical product which shares similar features in all respects, or which has characteristics that are of close resemblance to the product being examined.[51] So, even where a dumped product is not alike with the product of the local industry but shares similar characteristics or resemblances, it would still be found to be a 'like product' for the purpose of ascertaining the 'normal value'. Additionally, the Decree listed a number of non-exhaustive criteria upon which like products would be assessed, unlike the WTO Anti-dumping Agreement.[52]

Where the normal value cannot be determined by comparable price test, Subparagraph 1 and 2 of Article 12 as well as Articles 13 and 14 of Decree 8058/2013 provide for alternative methods for calculating the 'normal value'. In particular, Subparagraph I and II of Article 14 stipulate two alternative methods thus: (a) the price of like product charged in the exports to a third country, as long as this price is representative; or (b) the cost of production declared in the country of origin, which factored in the reasonable amount for selling, cost and profit (based on exporter's records).[53] These alternative methods are similar to those stipulated under the relevant provisions of the WTO Anti-dumping Agreement, previously discussed in Chapter 2 of this thesis. Thus, the SDCOM can revert to any of the two alternate methods, also known as

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- the definition conforms with that under the WTO Anti-dumping Agreement which has been analysed in Chapter 2 of this thesis. In accordance with the relevant provisions under WTO Anti-Dumping Agreement, Article 14.2 to 14.10 recognised instances sales would be considered not within the ordinary course of trade. Thus, transactions between associated parties or parties that have an agreed compensatory arrangement among themselves would not be considered as sales made in the ordinary course of trade. Also, such transactions would be disregarded in the determination of the 'normal price'. Hence, sale would not be considered to be in the normal trading course where the sales are made: (i) within a reasonable period of time, normally within a year, but no less than six months; (ii) in substantial quantities (i.e. a transaction made at a weighted average price for sale below the weighted average cost, or a sale volume below the unit cost corresponding to 20% or more of the amount sold in transactions considered for calculating the normal values); and (iii) at prices which do not provide for the recovery of all costs within a reasonable period of time, preferably twelve (12) months

[49] Article 11 of Decree 8058/2013 defined 'exporting country' as the country of origin of the imported products which is under examination. However, the country of origin shall not be applicable in ascertaining the normal value, *inter alia,* (i) the product is merely transshipped through that country; (ii) the product is not produced in that country; or (iii) there is no comparable price for the product in that country.

[50] See Article 8 to 17 of Decree No. 8058/2013

[51] This definition conforms with that under Article 2.6 of the WTO Anti-dumping Agreement. See Article 9 of Decree 8058/2013. See also "Anti-Dumping Duties and Countervailing Duties", *HKTDC Research* (11 March 2020), online: <https://research.hktdc.com/en/article/MzgwNDExOTM4> (accessed 15 June 2024).

[52] *Ibid*.

[53] See also Paragraph 12 & 15 of Article 14 of Decree No. 8-058/2013.

constructed normal value, to calculate 'normal value'. These alternative methods have been used in quite a number of Anti-dumping cases in Brazil.[54] Also, Articles 15 to 17 of Decree No 8058/2013 stipulate alternative means for calculating 'normal value' in the case of non-market economy countries, such as China, Korea, Ukraine, Serbia, Viet Nam, Russia amongst others[55] unlike the WTO rules.

After establishing the 'normal value', the next step is for the SDCOM to determine the 'export price' – which in principle is the actual price paid or will be paid for the goods exported to Brazil, that is free of charge or discount of any kind.[56] In accordance with the relevant provision of the WTO Agreement, Articles 18 – 20 of the Decree provide for the calculation of 'export price', whilst Article 21 envisaged an alternative methodology for calculating constructed 'export price' where the transaction between the exporter and importer is unreliable due to association or compensatory arrangement. In this regard, goods are considered dumped when the normal value is higher than the export price.

Afterward, the comparison between 'normal value' and the 'export price' must be made in order to determine the 'margin of dumping'. One of the major principles for the comparison between the export price and the normal value is that it must be fair. The concept of the 'fair comparison' and the factors it entails have been discussed in detail in Chapter 2 of the thesis. Moreover, the Brazilian Anti-dumping system provides for methodology similar to the approach envisaged in the WTO Anti-dumping Agreement for determining the 'margin of dumping'.[57] The difference between the normal value and export price is the 'margin of dumping'.[58] Its existence and calculation are based on the different methods contained in the WTO rule on Anti-dumping discussed in Chapter 2 - i.e. (i) the weighted-average-normal-value and the weighted-average-price of all comparable export transactions; and (ii)the normal and export price on a transaction-to-transaction basis.[59]

[54] Gecex Resolution No 470 of May 9, 2023; CAMEX Resolution 14, of 2 June 2004; CAMEX Resolution 28, of 5 October 2004; CAMEX Resolution 3, of 22 March 2001.
[55] See SECEX Circular 41, of 5 July 2004, published on 7 July 2004; SECEX Circular 84, of 13 December 2004, published on 14 December 2004; CAMEX Resolution 15, of 2 June 2004.
[56] "Anti-Dumping Duties and Countervailing Duties", *supra* note 51.
[57] See Articles 22 & 25-28 of the Decree. See also "Anti-Dumping Duties and Countervailing Duties", *supra* note 51; and Chapter 2 of this thesis.
[58] See Article 25 of Decree No. 8058/2013.
[59] See Article 26 of Decree No. 8058/2013.

B. Determination of Injury

In accordance with Article 3 and Footnotes 9 to 10 of the WTO Anti-Dumping Agreement, the Brazilian Anti-dumping framework recognised the determination of injury to be essential in the imposition of Anti-dumping measures. The Decree reinforces the rules of the multilateral trade regime when it provides for 'material injury', 'threat of material injury' and 'material retardation' as an essential component for the determination of injury.[60] Moreso, it provides for the determination of injury to be based on positive evidence and objective examination of - (a) the number of dumped imports; (b) their effects on the price of identical products in the country; (c) their impacts on the domestic industry.[61] Additionally, the regulation listed the factors that must be assessed in the determination of injury, similar to those under the WTO rules. Whilst, the SDCOM must be able to establish the totality of those factors because each one of the factors by itself is not enough to warrant a decisive decision of injury.[62] These factors have been relied on in a few investigations in the country.[63] Notwithstanding, the Brazilian Anti-dumping legislation like the WTO rules on Anti-dumping, fails to expatiate on the rule concerning 'material retardation' as briefly discussed in Chapter 2.

C. Causal Link

The SDCOM must be able to find a connection between the dumped imports and injury or threat of injury suffered by the domestic industry before the CAMEX can impose Anti-dumping measures.[64] The presence of the causal link can only be determined after examination has been conducted on relevant evidence and other known factors - aside dumping - causing injury to the domestic industry simultaneously. As such, the 8058/2013 gives a non-exhaustive link of factors that cannot be attributed to dumped imports.[65] During the course of the determination, the SDCOM must prepare a preliminary determination recommending either

[60] Article 29 of the Decree No. 8058/2013.
[61] Paragraph i-iii of article 30 of Decree 8058/2013. See also paragraphs 1-4 of Article 30 of Decree No. 8058/2013. It is important to note that in accordance with the relevant provisions of the WTO Anti-Dumping Agreement, Articles 35-36 of Decree No. 8058/2013 provides for how the term 'domestic industry' shall be interpreted.
[62] See Article 30-31 (for material injury) & Paragraph 2-4 of Article 33 (for threat of material injury) of Decree 8058/2013.
[63] Amanda Athayde, "Case Study on 'Threat of Material Injury': Brazil", (2019) SDCOM International Seminar on Trade Remedy Investigations, online: < https://www.gov.br/mdic/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/arquivos/apresentacoes-e-palestras/191031_apresentacao_-_case_study_on_threat_of_material_injury.pdf> (accessed 16 June 2024); See SECEX Circular 57 of 17 July 2003, published on 18 July 2003.
[64] See Article 32 of Decree No. 8058/2013.
[65] Paragraph 4 of Article 32 of the Decree Mo. 8058/2013.

provisional measures or price undertakings to the CAMEX for maintenance of the status quo until final report concerning the investigation is issued.[66]

Upon receipt of the final report, the executive branch of CAMEX – i.e. GECEX – shall deliberate and issue an Anti-dumping duty order based on the provisions of Article 78-80 of the Decree. These provisions are WTO-compliant and they provide more clarity than the WTO rules on Anti-dumping.[67] Where an exporter or importer is unsatisfied with GECEX Anti-dumping duty order, such producer can take advantage of any of the statutory review procedures contained in Decree No. 8058/2013 or SECEX Ordinance No. 171/2022.

D. Public Interest Consideration

Although Article 6.12 of the WTO Anti-dumping Agreement encourages members to give consumers and intermediate users the opportunity 'to provide information relevant to the investigation and the determination of dumping' and Article 9.1 implicitly considers public interest through the application of lesser duty, the Agreement does not have any explicit provision on public interest inquiry in Anti-dumping assessment. Conversely, the Brazilian Anti-dumping law explicitly caters to the public interest analysis in its Anti-dumping assessment. SECEX Ordinance No. 13/2020[68] as amended by SECEX No. 237/2023[69] is the most recent regulation governing public interest inquiry in Brazil. SECEX Ordinance No. 237/2023 made substantial changes to the assessment procedure for the analysis of public interest in Anti-dumping investigation. In particular, it made public interest analysis optional in the original dumping investigation,[70] unlike Ordinance No. 13/2020 which makes it mandatory for SECEX to initiate the analysis via administrative acts concurrently with the initiation of dumping investigation.[71] That is, the SECEX would no longer automatically initiate public interest inquiry concurrently with ant-dumping investigation. As such, interested parties would have to make the request for the public interest analysis in Anti-dumping investigation by filing a Public Interest Questionnaire or the SDCOM could open the same at its discretion.

[66] See Articles 65-67 of Decree No. 8058/2013.
[67] See generally "Anti-Dumping Duties and Countervailing Duties", *supra* note 51.
[68] *SEXEC Ordinance No. 13, of January 29, 2020,* (2020) Official Diary of the Union, online: < https://www.in.gov.br/web/dou/-/portaria-n-13-de-29-de-janeiro-de-2020-240570399> (accessed 14 June 2024)
[69] *SECEX Ordinance No. 237, of March 7, 2023*, Official Diary of the Union, online: < https://in.gov.br/web/dou/-/portaria-secex-n-237-de-7-de-marco-de-2023-468455518> (accessed 14 June 2024)
[70] *Ibid*, Article 1 & 2.
[71] Casagrande et al, *supra* note 37.

The regulation provides for the suspension, elimination, reduction or non-application of Anti-dumping duties where public interest is shown to exist.[72] Public interest concerns would exist where damage can be caused to economic agents by imposing duties that outweigh their benefits[73] - this is so as consumers may be negatively affected by Anti-dumping duties. Thus, the Ordinance set out a non-exhaustive list of economic factors that SDCOM must consider in assessing public interest inquiry in Anti-dumping investigation.[74]

Upon filing of the interested parties, the SDCOM is required to hold hearings and conduct on-spot checks for the purpose of conducting verification of the information submitted for public interest inquiry. Also, the Ordinance stipulates the analysis the SDCOM must conduct before recommending any measures on the basis of public interest consideration in its report to the GECEX.[75] Ultimately, the report could result in the elimination, suspension, reduction or non-application of Anti-dumping duties. For instance, between 1995 and 2019, Brazil concluded 121 public interest analysis – of which only 70 led modifications of the trade remedies duties.[76] Hence, the country is one of the few Global South countries that have successfully embraced public interest analysis in its trade defense assessment.

4.3 Anti-Dumping Practice in India

4.3.1 Overview, Developments and Trend

As an emerging Global South economy, India has experienced a considerable share of market economy volatility due to injurious dumped imports.[77] The negative impacts of dumped imports were evident in the low productivity base of the country's manufacturing industry – as the continuous presence of cheap and inferior quality of foreign goods continues to deny India's domestic producers of a level-playing field till date.[78] As such, in the pursuit of boosting the

[72] Article 2 of the Ordinance 13/2020.
[73] *Ibid*, Article 3.
[74] *Ibid*.
[75] See generally Ordinance 13/2020, *supra* note 69; and SDCOM, *Procedural and Material Guidelines: Public Interest Analysis in Trade Remedies Investigations Guidelines in Brazil*, (2020) Brazilian Government, online: < https://www.gov.br/mdic/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/arquivos/guias/GuiaIPversolimpratraduorevisadaesiteSDCOM.pdf> (accessed 15 June 2024).
[76] *Ibid*, 86-88
[77] See generally Jayanta Ray et al, "The Evolution of Indian Trade Policy: State Intervention and Political Economy of Interest Groups", online: <www.ipekpp.com/admin/upload_files/Report_3_54_The_2552084041.pdf> (accessed 17 June 2024); and Panagariya Arvind, *India: The Emerging Giant,* (New York: Oxford University press, 2008).
[78] See Centre for Digital Economy Policy Research, *Protecting Atmanirbhar: Report on Challenges in Protecting Domestic Industries,* (2023) C-DEP, online: <https://c-dep.org/protecting-atmanirbhar-report-on-challenges-in-protecting-domestic-industries/> (accessed 17 June 2024) [C-DEP 2023 Report].

industrial base of the country, India had for years utilised and maintained restrictive trade policy up until 1991 – when drastic economic reforms were introduced to liberalise the country's economy,[79] and which eventually paved the way for utilization of Anti-dumping measures in the country.[80] The Bretton Woods Institutions' backed economic liberalization reforms of the late 1980s prompted the country to initiate and impose its first Anti-dumping action in 1992 – as the exposure to open economy flooded the Indian market with foreign good that threatens the existence of its fragile domestic industries.[81] According to Aggarwal "as the country underwent a transition from a closed economy protected by import permits and very high tariffs to an open economy with more intense trade and greater exposure to international competition, the use of Anti-dumping remedies also increased."[82] Therefore, the Indian Anti-dumping regime emerged concurrent with the country's objective of attaining a self-reliant economy.[83] Thus, the utilization of Anti-dumping measure sin the country has since 1992 being on the rise as the country continues to balance its export-import volume.

India's Anti-dumping system dates back to 1982, when the country added sections 9, 9A, 9B and 9C to its Custom Tariff Act, 1975 – as the legal provision for imposing Anti-dumping measures in the country. Nonetheless, the first Indian Anti-dumping legislation was not enacted until 1985, when the Customs Tariff (identification Assessment and Collection of Duty or Additional Duty on Dumped Articles and for Determination of Injury) Rules, 1985 was issued. Although these legislations were in accordance with the rules of the then GATT 1947,[84] the country did not initiate any Anti-dumping measures until 1992 due to it fairly restrictive trade regime during that period.[85] Consequently, upon the conclusion of the Uruguay Round Agreement (which culminated in the establishment of the WTO system), both the Custom Tariff Act and the Custom Tariff Rules were amended in 1995 to bring the Indian Anti-

[79] Jayanta Ray et al, *supra* note 77 at 10-19; Harsha Vardhana Singh, "Trade Policy Reform in India Since 1991", (2017) Brooking Working Paper 02 at 9-10, online: < https://www.brookings.edu/wp-content/uploads/2017/03/workingpaper_reformshvs_march2017.pdf> (accessed 17 June 2024); Mike Krings, "Scholar Argues India Has Had Inconsistent Trade Policy, Economic Ties with World Since 1947 Partition", *KU News* (22 January 2024), online: < https://news.ku.edu/news/article/2024/01/22/scholar-argues-india-has-had-inconsistent-trade-policy> (accessed 17 June 2024); and Arvind, *supra* note 77.
[80] Gupta & Choudhury, *supra* note 1 at 123-124.
[81] See Aggarwal, "Trade Effects of Anti-dumping in India", *supra* note 1 at 149.
[82] *Ibid*, 119.
[83] *Ibid*, 117.
[84] Abhinaya Ramesh, "Dumping and Anti-Dumping Issues: An Indian Perspective", *The Law Brigade Publishers* (16 March 2019), online: https://thelawbrigade.com/competition-law/dumping-and-anti-dumping-issues-an-indian-perspective/#_ftn15 (accessed 17 June 2024); and Owais Hassan Khan, *A Critique of Anti-Dumping Laws*, (Newcastle: Cambridge Scholars Publishing, 2018) at 84-85.
[85] Jayanta Ray et al, *supra* note 77 at 10-19; Singh, *supra* note 79; Arvind, *supra* note 77; and Aggarwal, *supra* note 1 at 117.

dumping legislations in compliance with the WTO rules on Anti-Dumping. As such, the substantial changes gave way to the Customs Tariff Act, 1975-Section 9A and 9B (as amended in 1995) and the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury), 1995 (hereinafter the "Custom Tariff Rules, 1995").[86] Furthermore, in 2011, section 9A (1A) was included in the Customs Tariff Act, 1975 to address concerns of ineffective implementation that then featured the Anti-dumping laws – regarding circumvention of the Anti-dumping measures.[87] The inserted section came into force on 8 April 2011.

Notwithstanding, the intensive use of the measures in India started prior to the 1995 amendments. Given that the country had undergone massive trade liberalization scheme before joining the WTO, the reforms paved way for the increased use of the trade remedy to redress the adverse effect of an open economic system. Since 1992, the country has thus recorded massive successes that have immensely benefitted its local industry. Between 1992 and 1995 (i.e. the pre-WTO era), the country had initiated 21 Anti-dumping cases – of which about 60% success rate was recorded.[88] Moreover, the post-WTO era recorded more success rate of applied Anti-dumping measures until it slowed down around 2020, when the Indian government started exercising more caution in imposing Anti-dumping measures.[89] For Instance, between 1995 and 2023, India has initiated 1175 Anti-dumping investigation,[90] of which 790 resulted in Anti-dumping measure[91] – this ultimately ranked the country as the 1st and highest Anti-dumping user among WTO members. A major characteristic of India's Anti-dumping system during this post-WTO period is that of its high success rate. The 790 Anti-dumping measures so far applied translate to approximately 67% success rate.

Also, the imposed Anti-dumping duties have been argued to increase the growth of Indian industry and reduced the prices of products within its local market.[92] For instance, it has been

[86] Ramesh, *supra* note 84; Khan, *supra* note 84; and Aggarwal, *supra* note 1 at 117.
[87] Bhumika Billa, "Strategising Protectionism: An Analysis of India's Regulation of Anti-Dumping Duty Circumvention" (2018) 10:2 Trade L & Dev 417 at 427.
[88] Aggarwal, *supra* note 1 at 118-119;
[89] C-DEP 2023 Report , *supra* note 78 at 7-10; "India's Anti-Dumping Duty Imposition Drop Amid PostCovid-19 Shift", *Business Standard* (9 August 2023), online: < https://www.business-standard.com/economy/news/india-s-anti-dumping-duty-impositions-drop-amid-post-covid-19-shift-123080900314_1.html> (accessed 17 June 2024); and Ruben Banerjee, "To Make India Atmanirbhar, Strengthen Anti-dumping Laws", *Deccan Herald* (24 May 2023), online: < https://www.deccanherald.com/opinion/to-make-india-atmanirbhar-strengthen-anti-dumping-laws-1221535.html> (accessed 17 June 2024).
[90] WTO, *Anti-Dumping Initiations by Reporting Member 01/01/1995-31/12/2023, supra* note 4.
[91] WTO, "Anti-Dumping Measures by Reporting Member 01/01/1995 – 30/06/2023", *supra* note 4.
[92] C-DEP 2023 Report, *supra* note 78 at 13-17.

reported that the imposition of definitive Anti-dumping duty on importation of Vitrified Tiles from China on June 14 June 2017 increases the number of local producers of Tiles from five (5) in 2005 to 242 in 2021. It also increased the country's capacity from 3 million square metres to more than 1,000 million square metres, as well as the amount invested in the local Tiles industry. In addition, other local products such as Acetone, Alloy Road wheels, Caustic Soda and Ceramic Tiles have benefitted greatly from the success of India's Anti-dumping system.[93] Thus, so far, the Indian Anti-dumping system has been successful toward achieving its self-reliance objective. Despite the caution in its Anti-dumping behaviour, India has been efficient in deploying the trade remedy to prevent destruction of its industries and improving industrialization in the country compared to other Global South Countries. It has also used Anti-dumping measures to amplify its voice and participation in the multilateral trade regime.[94] Hence, the importance of the country has recently been on the rise as one of the few emerging economies with true economic success.

Nonetheless, academic commentators, such as Ardhana Aggarwal and Robert Feinberg, have fervently criticised India's Anti-dumping system as a protectionist regime that has been useful in catering to the protectionist demand of its local industries.[95] They argued that India's trade remedy practice has so far only benefited narrow segment of elite producers at the detriment of the downstream industries and the consumers[96] These criticisms also coincide with the concerns raised by the government of countries like USA, China, EU, Korea, Japan, Indonesia amongst others.[97] Hence, the Indian government has since 2020 exercised restraint towards the imposition of Anti-dumping measures through an implicit use of public interest inquiry.[98] Specifically, between 2020 and 2022, the government rejected 44 recommendations out of the total of 120 Anti-dumping recommendations made by its investigating authority.[99] In spite of

[93] *Ibid*, 13-15.
[94] See generally, *Reliance Industries Ltd. V. Designated Authorities & ors*, (2006) 10 SCC 268 at 368; Edalio Maldonado, "Managing Free Trade Under the WTI in an Era of Rising National Tensions", ODUMUNNC 2024 Issue Brief, online: < https://ww1.odu.edu/content/dam/odu/col-dept/al/docs/2nd-wto.pdf> (accessed 17 June 2024); Khan, *supra* note 84 at Chapter 7; and Mukul Shastry, "Anti-Dumping Laws and Practice in India", (2009), online: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406187> (accessed 17 June 2024).
[95] Aggarwal, *supra* note 1 at 150-153; and Robert M Feinberg, "Trends and Impacts of India's Anti-dumping Enforcement", (2010) US International Trade Commission Office of Economic Working Paper No 2010-10A, online: https://www.usitc.gov/publications/332/EC201010A.pdf (accessed 17 June 2024).
[96] *Ibid*.
[97] Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 5th ed (Cambridge, UK: Cambridge University Press, 2022) at 758-760; and Ramesh, *supra* note 84.
[98] C-DEP 2023 Report, *supra* note 78; "India's Anti-Dumping Duty Imposition Drop Amid Post Covid-19 Shift", *supra* note 89; Banerjee, *supra* note 89.
[99] C-DEP 2023 Report, *supra* note 78 at 7-8.

this caution, the country's trade remedy practice continues to attract criticism being the highest anti-dumping user.

4.3.2 Legislative and Institutional Framework

4.3.2.1 Laws and Regulations

Indian Anti-dumping laws can be found in two legislative instruments, namely, Section 9A, 9B and 9C of the Custom Tariff Act 1975 (as amended in 1995) and the Custom Tariff Rule, 1995, respectively. These Anti-dumping rules are the legal basis for the investigations and enforcement of the measures in the country. Moreso, these legislations are modelled after the WTO rules on Anti-dumping.

The Custom Tariff Act, 1975 (as amended in 1995) is not exclusively concerned with Anti-dumping as the Act consolidates and amends laws that relates to customs duty in the country. However, there are various provisions in the Act which literally constitute the Anti-dumping rules in the country. Thus, Sections 9A, 9A (1A), 9B and 9C of the Customs Tariff Act, 1975 (as amended in 1995) alongside the relevant provisions of the Custom Tariff Rules, 1995 regulate the substantive and procedural aspects of Anti-dumping in India. In particular, it stipulates the essential element for the determination of dumping (vis-a-viz dumping, injury and causal link), the administrative procedure for the initiation and conduct of Anti-dumping investigations as well as the imposition of the Anti-dumping measures, duration and administrative review. According to Owais, the provisions of these Anti-dumping legislations are WTO-compliant and reinforce the WTO rules on Anti-dumping measures.[100] Hence, the success of the Anti-dumping practice in India

Concerning the Customs Tariff Rules, 1995, the regulation was amended between 1999 and 2003 vide Customs Notification No. 44/1999 of July 1999, Notification No. 28/2001 of May 2001, Notification no. 1/2002 of 4th January 2002 and Customs Notification No. 101/2003 of 10th November 2003, respectively. The amendments were carried out to ensure detailed enumeration of the principles governing the determination of injury caused by dumping. The Customs Tariff Rules was enacted as supplementary rule to the Customs Tariff Act, 1975 as it expatiates on the procedural element for the initiation of Anti-dumping proceedings, the conducts for the investigation procedure, the preliminary screening and findings. Also, the

[100] Khan, *supra* note 84 at 84.

regulation governs the administrative procedures of the trade remedy, such as the initiation, determination of injury and enforcement of the Anti-dumping measures.[101] Thus, the rule alongside the Sections 9A, 9A (1A), 9B and 9C of the Customs Tariff Act, 1975 (as amended in 1995) constitute the legislative framework for Anti-dumping practice in India.

4.3.2.2 Institutional Authorities

In India, the institutional authority responsible for the administration and enforcement of Anti-dumping measures is the Directorate General of Anti-dumping and Allied Duties (DGAD) – created as a separate body of the Department of Commerce under the Ministry of Commerce and Industry - headed by the 'Designated Authority'.[102] The institution was established in 1998 as an autonomous body to oversee the initiation of Anti-dumping investigation and the implementation of the trade remedy measures. As such, its primary concern is the protection of the Indian local industries from the adverse effect of open economy system, and not necessarily the healthiness of the Indian economy. The DGAD had since undergone significant reforms to ensure its efficiency and effectiveness in the administration of the country's trade defense infrastructure. Prior to 1998, the 'Designated Authority' of the Department of Commerce handled the Anti-dumping complaint and investigation till the establishment of the DGAD. Altogether, the Directorate General of Trade Remedies (DGTR) is the institutional body charged with the implementation of the Indian Anti-dumping legislations.

Although the initiation and recommendation of Anti-dumping measures are administered by the DGAD, the Department of Revenue under the Ministry of Finance is the branch of the Indian government that is charged with levying the Anti-dumping duties as it related to the dumped products.[103] While the principal function of the DGAD is the initiation and investigation of Anti-dumping action as well as the imposition of the duties,[104] the Ministry of Finance assesses and collects the Anti-dumping duties imposed on dumped merchandizes.[105] The final decision of the DGAD is appealable before the Customs, Excise & Gold (Control) Appellate Tribunal (CEGAT), and subsequently the High Court or Supreme Court, as may be applicable.

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[101] *Ibid*, 85.
[102] See Rule 3 of the of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (hereinafter the "Custom Tariff Rules", 1995)
[103] Gupta & Choudhury, *supra* note 1 at 132-133
[104] See Rule 4 of the Custom Tariff Rules, 1995.
[105] Khan, *supra* note 90-91; Maiti, *supra* note 79 at 150.

Therefore, the DGAD has since its creation initiated and concluded significant numbers of Anti-dumping investigations. Its findings have been influential in addressing the occasional dumped imports from foreign countries, which has continued to mitigates the adverse effect of injurious dumping. For instance, the administrative body authority has initiated and concluded over 1096 Anti-dumping cases between the period of 1991-2022.[106] As earlier noted, the success rate of the institution is remarkable.[107] This is despite the backlash the Indian Investigating Authority has encountered from countries such as Bangladesh, China, Japan, Korea, and the EU concerning its investigatory methodology.[108]

4.3.3 Dumping and Anti-Dumping Methodology

4.3.3.1 Substantive Procedure

In India, the substantive elements for the determination of dumping, namely, dumping, injury, and causative link are regulated under Sections 9A, 9A (1A), 9B, 9C of the Customs Tariff Act, 1975 (as amended in 1995) and the Customs Tariff Rules, 1995, as previously discussed. These legislations are consistent with the provisions of Article VI of GATT 1994 and the Anti-dumping Agreement (WTO Anti-dumping rules). The laws provide for the principles governing the determination of concepts such as 'normal value', 'export price', 'margin of dumping', 'like products', 'injury', and 'domestic industry',[109] similar to those under the WTO Anti-dumping rules. Moreover, these concepts have been discussed in detail in Chapter 2 of this thesis. Hence, the explanation of these substantial elements under the Indian Anti-dumping laws will be summarised in this subsection.

A. Determination of Dumping

In India, dumping occurs when the foreign producer or manufacturer export and sell its products in the country at a price lesser than the actual or normal values at which the product is being sold in the country of origin or country of export. From this definition, there two fundamental parameters used by the DGAD to determine dumping, namely, the 'normal value'

[106] C-DEP 2023 Report, *supra* note 78 at 7-11. See also the Directorate General of Trade Remedies (DGTR), "Anti-Dumping Cases", Department of Commerce, New Delhi, online: < www.dgtr.gov.in/anti-dumping-cases> (accessed 18 June 2024) [DGTR Anti-Dumping Cases].
[107] See section 4.2.1 of this Chapter. See also generally C-DEP 2023 Report, *supra* note 78; & DGTR Anti-Dumping Cases, *supra* note 106.
[108] Gupta & Choudhury, *supra* note 1 at 132-133.
[109] See Rule 10 and 11 of the Custom Tariff Rules, 1995.

and the 'export price'.[110] The provisions of the Indian legislation concerning these two parameters are in consonance with Article 2 of the WTO Anti-dumping Agreement as discussed in Chapter 2. It also makes provision for 'like articles' which are required for the determination of dumped imports. Also, the 'margin of dumping' must be determined to get the actual cost of dumped imports. Thus, Section 9A of the Customs Tariff Act, 1975 (as amended) explained the dumping margin to be the difference between the two parameters for dumping – i.e. the difference between 'normal value' and 'export price'. In particular, the DGAD generally expressed the 'margin of dumping' as a percentage of the export price[111] - which must not be less than two-percent (2%) of the export price in order to attract Anti-dumping duties.

B. Determination of Injury

This is the second substantive element which the DGAD requires that the applicant/complainant prove by supported evidence.[112] To be able to establish injury to the domestic industry, the applicant must show that the dumped imports are causing or threatens to cause 'material injury', or 'material retardation' has been occasioned to the establishment of an industry.[113] As such, dumped imports cannot be sanctioned unless it is shown that it causes injury to the domestic industry. The methodology for determining 'injury' under the Indian Anti-dumping laws is in conformity with Article 3 of the ADA and Article V1:2 of the GATT 1994.[114] The extent of the injury can be examined in terms of economic indicators such as productivity, capacity utilization, profit sales, employment etc. These indicators are relied on by DGAD during investigation.

C. Causality

The demonstration of a special connection between the dumped imports and material injury suffered by the Indian domestic industry is fundamental for the initiation of Anti-dumping

[110] *Normal Value* is the comparable price at which the like articles of the products being examined are sold, in the actual course of trade, in the domestic market of the exporting country (and not the country of origin). Whilst the *export price* is the price at which the product, allegedly dumped, is exported or sold in India. The *Export Price* is generally calculated by the cost, insurance and freight value minus any adjustment on the account of the freight, insurance, commission etcetera which arrived at the value of the ex-factory level. See Section 9A of the Custom Tariff Act, 1975 (as amended) as well as the Custom Tariff Rules.

[111] That is the difference between a weighted-average-normal-value and weighted-average-export price, or the transaction-to-transaction basis of the difference between individual normal values and individual export prices over the period of investigation. See Chapter 2 of the thesis; and DGTR Anti-Dumping Cases, *supra* note 106.

[112] Section 9A of the Custom Tariff Act, 1975 (as amended in 1995); and Rule 5 of the Custom Tariff Rule, 1995.

[113] *Ibid*.

[114] The requirement in relation to determination of injury' has been discussed in detail in Chapter 2 of this thesis.

investigation, and the imposition of duties in India. Thus, the application for the initiation of the Anti-dumping procedure must be supported by relevant evidences in respect of the causal link between dumping and injury before DGAD can recommend Anti-dumping measures, and the same being imposed by the Ministry of Finance.[115] The causative link can be determined by examining the volume and price effect of the dumped product on the domestic industry.

D. Public Interest Test

Although India is ranked the largest user of Anti-dumping measures amongst WTO members, the country lacks specific legislation on public interest inquiry in its Anti-dumping assessment. Notwithstanding, Section 9C of the Customs Tariff Act, 1975 (as amended in 1995) provide room for the possibility of appealing the final decisions of the DGAD before the CEGAT on grounds similar to the public interest test.[116] Also, the institutional authorities, in particular the Ministry of Finance have been known to give weight to the issue of public interest in their implementation and collection exercise of Anti-dumping measures recommended by the DGAD.[117] For Instance, in the *Purified Terephthalic Acid* case, the Ministry of Finance abolished Anti-dumping measures imposed on the importation of the chemical – used in the production of polyester – in the interest of the public. The Public interest analysis was continuously raised by the local polyester manufacturer for over four (4) years on the grounds that the absence of cheap imports and increase in domestic prices had made their product less competitive on the international scene.[118] This was also the case in the *Penicillin* case,[119] where the Ministry of Finance refused to impose Anti-dumping measures on grounds of public interest.

[115] See Rule 5 & 11(2) of the Customs Tariff Rules, 1995.
[116] Chandra & Dasgupta, *supra* note 33 at 65-66; and SDCOM, *Procedural and Material Guidelines: Public Interest Analysis in Trade Remedies Investigations Guidelines in Brazil*, *supra* note 75 at 45
[117] *Ibid*.
[118] Chandra & Dasgupta, *supra* note 33 at 66; Sanjeev Choudhary, "Anti-dumping Duty Revoked on PTA Import", *The Economic Times* (20 February 2020), online: < https://economictimes.indiatimes.com/industry/cons-products/garments-/-textiles/anti-dumping-duty-revoked-on-pta-import/articleshow/73862837.cms?from=mdr> (accessed 18 June 2024).
[119] *Penicillin G – Alembic Ltd. V. Union of India*, Laws(GJH)-2011-12-303, online: < www.the-laws.com/Encyclopedia/Browse/Case?caseId=201102658200&title=alembic-ltd-vs-union-of-india> (accessed 17 June 2024).

4.3.3.2 **Procedural Issues**

A. Initiation and Administrative Procedure

Anti-dumping investigation can be initiated in India by a written application/complaint filed by or on behalf of the aggrieved 'domestic industry' before the 'Designated Authority' under the Ministry of Commerce, or the 'Designated Authority' can *suo motu* initiate the Anti-dumping proceeding in special circumstances. The application must be accompanied by relevant evidence concerning the substantive element, namely, dumping, injury suffered due to dumped import, and causality.[120] Afterward, the application will go through preliminary screening to ensure the documents and the evidence provided are sufficient for initiating the investigation. Upon being satisfied, the 'Designated Authority' must notify the government of the exporting country of its intention to initiate Anti-dumping investigation by Public Gazette.[121] Notwithstanding, the DGAD can only initiate an investigation on account of two conditions, namely, (i) the domestic producers in support of the application are not less than 25% of those that produces the like articles, and (ii) it is supported by domestic producers whose collective output constitute more than 50% of the total production of the like article produced by the portion of the domestic industry.[122]

Once initiation is made, the Designated Authority must notify the interested parties – who have a window of forty (40) days to respond to any of the required information in the prescribed questionnaire.[123] Also, the investigatory authority must carry out the required examination and investigation on the alleged dumping activities in conformity with the WTO Anti-Dumping Agreement.[124] Rule 12 of the Customs Tariff Rules, 1995 requires the DGAD to provide preliminary findings, in the form of public notice, regarding, normal value, export price, dumping margin, and injury to the domestic industry.

B. Preliminary Findings

In the course of the Investigation, Rule 12 of the Customs Tariff Rules, 1995 requires the DGAD to provide preliminary findings, in the form of a public notice, concerning normal value, export price, dumping margin and injury to the domestic industry. The preliminary

[120] See Rule 5 of the Customs Tariff Rules, 1995.
[121] *Ibid*.
[122] *Ibid*.
[123] See Rules 6-7 of the Customs Tariff Rules, 1995.
[124] *Ibid*, Rules 9-11.

findings must be made pending the completion of the investigation and final determination of the DGAD. Rule 13 provides that the DGAD may impose provisional duty or price undertaking (which may terminate the investigation) not less than sixty (60) days after the commencement of the investigation for quick relief to the Indian industry. However, the provisional measure must not be more than the margin of dumping and shall not remain in force for a period exceeding 6 months.

C. Final Findings, Definitive Measures and Appeal

The DGAD is required to complete its investigation within one year from the date of initiation of the investigation, as well as give its final finding via a report to the Ministry of Finance recommending whether or not the product being investigated is dumped into India. Rule 17 of the Customs Tariff Rule specifies the format for the final report and the information it must contain. Within three months of publication of the final determination, the Ministry of Finance may publish a notification in the Official Gazette imposing Anti-dumping duties not exceeding the dumping margin calculated by the DGAD, or price undertaking where applicable.

The final decision of the DGAD is appealable to the CEGAT and subsequently the court of records in India.[125] Upon exhaustion of the domestic remedies, the aggrieved parties may approach the WTO Dispute Settlement Body if not still satisfied with the outcome. These provisions of the Indian Anti-dumping legislations conform with the WTO Anti-dumping rules.

D. Review

Generally, Anti-dumping measures are ordinarily required to eliminate the adverse effects of dumped imports. However, where the measures no longer serve it purpose, due to economic factors, the same must be reviewed. Thus, Rules 22-23 of the Customs Tariff Rules provides for the mechanism regarding the conduct of administrative review of Anti-dumping measures including mid-term review, sunset review, and new shipper review.[126] The review must be periodically conducted by the Ministry of Finance. These procedural elements of the Indian Anti-dumping regime are in consonance with the WTO rules on Anti-dumping measures.

[125] See Section 9C of the Customs Tariff Acts, 1975 (as amended in 1995).
[126] *Ibid*, section 9A; and Rule 22-23 of Customs Tariff Rules, 1995.

4.4 Anti-Dumping Practice in South Africa

4.4.1 Overview, Development and Trend

From the historical antecedent of trade remedies in multilateral trade regime, South Africa is one of the earliest countries that enacted national legislation on Anti-dumping measures. It is also one of the traditional users of trade remedies in the world.[127] South Africa's trade remedy regime dates back to 1914, when the country enacted its first Anti-dumping legislation, namely, Section 8 of the Customs Tariff Act of 1914.[128] The legislation was borne out of the need to secure the protection of the local businesses - It is important to note that during this period, the country was under British colonial rule up until 1994, when it gained true political independence from colonialisation. The trade remedy was administered and enforced by the then Customs Department during this period.[129] Subsequently, the Board on Trade and Industries ("BTI") was established in 1924 to handle dumping and countervailing complaints in the country. This institutional reform influenced the country to impose its first Anti-dumping duties in 1921 on Australian flour and wheat.[130] As such, between 1921 and 1947 the country had deployed increased Anti-dumping measures with over 90 Anti-dumping and countervailing investigations concluded during the period.[131] Eventually, the South African Anti-dumping practice alongside the practices of the other earliest users prompted the recognition and the inclusion of the measures as an accepted practice in Article VI of the GATT 1947 and subsequent Anti-dumping Codes of the multilateral trade system, as previously discussed in Chapter 2 of this thesis.

Under the GATT 1947 system, the then South African government enacted the Customs and Excise Act of 1961, which included sections 55-57 on the application and implementation of Anti-dumping duties, to align its trade remedy practice with the rules of the then multilateral system. These said provisions were amended in 1967, and it consolidated and repealed all existing Anti-dumping legislations. Moreover, in 1977, the BTI in its annual report recommended the removal and withdrawal of all imposed Anti-dumping duties in the country

[127] Philippe De Baere et al, *The WTO Anti-Dumping Agreement: A Detailed Commentary,* (Cambridge: Cambridge University Press, 2021) at 1; WTO, Case Study 38, *supra* note 1.
[128] Act 26 of 1914.
[129] WTO Case Study 38, *supra* note 1.
[130] G Brink, *A Theoretical Framework for South African Anti-Dumping Laws*, (PhD Thesis: University of Pretoria, 2004) [unpublished] 46 [Brink (2004)]; see also C Vinti, "A Spring Without Water: The Conundrum of Anti-Dumping Duties in South African Law", (2016) 19:1 PER: Potchefstroomse Elektroniese Regsblad 10.
[131] *Ibid*; Mwanyisa, *supra* note 1 at 24.

by January 1, 1978. The recommendation was based on the premise that the 'measures have been in place for such a long time that their removal would not pose any threat to the South African industries and that any disruptive competition could be addressed through the use of formula duties'.[132] Thus, between 1970s and 1980s, while there was significant decrease in use of the Anti-dumping measures, the government heavily deployed high tariff barriers for the protection of South African industries.[133] In particular, the trade sanctions that were imposed on the then-South African government - for its apartheid practices - also swayed the country to utilise restrictive trade policy as a protectionist tool for strategic industries, such as the steel and aluminium industries amongst others.[134] In turn, the use of the trade remedy measures – that were in harmony with the then rules of the multilateral trade system - were reduced. Additionally, the BTI was replaced with the Board on Tariffs and Trade ("BTT") through the enactment of the Board on Tariffs and Trade Act of 1986 (hereinafter "the BTT Act).[135]

By the 1990s, South Africa was known for its extensive trade restrictive policies, with its tariff schedule classified as "one of the most complex in the world".[136] In an attempt to ensure compliance with multilateral rules and practice, the country drastically began reduction of its trade tariff barriers. It also established the Directorate of Dumping Investigations ("DDI") in 1992, as a department within the BTT, to revive its Anti-dumping regime.[137] Upon return to democracy in 1994, the country joined the WTO after its establishment. It also undertook the reform of its then Anti-dumping practice, which brought about the Board of Tariffs and Trade Amendment Act of 1995 ("BTT Act of 1995) - the amendments were carried out to harmonise South African Anti-dumping system with the rules under Article VI of the GATT 1994 and the ADA.[138] Also, its trade regime underwent considerable liberalization which simplified the country's tariff structure and reduced its high tariff rate.[139] In addition, the enactment of the International Trade Administration Act of 2002 ("ITA Act")[140] and the Anti-dumping Regulation of 2003 - which repealed the BTT Act of 1995 – further reformed and harmonised

[132] WTO, Case Study 38, *supra* note 1. See also International Trade Centre (ITC), *Business Guide to Trade Remedies in South Africa and the Southern African Customs Union*, (Geneva, Switzerland: International Trade Centre, 2003) at 2, online:
[133] WTO, Case Study 38, *supra* note 1; Barral et al, *supra* note 6 at 49-61.
[134] Barral et al, *supra* note 6 at 49-53.
[135] Act 107 of 1986.
[136] Barral et al, *supra* note 6 at 49-50.
[137] Board on Tariffs and Trade Amendment Act 1992 (Act 60 1992) and the Customs and Excise Amendment Act 1992 (Act 61 1992). See also Callie Lombard, "Trade Remedies Decade", *Engineering News* (17 January 2014), online: <www.engineeringnews.co.za/article/trade-remedies-decade-2014-01-17> (accessed 19 June 2024).
[138] WTO's Case Study 38, *supra* note 1; & Barral et al, *supra* note 6 at 51; and Mwanyisa, *supra* note 1 at 25.
[139] Gupta & Choudhury, *supra* note 1 at 130.
[140] No 71 of 2002.

the country's Anti-dumping system with its multilateral and regional commitments.[141] These regulatory reforms gave birth to the International trade Administration Commission ("ITAC"). Currently, the ITAC acts as the national tariff body for all of the countries in the Southern African Customs Union ("SACU"). It is also designated as the investigatory authority for the administration of the trade remedy in the SACU until the other members set up their national bodies.[142]

With the rapid liberalization came an increasing need for Anti-dumping measures, as South African producers were left to face increased competition from both fair and unfair international trade practice.[143] In particular, its fragile domestic industry had low chances with competitors from great economies in the Global South-Global North world. As such, there was rising propensity for the South African producers to experience more material injury from unfair trade practices with the potential for massive job losses and increased standard of living.[144] Thus, between 1995 and 2023, South Africa had initiated 225 Anti-dumping investigations at the level of SACU, which ranked it the 1st Anti-dumping user in Africa followed by Egypt with 118 Anti-dumping investigations. whilst it was ranked among the top ten (10) Anti-dumping users in the WTO.[145] Of the 225 Anti-dumping investigations, the country has imposed 161 Anti-dumping measures with a success rate of 71% compared to other countries in the multilateral trade system.[146] This high success rate is an important characteristic that has proven the country has a prolific user, and a top country in Africa with an effective trade defense structure and infrastructure. Additionally, the success rate reveals the growth and development that have gone into the country's Anti-dumping system[147] over the years.

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[141] The regional commitment during this period was the South African Customs Union (SACU) Agreement of 2002 (SACU). The members of the SACU are Botswana, Lesotho, Namibia, Swaziland and South Africa. See WTO, Case Study 38, *supra* note 123; Mwanyisa, *supra* note 1 at 26; and Brink (2004), *supra* note 130; M Holden, "Antidumping: A reaction to trade liberalisation or ant-competitive?", (2011) 70:5 South African J Eco 924.
[142] SACU Agreement 2002, Article 14. See also Case Study 38, *supra* note 1.
[143] WTO's Case Study 38, *supra* note 1; and Barral et al, *supra* note 6 at 51
[144] A Pieterse, "Reviewing South African Transnational Relations", (2017) 18:4 Safundi J South Afri & American Studies 425; Joseph Booysen, "SA Chicken Industry Set for Huge Job Losses", *IOL* (30 September 2016), online: <www.iol.co.za/business-report/economy/sa-chicken-industry-set-for-huge-job-losses-2074525#google_vignette> (accessed 20 June 2024).
[145] WTO, *Anti-Dumping Initiations by Reporting Member 01/01/1995-31/12/2023, supra* note 4.
[146] WTO, "Anti-Dumping Measures by Reporting Member 01/01/1995 – 30/06/2023", *supra* note 4.
[147] G Brink, "South Africa: A Complicated, Unpredictable, Long and Costly judicial Review System" in Muslum Yilmaz, ed, *Domestic Judicial Review of Trade Remedies: Experience of the Most Active WTO Members,* (London: Cambridge University Press, 2013) Chapter 12 [Brink (2013)].

In spite of the success rate and the positive attributes of the South African Anti-dumping system, its trade partners as well as scholars have commented their reservations. It has been argued that the successes reinforce the measures are being used as protectionist instruments rather than levelling the playing field.[148] Nonetheless, dumping activities have been proven to be detrimental to the country's domestic market,[149] similar to the Nigerian situation discussed in Chapter 3. As such, there is a need for Anti-dumping measures to be utilised in mitigating those adverse effects.

Moreover, there have been great scholarly contribution, such as the with the development of South Africa's Anti-dumping practice came scholarly publications and contributions of the Trade Law Centre (TRALAC) publications towards the development of South African Anti-dumping system. Also, the country has benefitted from WTO workshops that have been helpful with technical assistance and capacity building.[150] All these have helped South Africa develop expertise in the utilization of Anti-dumping measures. Therefore, the country's Anti-dumping practice is useful as a model standard for Anti-dumping infrastructure in Africa in the face of full implementation of the AfCFTA Agreement. In accordance with this, the country's legislative and institutional framework will be briefly analysed to reveal how the measure is being used to protect South African industries.

4.4.2 Legislative and Institutional Framework

4.4.2.1 Laws and Regulations

The International Trade Administration of 2002 ("ITA Act) and the Anti-dumping Regulation of 2003 ("ADR 2003") are the major regulations currently governing Anti-dumping practice

[148] Barral et al, *supra* note 6; William Watson, "Anti-dumping Fowls Out: U.S. – South Africa Chicken Dispute Highlights the Need for Global Reform", *CATO Institute* (19 October 2015), online: < https://www.cato.org/free-trade-bulletin/antidumping-fowls-out-us-south-africa-chicken-dispute-highlights-need-global> (accessed 20 June 2024); P K M Tharakan, "Political Economy and Contingent Protection", (1995) 105:433 Eco J 1550; W L Hansen, "International Trade Commission and the politics of protectionism", (1990) 84:2 American Political Sci Rev.

[149] See generally Dari, *supra* note 1 at Chapter 3; Mwanyisa, *supra* note 1 at Chapter 3; Brink (2004), *supra* note 130; WTO, Case Study 38, *supra* note 1; and Ikeagwuchi, *supra* note 8.

[150] See generally Barral et al, *supra* note 6; Brink (2004), *supra* note 130; Brink (2013), *supra* note 147; S Khanderia, "The Determination of Injury in South African Anti-dumping Investigations: Recent Approaches", (2016) 49:2 Comparative & Intl L J Southern Afr; *https://www.tralac.org/about.html* (accessed 20 June 2024); Doha WTO Ministerial adopted 14 November 2001: Ministerial Declaration para 3, online: <www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#cooperation > (accessed 19 June 2024).

in South Africa.[151] These laws are also applicable to the Anti-dumping system at the level of the SACU. In drafting the ITA Act, the country used the WTO Anti-dumping Agreement as a model whilst relying on the dumping regime in the EU, US, Canada, New Zealand and Australia for lessons.[152] Hence, the consistency of the ITA Act with the rule of the multilateral trade regime. Importantly, the ITA Act established the ITAC – the main Anti-dumping investigation authority in South Africa and for the SACU Member States – and stipulates its functions and procedure.[153] Also, the provisions of the ADR 2003 aid the ITAC in carrying out its tasks efficiently. Thus, the ITA Act and the ADR 2003 both help the country maintain general compliance with the WTO Anti-dumping rules, and best practices on trade remedies. While the ITAC provides for basic principles on the determination of dumping, injury and causal link ('normal value', 'export price', 'margin of dumping', and 'material injury' amongst others) as well as give greater transparency to the ITAC's Anti-dumping investigation procedure,[154] the ADR 2003 set out the governing principles for the system's administrative procedure.

Asides the ITA Act and the ADR 2003, the provision of the South African Constitution also affects the Anti-dumping practices and transparency in the country.[155] The Customs and Excise Act, 1964 also provides for the imposition of Anti-dumping duties on dumped imports. In addition, the Promotion of Access to Information Act, No. 2 of 2000 ("PAIA") is an important piece of legislation that has an impact on the investigation procedure for dumping. It regulates basic principles of access to information held by the investigatory authority or interested parties in Anti-dumping case.[156] Lastly, there is the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"), which provides for fair administrative action by the administrative body of the state. The legislation is of great importance as it prevents abuse of the Anti-dumping

[151] See *Association of Meat Importers v ITAC* (769, 770, 771/12) [2013] ZASCA 108. See also WTO, Case Study 38, *supra* note 1; and Barral et al, *supra* note 6 at 51; G Brink, "One Hundred Years of Anti-dumping in South Africa", (2015) 49 J World Trade 325 [Brink (2015)].
[152] WTO Case Study 38, *supra* note 1.
[153] International Trade Administration Commission, "An Overview of ITAC", online: <www.itac.org.za/pages/about-itac/an-overview-of > (accessed 20 June 2024) [ITAC Overview]; L Ndlovu, "South Africa and the World Trade Organization Anti-Dumping Agreement Nineteen Years into Democracy", (2013) 28:2 Southern Afri Public L 287.
[154] See Sections, 1, 16, 32-37 of the ITA Act.
[155] The Constitution of the Republic of South Africa, Act 108 of 1996, Sections 2, 32 & 33.
[156] Preamble of Promotion of Access to Information Act, No. 2 of 2000 (PAIA). See also C Mass, "Section 4 of the AJA and Procedural Fairness in Administrative Action Affecting the Public: A Comparative Perspective" in Lange C and Wessels J, eds, *The Right to Know – South Africa's Promotion of Administrative Justice and Access to Information Acts.* (2004) 63.

investigation process.[157] In essence, these other relevant provisions play a significant role in the overall administration of Anti-dumping measures and as such, the ITAC must take them into account when conducting an investigation.

Moreover, it is important to note that even though the WTO rule on Anti-dumping are yet to be domesticated as part of the South African municipal law, its Constitution requires the courts and all governmental bodies to interpret all laws or legislations in manners that are consistent with the international commitment or obligation of the country.[158] That is, the provision of the South African Constitution requires that an interpretation must honour the international obligations of the country, including that of the Anti-dumping measures.

4.4.2.2 Institutional Authorities

As previously discussed, the ITAC is the main institutional body responsible for administering the South African Anti-dumping system. The ITA Act created the Commission as an independent agency subject only to the Constitution and other policy statement, directives or notices issued by the Ministry of Trade and Industry.[159] Besides, the requirement that the ITAC performs its duties with impartiality makes it possible for the Commission to discharge its functions efficiently and effectively.[160] While the ITA Act established the Commission, the ADR 2003 elaborated the function of the ITAC. In this regard, the ITAC is assisted by administrative staff and teams of investigators organised into different divisions, from which one is responsible for trade remedies, particularly Anti-dumping investigations.[161] While the investigating teams conduct an investigation of dumping complaints and submits report of their findings to the ITAC, the Commission itself as a body has the statutory obligation to make a decision on the reports at its periodic meetings.[162] Also, the South African Constitution binds the operations and directives of the Commission contained in the ITA Acts.[163]

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[157] See commentary of section 3 of PAJA in C Hoexter, *Administrative Law in South Africa,* (2007) 390-397; I Currie et al, *The Promotion of Administrative Justice Act Bench Book* (2001) 133-149.
[158] The Constitution of the Republic of South Africa, Act 108 of 1996, Sections 233. See also L Smith, "The Relationship Between The Access of Individuals to WTO Law and The Socio-Economic Rights in the South African Constitution", (2007) 40:3 Comparative & Intl L J Southern Afri 350-394.
[159] ITA Act, Section 7. See O S Sibande, "South African Anti-dumping Law and Practice: A Juridical and Comparative Analysis of Procedural and Substantive Issues", (2011), online: <https://ssrn.com/abstract=2140084 > (accessed 19 June 2024) [Sibande (2011)].
[160] See ITA Act, Sections 2 & 7. See Fiona Tregenna & Marko Kwaramba, "A Review of the International Trade Administration Commission's Tariff Investigation Role and Capacity", (2014) 7 J Eco & Financial Sci 641-660.
[161] Barral et al, *supra* note 6 at 57.
[162] *Ibid*, 58.
[163] ITA Act, Section 7 (2) (a) (i).

The jurisdiction of the ITAC does not only cover South Africa, but extends to the regional block of SACU.[164] Within this context, the market concerns of the ITAC are primarily that of the SACU market. However, the dominance of the South Africa industry in this market makes the Anti-dumping investigation, in practice, to be focused on the South African market and producers seeking to mitigate the adverse effect of dumped imports.[165] Although the ITAC jurisdiction operates at the level of SACU, its concluded investigation is reported by the South African government to the WTO and not the SACU.

Lastly, while the ITAC is charged with handling the investigation aspect of the South African Anti-dumping system, it is the Ministry of Trade and Industry that imposes Anti-dumping measures based on the recommendation of the Commission.[166] The ITAC makes its recommendation alongside insight from the South African Revenue Services (SARS), who advised on the appropriate provisional measures after preliminary findings or definitive measures after the final finding.[167]

4.4.3 Dumping and Anti-Dumping Methodology

4.4.3.1 Substantive Issues

The South African Anti-dumping legislations provide for concepts such as 'normal value', 'export price', and 'margin of dumping' amongst others, which are essential to the calculation of substantial elements (i.e. dumping, injury, and causality) of Anti-dumping duties. The provisions of these concepts follow the calculation standard envisaged in the WTO rules on Anti-dumping. Hence, the ITAC is required to ensure the presence of these crucial elements in its investigation procedures concerning dumped imports. The substantial element would be highlighted thus:

A. Determination of Dumping

As previously discussed, this is the first element upon which the ITAC conducts its examination after initiation of the Anti-dumping investigation. The approaches deployed in the determination of dumping is similar to the procedure intended in the WTO Anti-dumping rules.

[164] ITAC Overview, *supra* note 153.
[165] WTO's Case Study 38, *supra* note 1; and Barral et al, *supra* note 6 at 59.
[166] See ADR 2003, section 47.
[167] See ITA Act, Section 30; and ADR 2003, section 33 & 39.

Therefore, the ITAC established dumping activities by first calculating the normal values[168] – which is mostly based on the comparable price of 'like products' between the exported products and those sold in the exporting country.[169] Besides, Article 32(4) of the ITA Act makes an essential distinction between free market economies and non-market economy (the communist or socialist countries, such as China and Russia) for establishing 'normal values'. Hence, aside from the comparable price test, the South African Anti-dumping system recognised alternative methods that the ITAC can utilise to calculate 'normal value' in cases such as the non-market economies.[170] The alternative methods are known, namely, as the constructed cost approach (where there are insufficient domestic sales in the ordinary course of trade); or the adoption of the price found in an appropriate third country as the 'normal values' (which becomes applicable in the import is from a non-market economy).[171] For instance, the ITAC has applied the normal value of a third country in the investigation against imports from China.[172] Reasonable adjustments, similar to those envisaged in Article 2 of the Anti-dumping Agreement, are also required to be made by the ITAC to the price comparability for effective calculation of normal value.[173]

Also, it is necessary for the ITAC to determine the export price. Also, the ITAC is required to determine the export price, or where applicable, the constructed export price – based on the ex-factory price of the exporter – in order to determine whether or not dumped imports exist.[174] This model is similar to the approach envisaged in the WTO Anti-dumping rules, previously discussed in Chapter 2 of this thesis.

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[168] See ITA Act, section 1; and ADR 2003, Section 32(2)(b)(i). These provisions defined 'normal value' in similar manner under Article 2.1 of the Anti-dumping Agreement.

[169] ADR 2003, section 3 defines like product as a "product which is identical …… to the products under consideration, or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". See Board Report 346 – Investigation into Alleged Dumping of Unmodified Starches, exported from or originating in Belgium, Denmark, Germany, Netherland, Portugal, Switzerland and Thailand (04/07/1994), where the ITAC applied the similar characteristic requirement, in accordance with Article 2.6 of the Anti-dumping Agreement, to establish normal values.

[170] ITA Act, Section 32(4); and ADR 2003, section 8.14-8.16.

[171] Under this alternative method, the Commission can determine the normal value either through, namely: (a) the cost of the production in the country of origin destined for domestic consumption plus the reasonable cost such as the administrative cost, selling cost, profit etcetera; or (b) the highted comparable price of similar products exported to a third country, as long as the price is representative.

[172] Report No. 251 Sunset Review of the Anti-dumping Duties on Picks, Shovels, Rakes and Forks originating or imported from the People's Republic of China: Final determinations.

[173] See ITA Act, section 32(3).

[174] See ITA Act, Sections 32(2)(a), 32(5) & 32(6)(b); and ADR 2003, section10.2(a) &(b). See also ITAC, "Report No 476: Investigation into Alleged Dumping of Disodium Carbonate (Soda Ash) Originating in or Imported from the United States of America (USA): Final Determination", (2014), online: < https://www.itac.org.za/upload/document_files/20140923010155_Report-no-476.pdf> (accessed 20 June 2024).

Upon successful determination of both 'normal value' and 'export', the Commission is then required to compare and determine the different between them in order to establish the 'margin of dumping'.[175] The 'margin of dumping' is fundamental to the imposition of Anti-dumping duties in South Africa. As such, the ADR 2003 set out two methods for calculating 'margin of dumping', namely: (a) a weighted -average- to -weighted- average basis; and (b) a weighted -average- to -weighted- average basis.[176] Also, the 'Fair Comparison' rule is the principle that must guide the methodology for determining the difference between the 'normal value' and 'export price', [177] as noted in Chapter 2.

B. Determination of Injury

In the determination of injury to the domestic industry, the Commission is mandated to adhere to the principle stipulated in Article 6 of GATT 1994 and Article 3 of the Anti-dumping Agreement – that is, there must be sufficient evidence of 'material injury' or 'threat of material injury' from the dumped imports to the domestic industry.[178] Also, there is the determination of 'material retardation' to the establishment of an industry, where applicable.[179] Without these principles, the ITAC cannot initiate an Anti-dumping investigation. Besides, the Anti-dumping investigation must be supported by at least 25% of the SACU producers of the volume of domestic production, or at least 50% of those producers of the volume of domestic production who express an opinion on the application.[180] Also, Section 13-14 of the ADR 2003 provides for factors that the Commission must considers in their determination of 'actual material injury' or 'threat of material injury' to the SACU industry,[181] similar to those under the WTO Anti-dumping rules.

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[175] ITA Act, section 1.
[176] See ADR 2003, section 12(2)(a) & (b). See also the analysis in Chapter 2 of this thesis; and N Theron, "Anti-dumping procedures: Lessons for Developing Countries with Special Emphasis on the South African Experience" in B Debroy & D Chakraborty, eds, *Anti-dumping: global abuse of a trade policy instrument* (2007) 74.
[177] See generally ITA Act, section 32(3); ADR 2003, section 11; and ADA, Article 2. See also *South Africa – Anti-Dumping Duties On Frozen Meat Of Fowls From Brazil Request* For Consultations By Brazil WT/DS439/1 G/L/990 G/ADP/D92/1.
[178] See ADR 2003, Article 1 & 24. See Chapter 2 of this thesis for detailed explanation on the determination of material injury.
[179] See ADA 2003, Section 15. See also Government Gazette Notice: 2844 of 2004 - Termination of Investigation Into The Alleged Dumping of forged or Stamped, But Not Further Worked, Grinding Balls and Similar Articles For Mills Originating In Or Imported from the People's Republic Of China (PRC).
[180] ADR 2003, Section 7(3).
[181] See G Brink, "South Africa" in Junji Nakagawa, ed, *Anti-dumping Laws and Practices of the New User*, (London: Cameron May Ltd, 2006) 221 [Brink (2006)]; ITAC, "Report No 400: Investigation into the alleged dumping of screw studding (rods threaded throughout) of stainless steel and steel (commonly known as threaded rods) originating in or imported from the People's Republic of China (PRC): Preliminary Determination Report",

C. Causality

The establishment of a special connection between the dumped import and the injury suffered is the last substantive step the ITAC must take in the Anti-dumping investigation. It is required that the Commission establish the causal link between both before recommending Anti-dumping measures. To achieve this, Section 16 of the ADR 2003 provides a non-exhaustive list of factors the ITAC must consider during an investigation and establishment of the special connection.[182] The regulation also recognised non-attributive factors,[183] similar to those contained in the ADA.[184]

D. Public Interest

Currently, the South African system has no provision on public interest assessment. Also, the country is yet to consider the broader economic impact of Anti-dumping measures on consumer and downstream industries since it commenced imposition of the measure. This lack of systemic analysis of public interest in the ITAC's Anti-dumping investigation exists in spite of the country being a prolific user of the measure amongst the WTO Member States. Hence, local scholars such as OS Sibanda[185] and G Brink[186] has been vocal in their criticism of the country's Anti-dumping practice.

Nonetheless, it has been argued that the public interest inquiry can still be inferred from some of the report and conducts of the ITAC.[187] The inference is similar to those of the Indian Anti-dumping practice, where the Ministry of Finance considers the impact of Anti-dumping measures on the interests of the consumer to determine whether or not to withdraw the existing measures.

(2015), online: < https://www.itac.org.za/upload/document_files/20150225032458_Report-no-400.pdf> (accessed 20 June 2024).

[182] These lists of relevant factors according to Section 16 of ADR 2003 are "(a) the change in the volume of dumped imports, whether absolute or relative to the production or consumption in the SACU market; (b) the price undercutting experienced by the SACU industry vis-a-vis the imported products; (c) the market share of the dumped imports; (d) the magnitude of the margin of dumping; and (e) the price of un dumped imports available in the market".

[183] ADR 2003, section 16(5). See generally Brink (2015), *supra* note 146.

[184] See Anti-Dumping Agreement, Article 2.4.3 & 2.6. See also Chapter 2 of this thesis.

[185] See generally Sibanda (2015), *supra* note 35.

[186] See generally Brink (2009), *supra* note 186.

[187] See generally Brink (2015), *supra* note 151; Dari, *supra* note 1 at 99-100.

4.4.3.2 **Procedural Elements**

As previously noted, the ITAC is the administrative agency responsible for the initiation of anti-dumping investigation, and the decision-making on the imposition of Anti-dumping measures. The Commission carry out these administrative tasks in accordance with the provisions and mandate of its legislation.[188] Moreover, the Commission is required to take into account the provisions of other relevant laws such as the Constitution, the PAJA and the PAIA during its investigation process.

A. Pre-Initiation, Initiation and Preliminary Findings

The commencement of Anti-dumping investigation must first be initiated through a written application by the SACU or on behalf of the SACU. Also, the ITAC may by its own initiative initiate the process - in the absence of written application - where there are sufficient evidence of dumped import, injury and causation.[189] The application submitted must be in the required format and must be supported by all relevant evidences concerning the substantive elements of dumped import.[190] Upon submission, the ITAC must check the accuracy and adequacy of the information submitted to determine whether or not it has enough merits to warrant initiation of investigation.[191] If otherwise, the ITAC must notify the concerned parties of the reason for its decision not to initiate an investigation. Where a positive decision is made to initiate an investigation, the Commission is required to notify the exporting country by means of the Official Gazette of its decision to commence Anti-dumping investigation prior to the initiation.[192]

Article 28 of the ADR 2003 provides that the initiation of investigation must be formally commenced by a notice published in the Government Gazette, so that the interested parties may have access to the non-confidential version of the application and the questionnaires to be filled by them. The provision also stipulates the prescribed format for the notice and its content. The notification is to avail the interested parties time to respond to the allegations raised in the application.[193] In turn, the response of the concerned parties must be received by the ITAC

[188] See generally Part B of the ITA Act.
[189] See ADR 2003, Section 21.
[190] *Ibid*, section 23. See generally G Brink, "10 Major Problem with the Anti-dumping Instrument in South Africa", (2005) 39:1 J World Trade.
[191] ADR 2003, sections 25-26.
[192] *Ibid*, 27.
[193] *Ibid*, 29. See J Czako et al, *A Handbook on Anti-Dumping Investigations,* (2003) 339.

within thirty (30) days of receipt of the questionnaire, or forty (40) days from the date of initiation in the Government Gazette.[194]

During this period, the Commission must make preliminary findings based on the data received from all interested parties. Where the preliminary reports find that dumping has taken place and it has caused injury, the Commission may recommend the imposition of 'provisional measures' to protect the injury from further consequences of dumping.[195] The provisional measure can only be imposed within sixty (60) days after initiating an investigation, whilst its validity can be extended to nine (9) months, upon request.[196] Also, the preliminary report must be accessible to all parties for their comments within seven (7) days of the preliminary report being made.[197] In place of provisional measure, price undertaking may be entered into with an exporter, and depending on its satisfactory level the investigation may be suspended or terminated.[198]

B. Final Determination and Appeal

Upon successful presentation and consideration of the essential factors, the ITAC must prepare its final findings on the Anti-dumping investigation. The report must be submitted to the Minister of Trade and Industry. Where accepted, the report must be publicised in the Government Gazette. In turn, the Ministry may impose Anti-dumping duties to help boost the 'manufacturing output, and recapture the domestic market' - which has been proven to be effective.[199] The final determination and the imposition of the definite Anti-dumping measure must be completed within the time limits stipulated in the regulations. In particular, the ITAC must issue its final report within 365 days, and the measure can remain in place for a period of five years, unless reviewed otherwise.[200] In recommending the imposition of Anti-dumping duties, the ITAC may apply the lesser duty rule – i.e. an Anti-dumping duty imposed at an amount lesser than the margin of dumping, which is deemed sufficient to redress the injury caused by dumped import.[201] In South Africa, the lesser duty obligation is optional compare to

[194] ADR 2003, section 29.
[195] *Ibid*, section 33.
[196] *Ibid*, sections 35-36.
[197] *Ibid*, section 34.
[198] *Ibid*, section 39.
[199] ITAC Annual Report 2015-2016 26.
[200] ADR 2003, Section 38. See also WTO Anti-dumping Agreement, Article 11.3.
[201] *Ibid*, section 1.

the standard envisaged in Article 9 of the Anti-dumping Agreement[202] - which makes the application of the rule mandatory for investigating authorities.

The final decision of the ITAC concerning Anti-dumping measures is appealable directly to the courts of records in South Africa, that is the High Court up to the Supreme Court.[203] Also, a decision taken under the ITA Act is capable of being reviewed under the PAJA.[204]

C. Review

The ADR 2003 recognised the need for periodic review of existing Anti-dumping measures. Particularly, when the measures no longer serve their purpose in the South African domestic industry. As such, sections 41 – 54 of the regulation lay down the rule for conducting a review of existing Anti-dumping measures. The provision stipulates different governing rules for interim, sunset, circumvention, new shipper, and administrative judicial review of existing Anti-dumping measures in the country.

4.5 Anti-Dumping Practice in Canada

4.5.1 Overview, Development and Trend

As a Western Hemisphere country, Canada has the oldest Anti-dumping regime in the world. It is also one of the prominent active users of the measure, whose trade remedy system dates back to 1904.[205] In particular, it was the first country to enact national Anti-dumping legislation in the history of trade remedy in the multilateral trading system.[206] Moreover, the public interest test was introduced into the Canadian trade defense system as far back as 1931, when its government effected inquiries into the impact which an increase or reduction of existing duties on commodities may have on the productivity of local industry and protection of the consumers against exploitation.[207] Hence, the early recognition for balance between the interests of the

[202] Dari, *supra* note 1 at 106-107
[203] See ITA Act, sections 46-47.
[204] See Promotion of Administrative Justice Act, Act 3 of 2000.
[205] An Act to Amend the Customs Tariff, 1897, S.C. 1904, c. 11, s. 19, which amendment Custom Tariff Act of 1897, and introduced 'special duty on under-valued goods'. The laws on 'special duty on under-valued goods' were amendment in 1907 and 1921, respectively. See Dan Ciuriak, "Trade Defence Practice in Canada: Canada Country Report for the Evaluation of the European Union's Trade Defence Instruments", (2012) CC Working Paper [Ciuriak (2012)].
[206] Magdalene Silberberger et al, "The Aftermath of Anti-Dumping: Are Temporary Trade Barriers Really Temporary", (2022) 33 Open Eco Rev 677-704; H Jackson et al, *Legal Problems of International Economic Relations*, (St. Paul: West Group, 2004) 694; De Baere et al, *supra* note 127 at 1.
[207] Ciuriak (2012), *supra* note 205 at 3-4.

domestic industry and consumers contributed to the success of the Canadian Anti-dumping system, as well as the system being used as a model standard for other traditional users such as the European Union, the USA, and South Africa. Also, its practice was recognised in the development of the trade remedy system in the multilateral trade system.[208]

The country views the use of Anti-dumping measures as a legitimate policy tool that must be utilised as a safety net against unhealthy competition. As such, the country periodically reviews its legislations to ensure the continued relevance and effectiveness of its Anti-dumping practice.[209] It also explains the country's contribution to the negotiation of trade remedies in the multilateral trade system,[210] as well as its current role in the negotiations of WTO reforms concerning trade remedies policy in contemporary time.[211]

The modern Anti-dumping system and practice in Canada can be traced to the enactment of the Special Import Measures Act of 1984 (SIMA).[212] The law repealed the then existing Anti-dumping Act as well as reformed the Canadian trade defense system to harmonise its practice with the rules of the multilateral trade system.[213] It also formerly incorporated the public interest inquiry into the Canadian trade defense system. Notwithstanding, the legislation has since undergone a series of reviews and amendments that seek to strike an appropriate balance between the promotion of international convergence in practices and the maintenance of the effectiveness of the system in addressing injurious trade practices.[214] Subsequently, the Canadian International Trade Tribunal (CITT) was created in 1988, due to the merger of the Canadian Import Tribunal, the Tariff Board, and the Textile and Clothing Board.[215] The CITT also replaced the Procurement Review Board in 1994, and in turn, was entrusted with additional mandate of overseeing review of complaints on the conduct of federal government

[208] See Jackson et al, *supra* note 206; De Baere et al, *supra* note 127 at Chapter 1. See also Chapter 2 of this thesis.
[209] See generally Eric Freedman, "Canadian Anti-dumping Provisions: Has the Use of the Public Interest Clause Helped Curb Protectionism?", (2016) 26 Asper Rev 27-42; Ernest & Young, "Canada Enhances Trade Remedy System by Amending the Special Import Measures Regulations", *EY* (17 September 2019), online: <https://globaltaxnews.ey.com/news/2019-6142-canada-enhances-trade-remedy-system-by-amending-the-special-import-measures-regulations > (accessed 20 June 2024); P M Saroli & G Tereposky, "Changes to Canada's Anti-dumping and Countervailing Duty Laws for the New Millenium", (2000) 79 Canadian Bar Rev 352-368.
[210] See Chapter 2 of this thesis on the history of Anti-dumping in the multilateral trading system.
[211] Jonathan O'Hara, Renee Dopplick & Lisa Page, "Trends in Trade Remedies around the Globe" (2018) 47:1 Int'l L News 3
[212] Special Import Measures Act, RSC, c S-15
[213] Ciuriak (2012), *supra* note 200 at 3.
[214] *Ibid*, 4; Freedman, *supra* note 209; Ernest & Young, *supra* note 209.
[215] It was established under the *Canadian International Trade Tribunal Act*, RSC, 1985, c 47 (4th Su).

procurements.[216] Following its establishment, the CITT alongside the Canada Border Services Agency (CBSA) (the CBSA commence operation in 2003 after it replaced the Canada Custom and Revenue Agency, which was created on 1999) jointly oversee the administration of the Anti-dumping measures in Canada.[217] Thus, the Canadian Anti-dumping regime currently runs a 'two-body' Anti-dumping determination system similar to the US Anti-dumping practice.

The years immediately following the reforms saw the country receive about 170 dumping complaints between 1992 to 1995, of which 31 Anti-dumping investigations were initiated with 30 of it awarded positive preliminary determinations by the Revenue Agency. Four of those 30 cases were resolved by price undertaking agreement, whilst 26 cases proceeded to the injury stage. Of the 26 cases, only 18 received positive final determinations from the CITT. Hence, Canada had about 90 Anti-dumping measures in force by the end of 1995, which ranked it 3rd among the WTO Members - after the USA (with 305 measures) and the EU (with 178).[218] Since 1995, the country has continued to record increased success from its anti-dumping practice with an average success rate of 70% across the years of its WTO membership.[219] For instance, between 1995 and 2023, Canada initiated 280 Anti-dumping investigations,[220] whilst only 190 cases resulted in definitive duties[221] - i.e. approximately 69% overall success rate compared to other prolific users such as the US and Brazil. This is despite the decline in the country's trade remedy cases initiated under the SIMA between 2005-2011 as well as between 2021-2023.[222] Thus, although Canada has historically been among the predominant Anti-dumping users, its share of Anti-dumping measures has since reduced drastically compared to other prolific ones. Also, the country is currently ranked 8th among the WTO Member by the number of Anti-dumping measures it has in force.

Generally, the Canadian Anti-dumping system has been classified as WTO-compliant. It has also been analysed as fair on other countries' producers, but it is not without its flaws. For

[216] See also Canadian International Trade Tribunal (CITT), "Report: Canadian International Trade Tribunal – 25 years of Excellence", online: <www.citt-tcce.gc.ca/en/publications/canadian-international-trade-tribunal-25-years-excellence#toc-id-40> (accessed 25 August 2024) [CITT Report].
[217] Ciuriak (2012), *supra* note 205 at 4; Nisha Malhotra & Horatius A Rus, "The Effectiveness of the Canadian Antidumping Regime: Is Trade Restricted?" (2009) 35:2 Canadian Public Polcy 187 at 192-195; House of Commons Canada, "Anti-Dumping and Countervailing Duty Actions", online: < www.ourcommons.ca/Archives/Committee/352/fine/reports/06_1996-12/chap1-e.html> (accessed 22 June 2024) [House of Common Overview on Anti-dumping]
[218] House of Common Overview on Anti-dumping, *supra* note 216.
[219] O'Hara et al, *supra* note 211 at 6.
[220] WTO, *Anti-Dumping Initiations by Reporting Member 01/01/1995-31/12/2023, supra* note 4.
[221] WTO, "Anti-Dumping Measures by Reporting Member 01/01/1995 – 31/12/2023", *supra* note 4.
[222] WTO, *Anti-Dumping Initiations by Reporting Member 01/01/1995-31/12/2023, supra* note 4.

instance, there has been situations where the country fails to consider the status of exporting countries that are 'developing countries' throughout its investigation process, particularly given the fact that majority of its Anti-dumping cases target developing countries.[223] Nevertheless, the Canadian administrative authorities have been commended for their competence, effectiveness and accessibility.[224] Besides, its system has relatively been impactful towards mitigating the adverse of dumping on its domestic industry as well as increase the financial performance and employment opportunities in its domestic industry.[225] In summary, the Canadian investigating authorities have continued to master the art of striking a fine balance between international practices and the interest of its local industry by promoting the predictability of its market access.

4.5.2 Legislative and Institutional Framework

4.5.2.1 Laws and Regulations

The Canadian Anti-dumping regime is currently governed by the Special Import Measures Act ('SIMA')[226] and the Special Import Measures Regulations ('SIMR').[227] These Anti-dumping laws embody the country's Anti-dumping and countervailing legal provisions against injurious foreign imports and subsidies. These laws were designed to protect the Canadian domestic industry from the injurious impact of unfair trade practices. In addition, they stipulate the principles governing the essential concepts for the determination of injurious dumping such as 'normal value', 'like products', 'export price', 'material injury', and 'margin of dumping' amongst others. It also delineates the decision-making powers of its administrative agencies in respect of Anti-dumping investigations, preliminary and final findings.[228] Moreover, the legislations make provisions for the implementation of the country's rights and obligations concerning Anti-dumping measures under the multilateral and regional agreements – i.e. the

[223] The neglect contradicts Article 15 of the WTO Anti-dumping Agreement. See Piyush Chandra and Cheryl Long, "Anti-dumping Duties and their Impact on Exporters: Firm Level Evidence from China" (2013), 51 World Development at 179; and Freedman, *supra* note 209 at 32.
[224] See generally Ciuriak (2012), *supra* note 205; House of Common Overview on Anti-dumping, *supra* note 216; O'Hara et al, *supra* note 211.
[225] *Ibid*; Judy Sagro, "Anti-dumping and Countervailing Duties Being Applied on Certain Canadian Softwood Lumber Products: report of the Standing Committee on International Trade" (2023) House of Commons 44th Parliament, Ist Session, online: < https://www.ourcommons.ca/Content/Committee/441/CIIT/Reports/RP12714556/ciitrp12/ciitrp12-e.pdf> (accessed 22 June 2024); Malhotra & Rus, *supra* note 217; Ciuriak (2004), *supra* note 2.
[226] Special Import Measures Act, § **45.1,** R.S.C., c. S-15, 1985 (Can.) (SIMA).
[227] Special Import Measures Regulations, § **41(a),** SOR/84-**927,** 1984 (Can.) (SIMR).
[228] Dan Ciuriak, "Canada", in Junji Nakagawa, ed, *Anti-dumping Laws and Practices of the New User*, (London: Cameron May Ltd, 2006) Chapter 5 [Ciuriak (2006)]; Malhotra & Rus, *supra* note 217.

WTO rules on Anti-dumping and the United States-Mexico-Canada Agreement (USMCA) (formerly North American Free Trade Agreement).[229] As such, both the SIMA and SIMR help harmonised the country's Anti-dumping system with its multilateral and regional obligation.

The Canadian Anti-dumping provisions have since undergone a number of modifications. For instance, the first amendment occurred in 1989, when couple of procedural reforms were introduced into the SIMA in relation to the USMCA.[230] It was also modified in 2000 based on the recommendation of the Sub-Committee on SIMA Review, which made changes to the investigation process on injury to the domestic industry, the collection of confidential information and the involvement of expert witnesses as well as stakeholder representation.[231] The most recent modification to the Anti-dumping legislation in Canada can be attributed to the 2019 and 2022 amendments of the SIMR, respectively. By the public Gazette issued in 2019, the SIMR was amended to empower the CBSA with more methodology for calculating the margin of dumping during an Anti-dumping investigation. It also recognizes the right of the Canadian producers to request Anti-dumping measures be imposed after successful investigation and determination, as well as clarified concepts related to the determination of the cost of products.[232] Also, the public Gazette issued in June 2022, introduced changes to the determination of dumping for the purpose of enhancing the Canadian trade remedy system.[233]

Moreover, there are other relevant regulations that impacts the investigation procedure and transparency of the Canadian Anti-dumping system. For instance, the Canadian International Trade Tribunal Regulations (CITTR)[234] is a piece of legislation that elaborates on the application of the Anti-dumping system to the USMCA. It also stipulates the function of the CITT under the system. Also, there is the CBSA Statement of Administrative Practices for the SIMA;[235] the CITT Rules (which set out the official procedural rules for the body); the CBSA Guidelines for Preparing Dumping and Subsidizing complaint ("the CBSA Guidelines");[236]

[229] *Ibid*.
[230] Ciuriak (2012), *supra* note 205 at 4.
[231] *Ibid*.
[232] See *Regulations amending the SIMR* SOR/2019-314; Ernest & Young, *supra* note 209.
[233] Regulations amending the SIMR, SOR/2022-160, online: < https://www.gazette.gc.ca/rp-pr/p2/2022/2022-07-06/html/sor-dors160-eng.html> (accessed 22 June 2024).
[234] Canadian International Trade Tribunal Regulation, SOR/89-35 (CITT Regulations).
[235] "Statement of Administrative Practices for Special Import Measures Act, online: < https://www.cbsa-asfc.gc.ca/sima-lmsi/ap-pa-eng.html> (accessed 23 June 2024).
[236] "Guidelines for Preparing a Dumping or Subsidizing Complaint", online: < https://www.cbsa-asfc.gc.ca/sima-lmsi/complaint-plainte-eng.html> (accessed 23 June 2024).

and the CITT Guideline for Public Interest Inquiries[237] amongst others. All these rules, regulations, guidelines and statements are supplementary and complimentary of the Canadian legislative framework on Anti-dumping.

4.5.2.2 Institutional Authorities

As previously noted, the Canadian Anti-dumping regime is administered by two institutional bodies similar to the US Anti-dumping practice. The two institutions are Canadian government bodies, namely, the CBSA[238] and the CITT, [239] and they are independent of each other. They undertake separate and complimentary tasks in the administration of the SIMA and SIMR. Also, the institutions are guided by strict timelines as regards their responsibilities, which makes their procedures transparent, expeditious, and efficient. While the CBSA oversees the investigation on the determination of dumping, the CITT has exclusive jurisdiction over the determination of injury to the domestic industry.[240] Additionally, the president of the CBSA makes the preliminary and final dumping findings, whilst the CITT oversees it preliminary and final injury findings. Besides, the CBSA handles the enforcement of the Anti-dumping measures and the collection the duties.[241] In this regard, both the SIMA and SIMR set out the conducts of the agencies during an Anti-dumping investigation.

Once the CBSA commences its investigation on dumping (after its preliminary determination that the document and evidence submitted are sufficient), the CITT must begin an injury inquiry immediately upon receipt of the preliminary dumping findings. While the CITT has within sixty (60) days to make its preliminary injury findings from the dates of receiving a notice of preliminary determination of dumping from CBSA, the CBSA has within ninety days (or up to one-hundred-and-thirty-five (135) days in complex situations) to complete its investigation and make recommendations. Consequently, the CITT must make its final injury findings within thirty days from the date it issues its preliminary findings. An affirmative final finding of injury would prompt an automatic imposition of Anti-dumping duties on the

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[237] "Anti-dumping Injury Inquiries: Public Interest inquiries", online: < https://www.citt-tcce.gc.ca/en/anti-dumping-injury-inquiries/public-interest-inquiries> (accessed 23 June 2024)
[238] The CBSA is created by the Canada Border Services Agency Act, SC 2005, c 38.
[239] The CITT is established under the *Canadian International Trade Tribunal Act*, RSC, 1985, c 47 (4th Su) (CITT Act).
[240] Bennett Jones, "International Trade and Investment Practice: Canadian Anti-Dumping and Countervailing Duty Measures", online: < https://www.bennettjones.com/-/media/Files/BennettJones/Publications/Canadian-Anti-Dumping-Guide.pdf> (accessed 23 June 2024); Malhotra & Rus, *supra* note 217 at 192.
[241] Ciuriak (2006), *supra* note 228.

complained products.[242] Therefore, these administrative agencies cumulatively have a time limit of seven (7) months, from the date of initiation, within which they must complete the Anti-dumping process. However, there are few exceptional cases when the institutional bodies would require an extended period beyond the normal seven-month timeline.[243] Regardless, the Canadian Anti-dumping system is one of the meteoric systems in the world with reduced uncertainty.

4.5.3 Dumping and Anti-Dumping Methodology

4.5.3.1 Substantive Elements

A. Determination of Dumping

In Canada, the first step towards determining whether or not dumped import exists is to calculate the 'normal value' and 'export price' of the products exported into the country – this is similar to the approach in the WTO Anti-dumping Agreement, which has been discussed in detail in Chapter 2. The normal value of the exported product is generally considered to be the selling price of the like products in the country of origin or the exporting country transacted under ordinary market conditions, which takes into accounts factors such as arm's length sales, proximity etcetera.[244] As such, it is expected that the determination of normal value must include these factors: (a) sales if goods similar to those exported (like products); (b)sales to purchasers that are not associated with the exporter at the time of sale and who are substantially at the same trade level of the importer; (c) sales in the ordinary course of trade in the country of export; (d) during specified period of 60-days; and (e) at the same location where the products were shipped directly to Canada.[245] As regards the last factor, the CBSA must reflect the differences in shipment in terms and conditions by adjusting the price. As such, the SIMR lays down the terms and conditions that the CBSA must take into account.[246] Moreover, the SIMA provides for the different methods which the CBSA may utilise to calculate the normal value, which are – (i) domestic selling price of like products; (ii) the selling price of like products in third countries; (iii) the cost of exported goods plus a mark-up; or (iv) a ministerial

[242] *Ibid*; Malhotra & Rus, *supra* note 217 at 193-5.
[243] Ciuriak (2006), *supra* note 223.
[244] See SIMA, section 15.
[245] *Ibid*.
[246] See SIMR, Rule 3, 5, 6, 7, 9 & 10.

specification.[247] However, where the normal value cannot be calculated using the comparable price test under section 15, the SIMA also provides for alternative method for determining the normal value – i.e. the constructed normal value approach specified in Section 19 of the SIMA[248].

As regards the export price, Section 24 of the SIMA requires the CBSA to calculate it as the exporter's selling price or the price at which the importer purchased or agreed to purchase the products minus others costs such as charges, insurances and freight.[249] Where the exporter sells to a related importer, the CBSA can devise a reliability test to determine the export price.[250] Also, the CBSA can utilise the constructed export price calculation, where applicable, under the specification of the Minister of Public Safety for the determination of dumping.

Lastly, the CBSA must determine the margin of dumping by comparing the total normal value with the total export price of the foreign product. Where the 'normal value' is greater than the 'export price', the product being investigated would be considered dumped, whilst the value produced between the two concepts is the 'margin of dumping'.[251]

B. Determination of Injury

The determination of injury in Anti-dumping investigation is overseen by the CITT in accordance with the WTO rules. The test involved in the determination of injury are, namely, the "material injury", or "threat of material injury" or "material retardation of the establishment of domestic industry". Similar to the situation under the WTO rules, the SIMA does not define "material injury" or "materiality". As such, the CITT examines the facts of each case to determine whether the extent of harm caused to the local industry equates to material injury.[252] Also, the CITT uses the "reasonable indication" of injury to establish injury to the local

[247] See SIMA, section 16. See also the provisions of the SIMA for more explanation. See generally "Guidelines for Preparing a Dumping or Subsidizing Complaint", *supra* note 229; and Bennet Jone, *supra* note 235 at 12-14; *Polyiso Insulation Board from the United States* – CBSA, Statement of Reasons, Final Determination, File No. 4214-27, Case No. AD/1386, April 21, 2010; and *Certain Corrosion Resistant Steel Sheet Products Originating in or Exported From the United States of America*, CDA-94-1904- 03.
[248] Ciuriak (2012), *supra* note 205 at 18-25.
[249] *Ibid*, 25-26; and Bennet Jone, *supra* note 240 at 14-15.
[250] *Polyiso Insulation Board from the United State*s – CBSA, Statement of Reasons, Final Determination, File No. 4214-27, Case No. AD/1386, April 21, 2010, at 12.
[251] See SIMA, section 30.
[252] *Ibid*, 42-43; *Aluminum Extrusions from China* – CITT, Findings and Reasons, Inquiry No. NQ-2008-003, March 17 and April 1, 2009; *Noury Chemical Corporation and Minerals and Chemicals Ltd and Pennwalt of Canada Ltd. v the Anti-dumping Tribunal*, [1982] 4 CER. 53. See also Ciuriak (2012), *supra* note 205 at 39-54; Bennet Jone, *supra* note 240 at 18-20.

industry by taking into accounts factors such as 'price erosion', 'lost sales and market shares', 'reduced production and under-utilization of capacity', 'reduced employment', reduced investment', 'profitability', 'like goods', 'causality' amongst others on a case-by-case basis, as described in the SIMR.[253] Prior to considering these factors, the CITT must ensure it determines what constitutes domestic industry during the investigation, by ensuring that the written application is supported by not less than twenty-five-percent (25%) of the domestic producer, but must not exceed fifty-percent (50%).[254]

C. Causal Link

The last step which the CITT must take into account is establishing the causative link between the between the dumped import and the injury suffered by the domestic industry. It must be done after establishing that there exists 'material injury' or 'threat of material injury' to the local industry. While it is not necessary to establish an exclusive link between dumping and injury, the CITT must be able to show that the former was the cause of the injury.[255] Both the SIMA and SIMR set out detailed guidance on the factors that must bears on the determination of causal link, similar to the WTO rules.[256]

D. Public Interest

Canada is the first country amongst the WTO members to include public interest inquiries in the trade defense analysis since 1985. In particular, it based the inclusion of the public interest consideration on the initiative of the CITT or the request of an interested person that may be affected by the injury findings of the CITT.[257] Also, rule 40 of the SIMR provides for an inclusive list of factors that must be taken into account in public interest inquiry thus: (a) the availability of goods of the same description from non-dumped products; (b) the effect of Anti-dumping measures on the domestic market, consumers, competition and choice of goods at a competitive price; and (c) the effects of not imposing Anti-dumping duty on the dumped products. Although the SIMA provides for the reduction or elimination of Anti-dumping duties where public interest tests would protect the interest of producers or consumers, in practice the CITT only focuses on the protection of the domestic industry.[258] It is important to note that the

[253] See the relevant provisions in the SIMR.
[254] SIMA, section 31; and Ciuriak (2012), *supra* note 205 at 107-108. See Chapter 2 of this thesis.
[255] See SIMR, Rule 37. See also the Canadian International Trade Tribunal Regulation, SOR/89-35
[256] Ciuriak (2012), *supra* note 205 at 66-70 and Bennet Jone, *supra* note 240 at 20.
[257] SIMA, section 45.
[258] Bennet Jone, *supra* note 234 at 23; Chandra & Dasgupta, *supra* note 35 at 54-56.

CITT's determination of public interest inquiry in Anti-dumping analysis is subject to a final decision of the Ministry of Finance.

In conducting the public interest inquiries, Canada has applied both economic and non-economic factors – this is obvious from all of the Anti-dumping cases the CITT has address public interest request.[259] Importantly, the *Grain Corn* and *Iodinated Contrast Media* cases reflect the use of both economic and non-economic factors[260] – where the CITT used economic and public health balancing factors between the industries' and the consumers' interest.

4.5.3.2 Procedural Elements

A. Pre-Initiation, Initiation and Preliminary Findings

In Canada, Anti-dumping investigation is initiated by the President of the CBSA either based on his own initiatives or a written complaint – filed by an industry or on behalf of the industry. In the case of written complaint, its must be supported by relevant documents and evidences that are sufficient to warrant preliminary dumping findings. Also, the written complaint must follow the format and requirements set out in section 2 of the SIMA and rule 37 of the SIMR. Although there are specific elements set out in the WTO Anti-dumping Agreement that must be contained in the complaint, which are not listed in the SIMA or the SIMR (such as details of the calculations on normal value export price and margin of dumping), but have been clarified in the CBSA *Guidelines*.[261] Where the initiation is based on the President's initiative, the application must be supported by evidence gathered by him or on the advice of the CITT.[262] Upon satisfactory evaluation, the President of the CBSA must notify the CITT, the exporters, the importers, the government of the country of export and other relevant parties, through publicised Canada Gazette, of its intention to initiate an Anti-dumping investigation.

The CBSA's *statement of administrative practice* also stipulates the process for the investigation – it requires the CBSA to first publicised a copy of the filing and request all necessary information or documents from the concerned parties. In turn, it is mandatory for the concerned parties to respond to all request and file written submission. Within 30 days of

[259] SDCOM, *Procedural and Material Guidelines: Public Interest Analysis in Trade Remedies Investigations Guidelines in Brazil*, *supra* note 75 at 26-31.
[260] *Ibid*, 28.
[261] Ciuriak (2012), *supra* note 205 at 109-111.
[262] SIMA, section 31. *Oil Country Tubular Goods* – CITT, Findings and Reasons: Inquiry No. NQ-2009-004; and Fresh and chilled Atlantic salmon from Norway – Determination of the Commission, Investigation No. 701-TA-302, USITC Publication 2272, April 1990.

issuance of the notice, the President of the CBSA must make a preliminary dumping findings to the CITT – which is required to initiate injury investigation. Where the matter is not referred to the CITT, the body concur with CBSA and the investigation terminates. [263] The CITT must commence it injury investigation based on the CBSA's preliminary findings. The administrative procedure of the CITT concerning determination of injury is guided by the CITT Rules. Thus, based on the CITT Rule, the CITT must make preliminary injury finding within 60 days of commencing its inquiry.[264] As such, the administrative procedure of the Canadian agencies with regards to Anti-dumping investigation is in consonance with the WTO rule.

B. Final Determination and Appeal

After careful consideration of the essential factors, the CBSA has within ninety (90) days from the date of initiation to complete its dumping investigation by reaching a final decision on dumping or accepting possible price undercutting and terminating the investigation if there are no positive results on dumped imports.[265] Subsequently, the CITT must hold a public hearing that must be completed within thirty (30) days to reach its final injury decision. In imposing measures, Canada applies the full duty rule in spite of the same being contrary to the public interest assessment. It also applied the full duty despite the lesser duties' provisions in its Anti-dumping framework.[266]

A positive finding would prompt an automatic imposition of Anti-dumping measures on the complained dumped products.[267] The final decisions of either the CBSA or the CITT are appealable before superior courts of record in Canada.

C. Review

Section 76 of the SIMA sets out the interim review mechanism for Anti-dumping measures in force.[268] The Canadian Anti-dumping framework alongside other relevant regulations and guidelines lay down the governing principles for conducting the review as well as the timeline for the review – the timeline is usual five (5) years period. Also, there is an option for judicial

[263] Bennet Jone, *supra* note 240 at 3-6.
[264] Canadian International Trade Tribunal Regulation, SOR/89-35, Rules 3-36. See also Ciuriak (2012), *supra* note 205 at 117-123.
[265] Ciuriak (2012), *supra* note 205 at 141-144; Bennet Jone, *supra* note 239 at 8-9.
[266] Ciuriak (2012), *supra* note 205 at 139.
[267] *Ibid*, 117-123; Bennet Jone, *supra* note 240 at 4-7.
[268] See Canadian International Trade Tribunal Regulation, SOR/89-35, Rule 6. See also Ciuriak (2012), *supra* note 205 at 127-130.

review of the Anti-dumping duties. Generally, where the court found that an error was made in the final determination of dumping or injury, the case would be sent back to the concerned administrative agency for reconsideration. However, where it is demonstrated that the CBSA or CITT exceeded its jurisdiction, erred in law, violated the principle of natural justice, or made erroneous findings of fact etcetera, the court would usually set aside such decision rather than send it back for reconsideration.

4.6 Conclusion

This Chapter analyse the Global South Anti-dumping practices in countries such as Brazil, India and South Africa. It also briefly examined Global North practice through the Canadian system. As such, the comparative analysis conducted in this Chapter reveals that the Global South countries are the new prominent Anti-dumping users in contemporary time – their emergence came from the adoption of neoliberalism ideology. Also, the study shows the commitments of the Global South countries towards ensuring the continuous effectiveness, transparency, and efficiency of their Anti-dumping system. These commitments were demonstrated through the various legislative and institutional reforms conducted on their Anti-dumping systems.

In particular, the Brazilian government has consistently reviewed and modified its Anti-dumping regulations and administrative bodies towards ensuring the continuous relevance and effectiveness of the regime in addressing the adverse effect of unhealthy competition, as well as protecting the consumers' interests against monopolist local producers. In turn, the country has set a clear mandate for its administrative bodies such as SDCOM, SECEX, CAMEX, and GECEX in handling dumping complaints and deploying measures to boost the productivity of domestic industries as well as safeguard the consumers' interest against abuse – by means of public interest inquiry in Anti-dumping analysis.[269]

Although India has yet to conduct a similar frequent review of its Anti-dumping framework to ascertain the continuous relevance of its Anti-dumping system, the increasing presence of foreign dumped products and its catastrophic impact on Indian domestic industry continues to

[269] See generally Chandra & Dasgupta, *supra* note 33; SDCOM, *Procedural and Material Guidelines: Public Interest Analysis in Trade Remedies Investigations Guidelines in Brazil*, *supra* note 75; Kanas & Muller, *supra* note 10; Cuiabano, *supra* note 25; Gupta & Choudhury, *supra* note 1; Junior et al, *supra* note 28.

strengthen the importance of Anti-dumping system in the country.[270] Most importantly, the country has strategically utilised the trade remedy to mitigate the adverse effect of injurious dumped import. It has also deployed the trade remedy to ensure a continuous level playing field for Indian manufacturers, which has led to the growth of its domestic industry and employment opportunities.[271] In essence, the Indian DGAD has proven to be effective in adverting the negative effect of dumped imports through timely utilization of the country's Anti-dumping framework, as evidence of the large number of Anti-dumping measures the country has in force.

Additionally, South Africa has proven to be the highest Anti-dumping user in Africa. The analyses conducted reveal the efficiency of the South African trade defense system. Aside the success rate, the effectiveness of the country's Anti-dumping framework (i.e. ITA Act, ADR 2003, ITAC as well as the Constitution, the PAIA, and PAJA) can be attributed to the progressive transition it has undergone since it was founded in 1914. In turn, it has ensured clarity, transparency, efficiency and reliability of the system. It has also been useful in protecting the industrialization and productivity of the country's market. Particularly, strategic industries such as textile, and agriculture have benefitted from the application of the measure.[272] Although the country does not have any mandatory provision on public interest inquiry, the ITAC has applied the measures in ways that improve the welfare of the South Africans.

Therefore, these Global South countries have strategically utilised Anti-dumping measures to amplify their voices as well as increase their participation in the multilateral trade regime. Also, they deployed the measures as an instrument of industrial policy to recapture the competitiveness of their local market as well as boost their industrial capacity. Hence, the Anti-dumping system of these Global South countries emerged with the adoption of the Bretton Woods Institutions' packaged neoliberalism ideology. Moreover, their use of the measure increased with the rapid liberalization reforms in their country. As such, they relied on the measures to promote their self-reliant objective. Thus, this study holds that these unique features of the Global South countries set them as model standard for reforming the Nigerian Anti-dumping system.

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[270] See Banerjee, *supra* note 89; C-DEP 2023 Report, *supra* note 78; Singh, *supra* note 79; "India's Anti-Dumping Duty Imposition Drop Amid PostCovid-19 Shift", *supra* note 89.
[271] See generally C-DEP 2023 Report, *supra* note 78.
[272] Booysen, *supra* note 114; Sibanda (2015), *supra* note 35; Dari, *supra* note 1 at 99-100.

Conversely, the Canadian Anti-dumping system paved the way for the Anti-dumping system in other countries, as well as in the multilateral trade regime. As such, the progressiveness of the country's Anti-dumping system is way ahead of those envisaged by the Global South countries. Moreover, the Canadian Anti-dumping system emerged from the need to promote international convergence alongside maintaining a balance between the interest of the producers and the consumers. In this context, the country's Anti-dumping system is not tied to increased trade liberalization, like those of the Global South Countries. Hence, the low utilization of the trade remedy, but the increased success rate of the measures in the country – which suggests that the country had become better at effectively recognizing dumped import that are injurious to its local industry. Therefore, the Canadian system represents a more advanced model standard for conducting reforms.

CHAPTER 5: CONCLUSION

RETHINKING NIGERIA'S ANTI-DUMPING SYSTEM

5.1 Summary of Findings

This research started from the premise that the rising tension over global trade, including the increasing concerns over the effectiveness of the WTO and the rapid importance of the Global South Countries in contemporary times have generally elicited an increasing politicization of national industrial policies towards protectionism, nationalism and anti-globalism in disregard of their multilateral commitment.[1] In turn, there has been a rapid resort to trade-distorting policies that continues to deprive many of the Global South manufacturers, such as the Nigerian manufacturers (whose country lacks effective trade defense structures to optimally mitigate the threats embedded in unfair trade practices) of a level playing ground, whilst international trade cooperation dwindled.[2] As such, the practices have widened the power imbalance between the Global North-Global South countries, as well as the structural inequalities that exist in the WTO system.[3] It has also made it almost impossible for the less-opportune and vulnerable Global South countries, such as Nigeria to overcome her premature deindustrialization (facilitated by the Bretton Woods Institutions backed structural adjustment programme (SAP) of the late 1980s), as well as attain the balance trade payment envisaged in her trade alliances.[4] Against this background, this study critically analyse the role and effectiveness of the WTO system in reducing the trade-distortion policies and practices among the WTO members. It also examines the efficacy of the Nigerian industrial policies and Anti-dumping structure in a world that continually changes.

To substantiate the above assertion, this research critically evaluated the strengths and weaknesses of the WTO Anti-dumping structure through reliance on the policy rationale underlying the trade remedy, the historical behaviour of the multilateral trading system, the substantive and procedural element of the trade remedy, and its dispute settlement system. The discussion on the strengths and weakness of the WTO Anti-dumping Structure was done with the aid of selected WTO reports and Appellate Body report alongside reviewed articles that provided significant insights for addressing the structural inequalities and disparities between

[1] See Chapter 1 of this thesis, especially section 1.1 and 1.2 of the Chapter.
[2] See Chapter 3 of this thesis.
[3] See Chapter 2 of this thesis.
[4] See Chapter 3 of this thesis.

the Global North-Global South countries in the multilateral trading system – as highlighted in section 2.5 under Chapter 2 of this thesis. In particular, the current crisis impeding the effectiveness of the WTO system was discussed within the context of the Anti-dumping regime in a changing world, and its impact on the developing countries to chart a new course for ensuring the efficacy of the WTO framework.

Afterward, the research proceeded to unpack the inadequacy of the Nigerian trade defense and its inconsistencies with her multilateral (WTO) and the regional (AfCFTA) commitments, within the context of her Anti-dumping regime, from a historical and contemporary perspective. The analysis in Chapter 3 revealed that Nigeria does not have an effective Anti-dumping system in place to address the large-scale dumping activities from foreign players. Also, the country lacks the required legislative and institutional framework and this has raised issues and legal uncertainties in her trading ecosystem.[5] In particular, the absence of an effective trade defense infrastructure has stripped some of her strategic local industries, such as the textile, steel, and automotive sectors of a level playing field, which is required to retain their competitiveness in the global value chain. Hence, it was pointed out that the Nigerian manufacturers have experienced significant injuries to, and threats to their overall existence given the inability of the country to overcome the continuous assault of dumped imports in her domestic market. Specifically, some have had to shut down, whilst many others are struggling to stay afloat.[6] Moreover, these trade-distortion practices have adversely impacted the industrial growth of the country as well as inflicted far-reaching effects on the Nigerian economy.[7] Within this context, Chapter 3 revealed the ineffectiveness and inconsistencies of the Nigerian trade defense practices with her multilateral and regional trade commitments. It also disclosed the wide discrepancies contained in the Nigerian Anti-dumping law, the *Custom Duties (Dumped and Subsidized Goods) Act, 1958* (CDA),[8] which makes it substantively and procedurally inadequate for investigating dumping activities, and imposing Anti-dumping

[5] See generally, WTO, "Case Study 32: Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *WTO Centre* (8 July 2020), online: <https://wtocenter.vn/chuyen-de/15799-case-study-32-import-prohibition-as-a-trade-policy-instrument-the-nigerian-experience> (accessed 19 May 2024); Nigeria's AFCFTA Strategy and Implementation Plan, "Development of AfCFTA Strategy and Implementation Plan – 007 MITI-NACJU", (2021), online: < https://www.pdfnigeria.org/rc/wp-content/uploads/2021/03/210302AfCFTA-Implementation-Strategy-and-Plan-Final-007-MITI-NAC-JU-vs-0.1.pdf> (accessed 16 May 2024) [Nigeria's AfCFTA Strategy and Implementation Plan].
[6] See Chapter 3 of this thesis in detail.
[7] *Ibid*.
[8] Cap C48 Laws of the Federation of Nigeria, 2004.

measures.[9] Besides, the country's persistent preference for restrictive trade measures was often inadequate in defending the domestic producers against the dumping activities of their foreign counterparts.[10] Thus, the growing need for trade remedial measures against the injurious impact of dumped imports in Nigeria.[11] The trade remedial measure is not only fundamental in retaining the competitiveness of the Nigerian domestic producers, but also in aiding the country effectively progress in the implementation of the intra-African trade as regards the possible benefits and risks embedded in the AfCFTA Agreement.[12] As such, Nigeria stands to benefit from the lessons of other successful countries in the reformation of their economy.

In light of the above findings, Chapter 4 briefly examined other Global South countries, such as Brazil, India and South Africa that have successfully utilised Anti-dumping measures to recapture their domestic market and boost their manufacturing capability over the years.[13] The

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[9] WTO, *Trade Policy Review Body: Report By the Secretariat on Nigeria*, WTO Doc WT/TPR/S/356 (9 May 2017), online <www.wto.org/english/tratop_e/tpr_e/s356_e.pdf> (accessed 13 November 2023) [herein referred as WTO 2017 Report on Nigeria]; WTO, "Case Study 32: Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *supra* note 5; Nigeria's AfCFTA Strategy and Implementation Plan, *supra* note 5; Ajoje Olufunke Iyabo, *South-South Cooperation and the Prospects of Global Economic Balancing: A Study Framework of Nigeria-China Relations* (PhD Dissertation, North-West University, 2018). See generally Godfrey George, "How Cheap Chinese Goods Killed Nigeria Textile Factories – Ahmed, MAN President", *PUNCH* (22 August 2021), online: < https://punchng.com/how-cheap-chinese-goods-killed-nigerias-textile-factories-ahmed-man-president/> (accessed 29 November 2023); "Product Dumping: How Asians are Killing Made-In-Nigeria Goods", *Vanguard* (2 April 2012), online: <www.vanguardngr.com/2012/04/product-dumping-how-asians-are-killing-made-in-nigeria-goods/> (accessed 21 January 2024); Temitope Adeyemi, "Panaceas: Dumping and Trade Remedies in Nigeria", *Mondaq* (4 June 2020), online: <www.mondaq.com/nigeria/export-controls--trade--investment-sanctions/947900/panaceas-dumping-and-trade-remedies-in-nigeria-#_ftn5> (accessed 16 May 2024); Adaora Osondu-Oti, "China's Market Expansion and Impacts on Nigeria's Textile Industry", (2021) 2:1 J of Contemporary Intl Relations & Diplomacy 192, 203-218; Justice Okamgba, "Stakeholders divided over proposed Import Ban on Used Vehicles", *Punch* (3 January 2024), online: < https://punchng.com/stakeholders-divided-over-proposed-import-ban-on-used-vehicles/> (accessed 16 May 2024); Olu Fasan, "Nigeria's Import Restrictions: A Bad Policy that Harms Trade Relation", *LSE Blog* (27 August 2015), online: <https://blogs.lse.ac.uk/africaatlse/2015/08/17/nigerias-import-restrictions-a-bad-policy-that-harms-trade-relations/> (accessed 13 May 2024).

[10] See Chapter 3 of this thesis in detail; WTO, "Case Study 32: Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *supra* note 5; Sahara Reporters, "Nigeria Places Full Ban On Importation of Goods Through Land Borders" (2019) <http://saharareporters.com/2019/10/14/nigeria-places-full-ban-importation-goods-through-land-borders> (accessed 18 May 2024); Okamgba, *supra* note 9; Fasan, *supra* note 9

[11] *Ibid*; Nigeria's AfCFTA Strategy and Implementation Plan, *supra* note 5; Adeyemi, *supra* note 9; Anugbum Onuoha, "Appraising the Current Legal Framework for Regulating Dumping Into Nigeria: Need for Legislative Reforms and Intervention", (2020) 8:5 G J Pol & L Research 64-80.

[12] See generally section 3.5 of this thesis (The Impact of the Trade Remedy under AfCFTA Agreement), in particular section 3.5.2 (The Role of Anti-Dumping Measure under the AfCFTA. See also Nigeria's AFCFTA Strategy and Implementation Plan, *supra* note 5; Gerhard Eramus, "Why Does the AfCFTA Provide for Trade Remedies?", *Tralac* (23 November 2021, online: < https://www.tralac.org/blog/article/15441-why-does-the-afcfta-provide-for-trade-remedies.html> (accessed 19 May 2024); Nigerian Economic Summit Group, "Economic Implications of the African Continental Free Trade Agreement (AfCFTA) on the Nigerian Industrial Sectors", (2020), online: <www.nesgroup.org/download_resource_documents/AFCFTA%20on%20Industrial%20Sector_1576844589.pdf> (accessed 16 May 2024) [herein referred as "Nigerian Economic Submit Group Report 2020"]

[13] See Chapter 4 (The Divergence in the Use of Anyi-Dumping Measure in The Global South-Global North Countries: Lessons for Nigeria).

Chapter also analysed the Global North's Anti-dumping practice vis-a-viz the Canadian Anti-dumping system in order to tease out the difference between the Global North and Global South's application and implementation of the trade remedy. The exploration revealed the varying degree of effectiveness enshrined in those countries trade defense structures and infrastructures. While the Global South countries were successful in deploying the measure to achieve a self-reliant economic objective (early stage of industrialization),[14] the Canadian system has modernized and advanced beyond the self-reliant objective towards the promotion of international convergence in its trade relations – such as the removal or restriction of trade remedial clauses in her trade alliance.[15] In general, it was found that these countries are collectively equipped with effective trade defense structure and infrastructure, and as such can serve as useful models from which Nigeria can learn and adapt to the peculiarity of her trading environment.[16]

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[14] *Ibid*; Helio Henkin et al, "The Reform of the Brazilian Anti-Dumping Regime: A Partial Review of the Determinants and the Implications of Decree 8,059/2013", (2021) 10:19 Brazilian J Strategy & Intl Relations 58-83; Vera Kanas & Carolina Muller, "The New Brazilian Anti-Dumping Regulation: A Balance of the First Years", (2017) 12:11 Global Trade & Custom J 462 at 463; Junji Nakagawa, *Anti-dumping Laws and Practices of the New User*, (London: Cameron May Ltd, 2006) 283 – 332; Sergio Kannebley Junior et al, "Policy Antidumping in Brazil: Determinants and Their Effects in Competition", (2021) 60 Planning & Public Policies 129-159, online: < https://repositorio.ipea.gov.br/bitstream/11058/11819/1/ppp_n60_Artigo5_politica_antidumping_no_brasil.pdf> (accessed 14 June 2024); Chandra & Dasgupta, *supra* note 33; SDCOM, *Procedural and Material Guidelines: Public Interest Analysis in Trade Remedies Investigations Guidelines in Brazil*, (2020) Brazilian Government, online: < https://www.gov.br/mdic/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/arquivos/guias/GuiaIPversolimpratraduorevisadaesiteSDCOM.pdf> (accessed 15 June 2024); Aradhna Aggarwal, "Trade Effects of Anti-dumping in India: Who Benefits?", (2011) 25:1 Intl Trade J 112-153, online: < https://www.tandfonline.com/doi/epdf/10.1080/08853908.2011.532047?needAccess=true> (accessed 22 January 2024); "Anti-dumping Investigations are Strongly Initiated by Many Countries", *Vietnam National Trade Repository* (23 October 2023), online: < https://vntr.moit.gov.vn/news/anti-dumping-investigations-are-strongly-initiated-by-many-countries> (accessed 21 January 2024); Centre for Digital Economy Policy Research, *Protecting Atmanirbhar: Report on Challenges in Protecting Domestic Industries,* (2023) C-DEP, online: < file:///C:/Users/krim/Downloads/Protecting-Atmanirbhar-v2_6-Feb_compressed.pdf> (accessed 17 June 2024) [C-DEP 2023 Report]; International Trade Administration Commission of South Africa (ITAC), *Annual Report 2015-2016,* at 26, online: < https://www.itac.org.za/upload/ITAC%20AR%20201516L%20.pdf> (accessed 23 June 2024); and World Trade Organization (WTO), "Case Study 38: The Reform of South Africa's Anti-Dumping Regime", *WTO Centre* (8 July 2020), online: < https://wtocenter.vn/chuyen-de/15805-case-study-38-the-reform-of-south-africas-anti-dumping-regime> (accessed 17 January 2024) [WTO Case Study 38].

[15] Dan Ciuriak, "Trade Defence Practice in Canada: Canada Country Report for the Evaluation of the European Union's Trade Defence Instruments", (2012) CC Working Paper [Ciuriak (2012)]; Dan Ciuriak, "Canada", in Junji Nakagawa, ed, *Anti-dumping Laws and Practices of the New User*, (London: Cameron May Ltd, 2006) at Chapter 5 (Ciuriak (2006)); Eric Freedman, "Canadian Anti-dumping Provisions: Has the Use of the Public Interest Clause Helped Curb Protectionism?", (2016) 26 Asper Rev 27-42; Ernest & Young, "Canada Enhances Trade Remedy System by Amending the Special Import Measures Regulations", *EY* (17 September 2019), online: <https://globaltaxnews.ey.com/news/2019-6142-canada-enhances-trade-remedy-system-by-amending-the-special-import-measures-regulations > (accessed 20 June 2024).

[16] See generally 4.2 (Anti-dumping Practice in Brazil); 4.3 (Anti-dumping Practice in India); 4.4 (Anti-dumping Practice in South Africa; and 4.5 (Anti-dumping Practice in Canada).

Although these countries' systems are not without flaws, a lot can still be learnt to help Nigeria in the revitalization of her industries. Moreover, the study cannot be said to be comparative in the traditional sense given that these countries – Brazil, India, South Africa and Canada – have developed an effective trade defense system in force, whilst Nigeria lacks the same.[17] These countries have shown considerable efforts towards amendments to their Anti-dumping system to reflect the changes in the contemporary world.[18] In turn, it has paved the way for the effectiveness of their legislative and institutional framework on Anti-dumping measures. Conversely, the Nigerian trade defense system and her several Anti-dumping campaigns are still overwhelmingly unproductive and ineffective.[19] Hence, the need to learn from the considerable Anti-dumping efforts of Brazil, India, South African and Canada in levelling the playing field for her manufacturers and the revitalization of her local industries towards full industrialization.[20] In light of this findings, the following sections would conclude, as well as recommend how Nigeria can draw from the experiences of these selected countries to address the shortfalls in her trade defense system.

5.2 Conclusion

Using the TWAIL lens as a tool for interrogation of the research objective, this study advocates for the growing importance of Anti-dumping measures in securing fair play for less-opportune and vulnerable Global South manufacturers by using Nigeria as a case study. In particular, the study argues that trade remedial measures are of utmost importance in present times when imperialism and colonial legacies have come to adorn the cloak of trade liberalisation in the trade alliances of the marginalised Global South countries.[21] For instance, the persistent imbalance of trade payments in Nigeria's trade alliances has continuously jeopardized the industrialization of the country as well as undermined the industrial growth of her strategic industries, such as the textiles, steel, and automotive industries.[22] It has also bred import

[17] For a discussion of what a comparative analysis entails, see generally Sussan Bassnett*, Comparative Literature: A Critical Introduction*, (Blackwells, 1993); Mathias Siems, *Comparative Law*, (London: Cambridge University Press, 2018) 148; K Boele-Woelki, "What comparative family should entail" in K Boele-Woelki, ed, *Debates in family law around the globe at the dawn of the 21st Centur*y (2009) 3- 36.
[18] See generally 4.2.2, 4.3.2, 4.4.2 and 4.5.2 on Legislative and Institutional Framework.
[19] See generally 1.3 (Research Questions); 3.3 (Dumping Imports in Nigeria's Domestic Market); 3.4 (Overview of the Anti-dumping Mechanism in Nigeria) and 3.5 (The Impact of the Trade Remedy under AfCFTA Agreement).
[20] See generally 1.3 (Research Questions).
[21] See generally section 1.3.4 (Third World Approach to International Law (TWAIL); section 3.2 (Understanding the Nigeria's Post-Colonial Trade Policy: Historical and Contemporary Perspective); and section 3.3 (Dumping Imports in Nigeria's Domestic Market).
[22] See generally section 3.3 (Dumping Imports in Nigeria's Domestic Market)

dependence in Nigeria, thereby making the country a fertile ground for trade imperialism in light of the current global economic crisis.[23] All these are reflections of the global exploitation and imperialism currently ongoing within the multilateral trading community.

With the exposure of globalization and neoliberalism, comes the risks of market monopolisation (embedded in an open-market system). The risks from the exposure are particularly high for low- and lower-middle-income developing countries - most of whom were pressurised to industrialise sooner than their premature economy could withstand.[24] As such, developing economies like Nigeria seeking to establish their local market in globalised economy often encounter difficulties (such as trade-distortive practice) when competing with more industrialised countries, such as the advanced countries and the emerging industrialized East Asian Countries on the global scene.[25] Therefore, it is important to prioritise the role of trade remedial measures in the revitalization and industrialization of Nigerian industries – given that it does ensure a level playing field in liberalized trade system. In light of this, the study highlighted the critical need for Nigeria to reform its trade defense structure, in particular the Anti-dumping system, not only because the current system has proven to be ineffective in retaining the competitiveness of the Nigerian industry (compared to the system in other Global South countries), but also to reflect the changes in the multilateral and regional trading trend. In turn, it would enable the country to implement its commitment under the multilateral and regional trade agreement, respectively.

Moreover, despite the increasing global trade tension and fragmentation of trade, Nigeria stands to benefit from global trade and intra-Africa integration instead of trade isolation. However, Nigeria must be strategic in her industrial pursuit by leaning, *inter alia,* towards strategic alliance, capacity building, diversification of the economy, technology and knowledge transfer, strategic independence from foreign intermediate products, and an efficient trade remedy system – that is WTO and AfCFTA compliant. Also, an effort must be made to redefine

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[23] *Ibid*.

[24] Edalio Maldonado, "Managing Free Trade under the WTO in an Era of Rising National Tensions", (2023) Old Dominion University Model United Nations Society & ODU Graduate Program in Intl Studio, ODUMUNC 2024 Issue Brief at 2-3, online: < https://ww1.odu.edu/content/dam/odu/col-dept/al/docs/2nd-wto.pdf> (accessed 12 May 2024)

[25] Olu Ajakaiye & Afeikhena Jerome, "Economic Development: The experience of Sub-Saharan Africa" in Bruce Currie-Alder et al, eds, *International Development: Idea, Experience & Prospects* (Oxford, United Kingdom: OUP, 2014) 736; Maldonado, *supra* note 24; Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission*, (Oxford: Hart, 2010); Nam-Ake Lekfuangfu, "Rethinking the WTO Anti-Dumping Agreement from a Fairness Perspective" (2009) 4:2 Cambridge Student L Rev 30.

her industrial policy in favour of transitioning the income of the country by increasing the competitiveness of local production to prevent the collapse of industrialization in Nigeria.

5.3 Recommendations

Anti-dumping measure as a trade remedial tool is used to rectify the trade-distortive effect of dumped imports and to re-establish fair trade, by providing relief to the domestic industry against the injury suffered from the unfair practice of foreign producers. From Nigeria's historical antecedent, the country has been a fertile ground for low-quality and cheap foreign products – which became overtly pronounced in the contemporary climate and has caused widespread collapse and readjustment of strategic domestic industries.[26] In response, the country has unsuccessfully resorted to the use of protectionism measures, as against the trade remedy measure, which has generated uncertainty in her industrial policies and deprived the country of robust foreign investments. Also, the restrictive measures have been ineffective in rectifying the trade-distortive effects in the country alongside being incompatible with the multilateral and regional commitments of the country.[27] The inadequacies can be attributed to the country's lack of clear regulatory and institutional framework for curbing injurious dumped imports. Thus, it is imperative for Nigeria to establish an adequate trade defense approach by drawing on the experiences of other Global South countries and that of Canada analysed in Chapter 4 of this thesis.

The reformation and development of trade defense structure in Nigeria would provide safety net for local manufacturers in the country. It would also enable the country to impose extra duties on the perpetrators of dumped imports as a means of levelling the playing field between domestic and foreign producers. The excess duties would help the domestic industries adjust to the unexpected surges of traded imported goods. It would also discourage the consumption of imported goods, whilst it encourages the consumption of local goods and enhances the operation of domestic industry. Thus, by employing this mechanism the Nigerian government would not only strengthen the manufacturing output of the domestic industries, but would also demonstrate the country's adherence to multilateral commitment under the WTO rule and regional commitment under the AfCFTA rules.

[26] See generally section 3.2 (Understanding the Nigeria's Post-Colonial Trade Policy: Historical and Contemporary Perspective); 3.3 (Dumping Imports in Nigeria's Domestic Market).
[27] *Ibid*.

Although the Anti-dumping mechanism of the multilateral trading system has been inundated with many criticisms (which also stemmed from the criticism of the WTO system), the system still offers legal means for the developing world to strategically utilize the measures in curbing the trade-distortive constraints that have bedeviled their competitiveness on the world market. Against this background, this study draws on the Anti-dumping experiences of other Global South countries – such as Brazil, India, and South Africa – alongside that of Canada to recommend the following thus:

5.3.1 Trade Defense Department

The experiences from Brazil, India, South Africa and Canada have shown that having an efficient trade defense institutions in place is essential for a successful Anti-dumping regime. In all of these countries, their trade defense departments – i.e. the Undersecretariat of Trade Defense and Public Interest (SDCOM), Secretariat of Foreign Trade (SECEX)) and the Chamber of Foreign Trade (CAMEX) for Brazil; the Directorate General of Trade Remedies (DGTR) or more specifically the Directorate General of Anti-dumping and Allied Duties (DGAD) for India; the International Trade Administration Commission ("ITAC") for South Africa; and the Canada Border Services Agency (CBSA) and the Canadian International Trade Tribunal ("CITT") for Canada – has been proven to be efficient and effective in the mitigation and prevention of the adverse effects of unfair trade practices through timely utilization of those country's Anti-dumping frameworks.[28] Conversely, Nigeria currently lacks a trade defense department. Thus, it is imperative that for Nigeria to overcome her premature de-industrialization - caused by consistent dumped imports of foreign products - as well as boost her manufacturing output, it must be able to establish a trade defense department within the Nigerian Office for Trade Negotiations (NOTN) – which is the institutional framework and foundation for Nigeria's trade policy infrastructure. Most importantly, the country must reform its Anti-dumping policy and facilitate the passage of a Trade Defense Bill that would stipulate clearly the structure, power, and mandate of the departments. Moreover, it is recommended that the authority must be an independent body under the NOTN as in the case of Brazil, India, South Africa, and Canada – whose trade defense authorities enjoys autonomy and independence without interference from the Ministries under which they were created.

[28] See generally section 4.2.2.2, 4.3.2.2, 4.4.2.2 and 4.5.2.2 on Institutional Authorities under Chapter 4 of this thesis.

Currently, the President is deemed the sole investigatory authority for the implementation of Anti-dumping measures under the CDA 1958. This obsolete law fails to institutionalise nor create a trade defense department in line with the country's multilateral or regional commitment. It also contains ambiguous provisions on the true extent of the investigatory official's power and mandate. Within this context, this study recommends that a clear trade defense bill be enacted establishing an independent trade defense authorities with clearly written and specified functions, structures and mandates in accordance with the WTO and AfCFTA rules on trade remedial measures. It must also stipulate in clear terms the investigatory capacity of the authority and the timeframe for conducting the determination of dumping, injury, and causality without interference from other governmental bodies. Furthermore, the bill must also highlight the communication route for the final determination and the channels for reviewing the decision of the trade defense authority. Notwithstanding, the bill can subject the imposition of the duties to the ministry to create room for check and balance against abuse of power by the trade defense authorities.

5.3.2 Reform of the Anti-dumping Policy

The CDA 1958 is the subsisting legislation on dumped imports in Nigeria. The same was enacted long before the Article VI of GATT 1994 and the Anti-dumping Agreement (WTO Anti-dumping rules), and as such, the consistency and compliance of the CDA to the WTO standard are expected to be low compared to Anti-dumping laws that were enacted long after the WTO rules on dumped import. Although two legislative attempts to pass the Anti-dumping Bill (the Anti-Dumping and Countervailing Bill of 2010 and Anti-Dumping and Countervailing Bill of 2015) were made, they were unsuccessful due to a lack of an effective structure and implementation mechanism.[29] Within this context, the analysis in Chapter 3 of this thesis revealed that the CDA contains lot of discrepancies and ambiguities as regards the governing rules on the substantive and procedural elements for the implementation of Anti-dumping system in accordance with the WTO and the AfCFTA standards. Thus, crucial factors, *inter alia,* such as "normal value", "export price", "fair market price", "margin of dumping", "material injury", and "domestic industry" that bears on the determination of dumping, injury and causative issues for the imposition of Anti-dumping duties were lacking of sufficient expression, interpretation, and guidance in the CDA 1958. In particular, the legislation fails to

[29] See generally, G A Ikeagwuchi*, "Implementing Effective Trade Remedy Mechanisms: A Critical Analysis of Nigeria's Anti-Dumping and Countervailing Bill 2010"*, (LLM Thesis: University of Pretoria, 2014) [unpublished].

provide for the causation link between the dumped imports and injury suffered by the domestic industry.[30] It also fails to provide for procedural issues such as initiation, conducting Anti-dumping investigation, duration, and judicial review amongst others. It is important to note that under the WTO Anti-dumping rules it is not mandatory for a country to enact Anti-dumping legislation.[31] However, once the country makes the policy choice to do so, it has the obligation to ensure its Anti-dumping legislation is WTO-compliant.[32] In this regard, the discrepancies in the CDA makes its inadequate and incompatible with the WTO and the AfCFTA standards. Hence, Nigeria is deemed to lack an effective Anti-dumping framework and infrastructure

In this regard, this study recommends that the government needs to commence and expedite the passage of the legislative bill and policy on trade remedial measures by drawing on the various legislative reform experiences of other Global South countries, such as Brazil, India, and South Africa that have successfully implemented the system in their trading environment. The structure of the proposed legislature must be spelt out in a clear format that contains, for instance, definition clause; the scope and functions of the trade defense authorities including their limitations as regards Anti-dumping investigation; the substantive element clause (which must contain clear mandate and detailed rules on determination of dumping, injury, and causal issues); investigation proceedings and timeframes for the investigation including imposition of provisional measures, undertaking, definitive duties and termination without measures; the duration, review and refunds; and lastly general issues such as oral hearing, confidentiality etcetera. In particular, crucial issues such as 'normal value', 'export price', 'like products', 'fair comparison rule', 'domestic industry', 'injury', and 'causality' must be clarified in the law. In this regard, Nigeria may take lessons from the Canadian Anti-dumping legislation and the various rules, regulations, and statements of administrative practices for its CITT and SIMA. These relevant regulations are robust and impactful on the transparency of the Canadian Anti-dumping system. In essence, the new legislation must be drafted in a manner that is clear to the understanding of what constitutes Anti-dumping rules. It must not create confusion as to the standard to be followed, as the same must be precise and align with the country's commitments under the WTO and AFCFTA standards. Moreso, the legislation must be clear in terms of the rule of origin and trade transparency in regards to the new market created under the AfCFTA.

[30] See generally section 3.4.2 Nigeria's Anti-Dumping Legal Framework.
[31] Anti-Dumping Agreement, Article 16.
[32] *Ibid*; Article 1.

5.3.3 Other Essential Reforms

To achieve the trade defense department and Anti-dumping reform objective highlighted above, necessary industrial measures must be in place to strengthen the domestic industries and their operations. This would entail embarking on strategic replacement of the various restrictive policies and measures in the country as well as progressive industrial policies geared towards stimulating rapid economic diversification and structural changes, and protecting the economy from foreign imperialism. An effective enforcement mechanism must be established to monitor any unequal income gap from Nigeria's bilateral trade, and also implement the various trade policy instruments for preserving her industrialization. To pave the way for effective implementation of Anti-dumping measures, the following enforcement related issues must also be addressed - lack of awareness on dumping and Anti-dumping, corruption of government officials; poverty; poor standard of living: unstable and weak governance structure; unskilled border officials, porous borders; epileptic power supply, political instability amongst others. Addressing these concerns is essential to repositioning the local industries on the world market.

Also, to ensure the efficiency of the trade defense structure, the Nigerian government must make an effort to engage in purposive and strategic collaboration with the private sector, trade associations, labour unions, and foreign trade partners (investing in the Nigeria trade scene) on strategic utilization of trade policies and application of Anti-dumping laws. In this regard, Nigeria can take lessons from Brazil, India, and South Africa on purposive collaboration and strategic utilization of the trade remedy. In addition, the country must cut-down its appetite for foreign loans and aid to counter China or Western imperialism. It will prevent the country as a Third World nation from being susceptible to domination by rich countries and dependent on foreign nations. As such, being self-sufficient will enable the country to address the trade deficits in her numerous trade alliances as well as being able to hold foreign countries accountable for dumping activities in the country. This was how the Indian economy attained self-reliance in contemporary times.

Furthermore, the Nigerian government must in conjunction with relevant stakeholders (governmental bodies and other privates sector groups such as Manufacturing Association of Nigeria (MAN)) facilitate the establishment and implementation of a whistleblowing system for reporting dumping activities by local and foreign producers. It must also incorporate the system into the investigative procedure for the trade defense authorities – which must include an official notification through the Public Gazette to the exporter or importer and sufficient

opportunity to respond to the notice, similar to the approach in Brazil, India, South Africa, and Canada.

This study's recommendations would not be complete without the mention of capacity building. From the experiences of Brazil, Canada, and South Africa, capacity building was made the bedrock of their Anti-dumping system. Their investigatory authorities, practitioners, and trade defense policy-makers had on numerous occasions undertaken training and learnings from other jurisdictions, studies, and publications as well as took advantage of the WTO technical and capacity building initiatives. For instance, the South African trade defense practice has on various occasion taken clue from the rich publication and contributions of the Trade Law Centre (TRALAC) on the development of the country's Anti-dumping system. The country has also benefitted from WTO Workshops on technical assistance and capacity building. In this regard, the study recommends that Nigeria takes South Africa as a useful model standard in Africa for the adoption of capacity building approach in the development of effective trade defense infrastructure. In particular, Nigeria's partnership with South Africa's TRALAC would help gear the country towards taking a hint from the organization on conducting capacity building programme for customs and trade defense officials as regards trade transparency and effective utilization of Anti-dumping measures.

5.4 Final Remarks

In summary, the Nigeria's Anti-dumping system is currently in need of an overhaul in order to ensure an effective trade defense structure in light of the current international trading tension and challenges. To achieve these changes, the country may do well to draw from the experience of other Global South Countries as well as Canada whilst bearing in mind the differences in markets, socio-political circumstances, geographical and historical peculiarities. This would help create certainty and transparency in the Nigerian trading environment.

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