

**ANALYZING THE LAW ON SUBSIDIES AND COUNTERVAILING MEASURES IN  
KENYA AND ITS IMPACT ON DEVELOPMENT IN KENYA**

**BY**

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**G62/64273/2010**

A Project Submitted in Partial Fulfillment of the Requirements of the Award of the Master of  
Laws (LL.M) Degree of the School of Law, University of Nairobi.

**Nairobi, Kenya.**

December, 2019

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## **DEDICATION**

*To my loving parents, Mr. & Mrs. Nyamwaya.*

## **ACKNOWLEDGEMENTS**

This research project would not have been possible without the support of many people. To begin with, I wish to thank my supervisor Mr. Bosire Nyamori for the valuable guidance and advice.

My sincere appreciation to my beloved parents for their blessings and faith in me. To my entire family, thank you for your patience throughout this period.

Finally, an honorable mention goes to all my friends for their understanding, support and wishes for the successful completion of this project.

Despite the contributions and support of the above named persons, any error(s) of commission and/ or omission remain solely my responsibility.

## **ABBREVIATIONS AND ACRONYMS**

**ACP Group** – African Caribbean and Pacific Group

**AOA** – Agreement on Agriculture

**ACWL** – Advisory Center on Trade Law

**CAP** – Chapter

**CET** – Common External Tariff

**COMESA** – Common Market for Eastern and South Africa

**CVT** – Countervailing Measures

**DSB** - Dispute Settlement Board

**EAC** – East African Community

**EAC CUR** - East African Community Custom Unions Regulations

**EU** – European Union

**GATT** – General Agreement on Tariffs and Trade

**ROO** – Rules of Origin

**SCM** – Subsidies and Countervailing Measures

**SCM AGREEMENT** – Agreement on Subsidies and Countervailing Measures

**SECEX** – Secretariat of External Trade

**UK** – United Kingdom

**WTO – World Trade Organization**

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## CHAPTER ONE

### **1.1. Introduction**

Subsidies and countervailing measures are trade remedies and policies that are used by governments to impose sanative action against imports that are detrimental to the local producers. The aforementioned policies are tailored to provide relief from imports that are perceived to be unjust. Additionally, they are also used as modification measures against import upsurge. There are various modes of trade remedies, the main ones being; anti-dumping, subsidies and countervailing trade measures. Countervailing measures are concerned with instituting duties that counterpoise the outcome of subsidies that an exporting country offers to its domestic producers and entrepreneurs in general. The whole essence of these remedies is to shield local industries and market from unfair trade practices by foreign players.<sup>1</sup>

Subsidies are an important development tool that enables governments to achieve economic goals. The use of subsidies also encourage channeling of economic resources to sectors where a country may lack comparative advantage. It also imparts artificial competitiveness to subsidized products, which can thereafter be sold in the world market at a considerably cheaper price.<sup>2</sup> Thus, it is a policy of immense economic value whose importance cannot be gainsaid.

The use of this trade policy is widely exploited in international trade as a trade remedy with the main purposes of enhancing the overall achievement of trade liberalization.<sup>3</sup> The primary

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<sup>1</sup> Trade Program Team, "Trade Remedies: Subsidies and Countervailing Measures and their Application in Developing Countries," Institute for Economic Affairs 2013. Available at <[http://chongbanphagia.vn/files/subsidies%20and%20countervailing%20in%20developing%20countries\\_0.pdf](http://chongbanphagia.vn/files/subsidies%20and%20countervailing%20in%20developing%20countries_0.pdf)> (Last accessed on 21<sup>st</sup> August 2018).

<sup>2</sup> K T Chacko, *Agreement on Subsidies and Countervailing Measures*, IIFT New Delhi 2009.

<sup>3</sup> Trade Remedies are contingent measures taken by governments to shield domestic industries against unfair competition from foreign industries. They are a number of measures which can be taken. These include safeguards,

objective of these trade remedies is tailored to raise the cost of imported products vis-à-vis the local products thus making the domestic market unfavorable for imported products.<sup>4</sup>

Even though the World Trade Organization (WTO),<sup>5</sup> advocates for trade opening, many member states, Kenya included, have not liberalized every sector of their economy but have instead maintained placed barriers to shield local industries from the competition posed by well-established international companies.<sup>6</sup>

The Kenyan Government (the “Government”) has utilized subsidies to offset trade imbalances. The Government has also exploited subsidies in instances of market failure or in circumstances where there is overwhelming uncertainty in the market.

Equally, in cases where subsidized imports hurt the domestic market, the Kenyan Government has waged extra duty on the imports to protect local industries.<sup>7</sup> The extra duty is referred to as the countervailing duty. It has been argued that:

Subsidies and countervailing measures are two sides of a coin. A subsidy is a monetary benefit or compensation to a producer or exporter which could be in the form of a financial grant, tax exemptions etc. On the other hand, countervailing measures are like a penalty imposed on the exporter in the form of a duty at the point of importation to balance the benefits of subsidy enjoyed by the exporter. These remedies thus offer the

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anti-dumping duties and countervailing measures. However, seeing that safeguards provide temporary relief from import surges under ‘fair’, rather than unfair trade conditions, this measure is strictly speaking not a trade remedy. However, owing to the fact that safeguards are temporary reliefs against import surges countries normally apply subsidy or countervailing measures to offer sustainable long term remedy to against foreign imports.

<sup>4</sup> Van Beers, Cees F. and Andre de Moor, *Public Subsidies and Policy Failures: How Subsidies Distort the Natural Environment, Equity and Trade, and How to Reform them*, Cheltenham: UK 2001.

<sup>5</sup> International trade is the exchange of capital, goods and services across international borders or territories.

<sup>6</sup> The Kenya Trade Remedies Act, No. 32 is enacted to provide for the establishment of the Trade Remedies Agency and for the investigation and imposition of Anti-dumping duties, countervailing measures and Trade Safeguards.

<sup>7</sup>The Kenya Trade Remedies Act, Section 23(1)

necessary adjustments that are fashioned towards providing a level playing field for the local producer of importing country to meet the requisite preponderant objective of the multilateral trade regime i.e., free and fair international trade.<sup>8</sup>

Although the usage of these remedies have been sanctioned by WTO as legitimate means of trade remedy<sup>9</sup> a lot needs to be done to guard against foreign market upsurges experienced especially in the Kenyan market.<sup>10</sup> According to the WTO, the primary objectives of the Agreement on Subsidies and Countervailing Measures (the “SCM Agreement”) which have been promulgated as binding regulation are twofold.<sup>11</sup> First, it is expected to discipline the use of subsidies. Secondly and pursuant to the SCM Agreement, it is mandated to regulate the reactions employed by member countries to counter the negative effect of subsidies.<sup>12</sup>

While the usage of subsidies is an important tool for economic development it is also subject to abuse and misuse. The consequences of abuse and misuse of subsidies and countervailing measures are gross as its impact is likely to be felt in the international market. Abuse and misuse

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<sup>8</sup>*Ibid* note 4 Van Beers.

<sup>9</sup> The use of subsidies and countervailing measures is contained in the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) in Article IV of the General Agreement on Tariffs and Trade GATT (1994).

<sup>10</sup>*Supra* note 1.

<sup>11</sup> Kamala Dawar, *Decision Making in the Global Market: Trade, Standards and the Consumer*, Consumer International Steve Paveley (2005). Available at <<http://www.consumersinternational.org/media/308861/decision%20making%20in%20the%20global%20market-%20trade%20standards%20and%20the%20consumer.pdf>> (Last accessed on 21<sup>st</sup> August 2018). According to this book the author elaborates that WTO agreements are intended to remove barriers to trade between countries. As a result of this, they have raised the status of international standards from being voluntary, to the level of obligations to the national governments. Failure to comply with these agreements leaves governments vulnerable to accusations of maintaining trade barrier, and to trade disputes.

<sup>12</sup> World Trade Organization, “Understanding the WTO: The Agreements – Anti-Dumping, Subsidies, Safeguards and Contingencies, etc.” (2012). Available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm#subsidies](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm#subsidies)> (Last accessed on 21<sup>st</sup> August 2018).

of subsidies as an instrument for trade lead to serious market distortions which has a cyclical downturn on the market as a whole.<sup>13</sup>

Apart from undermining the equitable use of resources it also results in oversupply of substandard commodities and closure of otherwise efficient companies hence causing costly budgetary outlays and improper use of resources.<sup>14</sup>

While noting the integral role that special and differential treatment plays in international trade, the special treatment provisions are not intended to apply in perpetuity.<sup>15</sup>

This presents an irrefutable suggestion that Subsidies Agreements (the SCM Agreement and the GATT 1994) do not endorse indiscriminate subsidization policies as an effective and permanent economic development tool. Neither does it approve the idea that it is necessary to expand the exceptional and differential treatment of the Subsidies Agreement to allow greater unrestricted subsidization on the part of both the least-developed and developing countries.<sup>16</sup>

In respect of the foregoing it is emerging that the special and differential provisions of the Subsidies Agreements should be seen as temporary deviations from the normal disciplines necessary to promote trade liberalization and growth, which should only be invoked to the extent necessary and consistent with an individual country's peculiar economic, financial and

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<sup>13</sup> Oxfam Briefing Paper, "Truth or Consequences," Mark Fair Trade (2005). Available at <<http://www.oxfam.org/sites/www.oxfam.org/files/truth.pdf>> (Last accessed on 21<sup>st</sup> August 2018).

<sup>14</sup> Joint Report of the Office of the United States Trade Representative and the US Department of Commerce, Subsidies Enforcement Annual Report to the Congress, 2003.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

development needs.<sup>17</sup> Therefore, Kenya needs to adjust its approach and streamline its policies on subsidy arrangements if it intends to reap maximum benefit from it in the future.

The WTO members have the right to impose trade remedies,<sup>18</sup> such as, anti-dumping and countervailing duties, to correct the competitive imbalances created by unfair trade practices, such as dumping and subsidies, when these cause injury. They have also agreed on multilateral disciplines governing the granting of subsidies. Member states are also allowed to apply safeguard measures in case of a surge of imports that causes, or threatens to cause, serious injury.<sup>19</sup>

Apart from the General Agreement on Tariffs and Trade (GATT) and Agreements relevant to trade remedies on a multilateral level, the WTO rules can be implemented by member states in the form of domestic legislation to attempt to mitigate the adverse impacts of various trade practices on domestic industries.<sup>20</sup> Countervailing measures provide relief to domestic industries that have been or may be injured by foreign subsidies on competing imports.

Kenya, just like many developing countries have failed to efficiently use the trade remedies availed to it in order to spur its economic development internationally. The study looks at some of the challenges and setbacks the government faces limiting its use of subsidies and countervailing measures.

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<sup>17</sup>Ibid.

<sup>18</sup> Articles VI and XIX of the GATT 1994

<sup>19</sup> World Trade Organization, WTO e learning: The WTO Multilateral Trade Agreements (2011) 209

<sup>20</sup> Jones VC „Trade Remedies and the WTO Negotiations „(2010) 1 Congressional Research Services.

## 1.2. Statement of the Problem

Subsidies play a critical component of trade liberalization.<sup>21</sup> In order to allow industries which have been significantly injured due to increased liberalization of trade to grow, Kenya has resorted to the use of subsidies.<sup>22</sup> This has been done through initiating contingent protection measures as a strategic tool to reduce the domestic pressures when liberalizing domestic markets for foreign competition.<sup>23</sup> This has however posed an array of problems. The implementation of these contingent protection measures are often too arbitrary, unilateral and lack in transparency. This has subjected these noble measures to misuse and abuse.<sup>24</sup>

Critically, the SCM Agreement prohibits specific subsidies especially those directly pre-configured to boost exports and give a country a competitive advantage in the market.<sup>25</sup> It is primarily designed to address traditional types of market distortions, such as price depression and loss of market share.<sup>26</sup> It is not designed to directly address the impact of subsidies that conduces to the actual debilitation of the resources and sequent debarment of external producers from accession.<sup>27</sup> This, coupled with the lack of a functional domestic institution to regulate subsidy arrangements, conduct investigations and prescribe countervailing measures exposes Kenya to potential risk of economic abuse.<sup>28</sup>

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<sup>21</sup>Anwarul Hoda and Rajev Ahuja, "Agreement on Subsidies and Countervailing Measures: Need for Clarification and Improvement," *Journal of World Trade* 39(6) 2005.

<sup>22</sup>Willemien Denner, *Trade Remedies and Safeguards in Southern and Eastern Africa*, Trade Law Center for Southern Africa, the Konrad-Adenauer-Stiftung Center, 2009.

<sup>23</sup>Ibid.

<sup>24</sup>Ibid.

<sup>25</sup>Levit J K, "The Dynamics of International Trade Finance Regulation: The Arrangements on Officially Supported Export Credits," *Havard International Law Journal*, no. 45, 2004, p.56.

<sup>26</sup> Robert Z. Lawrence and Nathaniel Stankard, *Should Export Subsidies be Treated Differently?* Havard University 2005.

<sup>27</sup>Supra note 19.

<sup>28</sup>Supra note 19.

Notably, most countries and regional economic establishments within Africa do not play an active role in the implementation of SCM Agreements or in disputes arising from their implementations.<sup>29</sup> Kenya however, has participated in the international trade sphere but has not sufficiently utilized the WTO trade mechanisms accorded to it.<sup>30</sup> This apparent lack of participation is primarily attributed to the complex rules and regulations involved in international trade. This emanates from and is compounded by the noticeable lack of expertise, knowledge, financial and legal capabilities to implement these rules and regulations or to protect its exports from this policy instruments.<sup>31</sup> Consequentially, Kenya remains dangerously exposed to the whims of the international players who participate in drawing these instruments with the net effect that the strict application of these rules may lead to devastating results in the local industries.<sup>32</sup>

Lastly, most of the provisions on subsidies as constituted in the General Agreement on Tariff and Trade (GATT) only go as far as protecting industrial products. However, given that Kenya is an agricultural country it is deprived of the capacity to fully utilize these policy instruments. As such its benefits is only limited to a narrow scope.<sup>33</sup>

The study seeks to examine the usage of subsidies and countervailing measures in Kenya, the challenges and constraints confronting it in the implementation of countervailing measures, to solve the significant question as to why Kenya fails to utilize countervailing measures in the face

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<sup>29</sup>Santiago Ibanez Marsilla, "Recent Stimulus Packages and WTO Law on Subsidies," *World Custom Journal* 2011.

<sup>30</sup> Kenya has had no cases in the WTO as a complainant or a Defendant. It has however participated in 3 cases as a third party i.e European Community Export Subsidies on Sugar cases by Australia, Brazil and Thailand. Kenya and the WTO available at [https://www.wto.org/english/thewto\\_e/countries\\_e/kenya\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/kenya_e.htm) (Last accessed on 14<sup>th</sup> December 2018).

<sup>31</sup>Supra note 1.

<sup>32</sup>Supra note 1.

<sup>33</sup>Ibid.

of the adverse effects of unfair trade practices from subsidized imports, and to explore whether it is feasible to apply and implement countervailing measures.

### **1.3. Theoretical Framework of the Study**

This study proceeds on the theory of need for exceptional circumstances justifying government intervention in economic development through administration of economic trade subsidies. Two terms comes to mind in this study; economic liberalization and nationalism. Economic liberalization encompasses the processes, including government policies that promote free trade, deregulation, elimination of subsidies, price controls and rationing systems, and, often, the downsizing or privatization of public services. From this perspective, government intervention in markets is seen as both inefficient and distortionary. It is argued that even if an interventionist State acts with good intentions, it does not have the competence to manage the economy well. By moving scarce resources into less productive economic activities, the State is thought to reduce overall economic growth, with adverse consequences for poverty reduction. Within this framework, the State creates enabling conditions in the form of macroeconomic stability, guaranteeing property rights, and maintaining law and order for rapid economic growth driven by private sector (both domestic and foreign) investment.

Economic nationalism on the other hand is the policy which emphasizes domestic control of the economy, labour and capital formation, even if this requires the imposition of tariffs and other restrictions on the movement of labor, goods and capital. It opposes globalization in many cases, or at least it questions the benefits of unrestricted free trade. Economic nationalism may include such doctrines as protectionism and import substitution. These measures are important in cases where the government needs to leverage a country's competitiveness in the international market and where there is need for domestic industry protection.

The study is equally based on the theory that there is need to open up the market to other countries internationally. However, this international trade is not in any way absolute as every country has the right to respond to trade that injures its economy in any way. A government has the right to determine what is permissible and that which is not. International trade presupposes fair trade practices between countries but where there is a breach of the laid down requirements, a government can impose countervailing measures to safeguard the interests of its country.

The paper proceeds on the theory that economic nationalism policies which emphasize domestic control of the economy, labor and capital formation are important so long as it is justifiable put in place within a reasonable and justifiable legal and institutional framework. The same is even recognized under the various regional integration instruments through the principles of geometrical and asymmetrical relationship among countries.

#### **1.4. Justification of the Study**

The advent of the Constitution of Kenya 2010 presented a totally different legal landscape for the use of subsidies as a mechanism for trade in the international trade law.<sup>34</sup> Reasonably so, the Constitution expressly allows the application of general rules as stipulated in the international laws as propounded in the laws of Kenya.<sup>35</sup> Pursuant to this provision, applicable laws relating to the use of subsidies are effectively being used as legal instruments in Kenya. As a result, Kenya has made remarkable steps towards effectively utilizing subsidy instruments as a tool for international trade law.<sup>36</sup>

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<sup>34</sup>The Constitution of Kenya, Article 3 (5).

<sup>35</sup> Ibid

<sup>36</sup> Ibid.

In 2017, the President accented to the Kenya Trade Remedies Act No. 32 of 2017. The Act provides for the establishment of a Trade Remedies Agency, provided to the investigation of subsidies and stipulated guidelines on the use of trade remedies. One year later since the Act came into force, the management board of the Agency is yet to be appointed in order to start its mandate under the Act.

Even with the Act in place, the government is faced with challenges as to how to effectively handle the growing amount of subsidized products within the country. Being a Developing country, the government is largely dependent on foreign aids and grants to adequately finance the development of infrastructure in the country. This has made the government hesitant in its action against subsidizing foreign country.

Kenya, through the Trade Remedies Act has adopted the provisions of the SCM Agreement. This is together with all its shortcomings and without effort to make it any better. This is the case even with the East African Community legislation on subsidies and countervailing measures.

As indicated above, the limitations posed by the existing legal, policy and institutional regime poses significant challenges to the utilization of subsidies in Kenya. It presents a desire to advocate for the legislation of a law unique to the prevailing local circumstances. This is the major reason of undertaking this study.

This study aims to contribute to what has been said on the WTO trade remedies and developing nations, and, moreover, to explore the possible benefits for developing countries by using countervailing measures. The focus here is Kenya as a developing country and the study seeks to

explore the reasons why developing countries fail to utilize this unlimited opportunity to outmost.

The proposed reforms, such as, an institutional, regulatory framework and third party participation to the WTO dispute settlement process , to mention a few ,are intended to provide a guide on how to deal with international trade remedies.

### **1.5. Objectives of the Study**

This research undertakes to look at two objectives. These are the overall and specific objectives of this study. The precise objectives are as stated:

#### **1.5.1. Overall Objectives**

The overall objectives of this study is to investigate the significance of subsidies and countervailing measures in the economic development of the country and to highlight the challenges and constraints in their implementation.

#### **1.5.2. Specific Objectives**

The specific objectives of the study are:

- i. to coherently spell out the provisions on the domestic and international trade law on the regime of the subsidies and countervailing measures applicable to the Kenyan Context.
- ii. to examine contemporary legal and policy issues which should be addressed in regard to the concords on subsidies and countervailing measures to ensure that trade is done on a uniform platform.

- iii. to interrogate Kenya's policy, legislative and institutional gaps which hinders effective use of subsidies as envisioned by the World Trade Organization legal provisions.
- iv. to assess the practical challenges faced in implementation of the regulatory framework envisaged by the World Trade Organization in Kenya.
- v. to analyze whether establishment of countervailing measures against abuse of subsidies has been effective in its functions.

### **1.6. Research Questions**

This study will be guided by the following questions:

- a) Is Kenya's Legislative and Institutional framework comprehensive enough to sufficiently govern the utilization of subsidies and countervailing measures?
- b) What are the challenges that hinder the proper implementation of the Kenya Trade Remedies Act 2017?
- c) What are the possible lessons that Kenya can learn from other jurisdictions on the use and implementation of countervailing measures;
- d) What kind of legal reform and practices should Kenya adopt for the proper, adequate use and implementation of countervailing measures?

### **1.7. Research Hypothesis**

This research paper proceeds on four assumptions. They are that:

- a) the Kenyan government has not effectively used subsidies as a tool of trade due to the apparent lack of institutional framework to regulate the use of subsidies in Kenya.

- b) the legal and institutional framework laid down to regulate the use of subsidies have not properly implemented.
- c) the establishment of an independent institution to monitor the regulation of Subsidies in Kenya will greatly promote the implementation of the subsidies and countervailing laws .

### **1.8. Literature Review**

Regulation of subsidies and countervailing measures and its importance in the international trade platform has been an issue of intense study. Various authors have researched in this area and advanced different arguments regarding institutional, legal and policy changes which can be used to enhance regulation of subsidy laws. This research will narrow down on policy, legal and institutional issues with an aim of interrogating specific areas for reform.

An article by the Trade Program Team, “Trade Remedies: Subsidies and Countervailing Measures and their Application in Developing Countries,”<sup>37</sup> opines that developing countries face huge obstacles and challenges in implementing the SCM Agreement and GATT. This article outlines that the genesis of this challenge is attributed to the fact that most of the developing nations have not domesticated the various instruments meant to regulate the use of subsidies. As a result, this has incapacitated the use of these instruments in national laws and regulations. The article particularly underscores that these various instruments have not been domesticated because they do not provide legal framework unique to the developing countries set up.

Similarly, due to the overreliance of developing countries on agricultural products more than manufactured products, the use of the SCM Agreement which largely address issues of industrial products has led to the modification of the laws to the African set up. This study proceeds from

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<sup>37</sup>*Supra* note 1.

this foundation and enumerates the specific adjustments which have been made by Kenya in implementing these laws while clearly outlining contemporary challenges faced with a view to proposing relevant reforms.

Ousseni Illy in his paper *African Countries and the Challenges of Trade Remedy Mechanisms within the WTO*<sup>38</sup> states that trade remedies are very important tool in dealing with any negative effects of trade globalization yet a majority of African countries are not properly equipped to handle them. He looks at the experiences and the challenges faced by African countries in so far as trade remedies are concerned. In the end, he proposes some solutions, including regional approaches and ad hoc trade remedy investigating bodies, to overcome these constraints

Willemien Denner in his book, *Trade Remedies and Safeguards in Southern and Eastern Africa*,<sup>39</sup> argues that countries are legally allowed to temporarily suspend obligations for industries which significantly injure their domestic industries due to increased liberalization. He goes further to assert that the need to create contingent protections is what has led to creation of SCM Agreement and GATT. He however, reinforces that the application of these trade remedies is practically largely arbitrary, unilateral and devoid of openness. He further asserts that individual countries and regional economic establishments specifically within the East Africa and Southern Africa play little or no role during the development, application and implementation of these trade remedies or disputes arising therefrom. He opines that the poor participation by these countries can be ascribed to complex regime of rules and regulations.<sup>40</sup>

This study shall highlight the legal framework that govern and regulate these trade measures and

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<sup>38</sup> Illy, Ousseni, *African Countries and the Challenges of Trade Remedy Mechanisms within the WTO* (June 23, 2016). Society of International Economic Law (SIEL), Fifth Biennial Global Conference, Forthcoming.

<sup>39</sup>Supra note 19.

<sup>40</sup>Ibid. According to the author this is primarily due to the deficient expertise, knowledge, fiscal and licit capabilities to implement these rules and regulations or to buckler their exports from these policy instruments.

point out areas that must be addressed to improve the ability of Kenya as an African country to utilize trade remedy provisions and protect her exports from the purview of these complex policy instruments with an aim of ensuring that maximum foreign exchange is earned from international trade.

Von Christian Tietje in her article “*Current Developments under the WTO Agreement on Subsidies and Countervailing Measures as an Example for the Functional Unity of Domestic and International Trade Law*”<sup>41</sup> explores some of the contemporary legal and policy concerns which have arisen since the introduction of SCM Agreement by the WTO. Particularly, arising out of legal issues, the author argues that in respect to international trade law, the typical application of dualist and monist theories of law is no longer tenable. This argument is premised on the fact that the influence the WTO has on its member states on a broad range of domestic regulations concerning economic issues cannot be ignored. This has fundamentally influenced in a number of ways the domestic legal system of several member countries. Pursuant to this interaction, a unique interrelationship of domestic and international law and policy has developed. This thesis will proceed from that foundation and examine how such a functional approach is applicable on broader terms to the debate on the relationship between domestic and international law in general. Special regard will also be paid to the Constitution of Kenya and its provisions particularly relating to the application of general rules of international law, treaties and conventions and even customary international law.

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<sup>41</sup> Von Christian Tietje, “Current Developments under the WTO Agreement on Subsidies and Countervailing Measures as an Example for the Functionality Unity of Domestic and International Trade Law,” Heft 26 2004.

Another author, Scott Lincicome in his analysis in *Countervailing Calamity: How to Stop the Global Subsidies Race*<sup>42</sup> asserts that as a result of international trade, the world is awash with trade-distorting subsidies. While alluding to the financial crisis of 2008, he opines that governments have since adopted massive “stimulus” packages in specific areas of the economy in order to prevent them from muzzling stranglehold of trade remedies applied by different countries. He admits that these remedies are used as immediate leverage to alleviate foreign competitions and that this is increasingly leading to abuse of dispute resolutions mechanisms to solve disputes that are largely propelled by act of good faith at the behest of allowing market forces to define trade engagements. Clearly, this has necessitated the need for trade reforms. It is therefore imperative and compelling for the third world economies like Kenya to come up with sound measures for regulating subsidies so as to protect their interests. This research focuses on remedial measures the Kenyan government must undertake as necessary adjustments if they are to continue to remain a force to reckon with in international trade. In particular, it greatly emphasizes on the countervailing measures which ought to be taken to combat measures taken by other trading partners.

Barbara J. Spencer notes in *Countervailing Duty Laws and Subsidies to Imperfectly Competitive Industries*<sup>43</sup> that governments today are under substantial pressure to subsidize particular industries or firms within industries. She argues that this arises out of a natural desire to maintain employment, improve economic development in particular regions and to increase imports.<sup>44</sup> She underlines that though subsidy is generally and fundamentally expected to be salutary to the

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<sup>42</sup> Scott Lincicome, “Countervailing Calamity: How to Stop the Global Subsidies Race,” Policy Analysis 2012.

<sup>43</sup> Barbara J. Spencer, *Countervailing Duty Laws and Subsidies to Imperfectly Competitive Industries*, University of Chicago Press (1988).

<sup>44</sup>*Ibid.* The author explains that it is often hard to resist the pleas of an ailing industry for help while at the other end of the spectrum, governments are tempted to intervene for the purpose of giving domestic firms a bigger role in industries that develop new technologies and have a promise of creating wealth for the future.

concerned industry, in most instances it does not wholly benefit the country. This stems from the fact that the cost to taxpayers usually more than outweighs the gains to workers and firms who receive subsidy.<sup>45</sup> Nevertheless, a national gain is possible from subsidies to firms facing foreign competition in imperfectly competitive industries.<sup>46</sup> She argues that subsidies that increase exports in these imperfectly competitive industries can increase profits by more than the subsidy payment and thereby yield a national gain at the expense of foreign firms. This paper will delve into examining the effect of introduction countervailing duty as a measure to combat subsidies. One key issue it seeks to analyze is whether the countervailing duty levels calculated under the GATT rules are sufficient to prohibit harmful subsidies.

Rajesh Aggarwal discusses in, *WTO: Agreement on Subsidies and Countervailing Measures*<sup>47</sup> the use of import-substitution subsidies. He underscores that this type of subsidies is highly effective for prompting and promoting growth of certain industries. However, he asserts, that it is compounded by several pitfalls. This is an affirmation that there are indeed genuine concerns which need prompt attention. He goes on to discuss the channels of procedure engraved in the legislative framework which can be followed where regulations are floated. He outlines that an affected country or government can approach the WTO's Dispute Settlement Body (DSB) to challenge the applicability of certain trade measures against its product or market. If such a challenge is found to have reasonable merit then such a country can be asked to remove the

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<sup>45</sup>*Ibid.* The author elaborates that for example, there can be no national gain from the subsidization of a competitive industry such as agriculture except to the extent that maintenance of a way of life is given heavy weight or that regional effects are considered very important.

<sup>46</sup>*Ibid.* Such industries normally consists of only a few firms earning high profits because of entry barriers arising from substantial capital or research and development requirements that leads to economies of scale.

<sup>47</sup> Rajesh Aggarwal, "WTO: Agreement on Subsidies and Countervailing Measures (SCM)," International Trade Center 2010. Available at <http://rbdi.bruylant.be/public/modele/rbdi/content/files/RBDI%201997/RBDI%2019972/Etudes/RBDI%201997.2%20-%20pp.%20635%20C3%A0%20660%20-%20Melaku%20Geboye%20Desti.pdf> (Last accessed on 24<sup>th</sup> August 2018).

subsidy. Secondly, he outlines that a country can independently undertake a national investigation from which it can impose the necessary compensative duties where subsidized products are gaining entry into its territory. This study explores the viability of exploring such options with special regard being paid to the Kenyan trade policies and the policy statements likely to be enacted to come up with a coherent body of laws of regulating such circumstances.

John H. Barton in *Subsidies and Countervailing Duties*<sup>48</sup> acknowledges that most countries deliberately abuse countervailing measures to fend off competitions that there always exists the possibility that countervailing duties may be perverted by an importing Country to obviate licitly valued imports from other countries. He proceeds to argue that since GATT permits member nations to use countervailing duties only under specific conditions, it is critical to define the concept of subsidy for the purposes of international trade regulation. He asserts that the ultimate effect of applying countervailing duty in bad faith is that it is likely to lead a country pursuing protectionist policies in order to protect its own industries. As a result, he argues, this is likely to distort use of trade policies and consequently lead to abuse of rules. This research seeks to mirror the Kenya's subsidies policies to this argument so as to determine if Kenya has been floating the rules to its advantage. In retrospective, it will also undertake to examine if similar incidences has been done to Kenya. Consequently, it will explore which mechanisms can be put in place to ensure that incidences of similar nature do not happen in future.

The emphasis on the need to study and investigate the subsidy mechanisms in Kenya has been informed by the need to legitimately ensure that the subsidies and countervailing measures are effectively being used by the government to promote international trade while at the same time protecting domestic companies from the upheavals of the international market so that they do not

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<sup>48</sup> John H. Barton, *Subsidies and Countervailing Duties*, Curtis Steel Printer (2006).

collapse. This will ultimately ensure that a coherent mode of regulation is being deployed by the government.

### **1.9. Methodology**

This is a qualitative research work. It will be enriched through the use and review of international legal instruments, subsidiary legislations and government policy papers. In addition to primary sources of data, secondary sources are also used. These include inter alia: textbooks, local and international journals, articles, research papers, case law, newspapers and magazines, internet sources and other materials relevant to this study.

### **1.10. Limitations of the Study**

This research paper will not focus on other aspects of international trade law. It will be greatly restricted to the aspect of subsidies and countervailing laws. The main focus of this study is to demonstrate that there are inconsistencies in the international legal instruments and that Kenya has not done enough to address this problem. As a result the country's economic blueprint has been left thoroughly exposed.

### **1.11. Chapter Breakdown**

This study is broken down into five thematic chapters all having a direct bearing on subsidies and countervailing duties.

Chapter one marks the introduction of the research topic and an overview of the research problem and background of the study is highlighted. This chapter also outlines the way the research is conducted and clearly defines the boundary of the research topic. It also contains a

theoretical review. A general outlook of how the research is organized is also laid out in a chronological order.

Chapter two on the other hand discusses the legal framework of the subsidies and countervailing duty's law in Kenya. It looks at the basic fundamental rules governing the application of the subsidies and countervailing measures. This chapter dissects provisos of the SCM Agreement and GATT rules and their implications implored in respect to the Kenyan markets. This chapter also ascertains whether government policies governing the use of subsidies and countervailing duties meet the threshold cast in the international legal instruments.

Chapter three explores the usage of subsidies and countervailing duties as tools of trade in the international trade law. It undertakes to define and elaborate exactly what these concepts mean. Great emphasis is paid to the Kenyan market and the chapter also interrogates how Kenya has been using these mechanisms in international trade and also outlays the challenges the country has been experiencing in using these mechanisms.

Chapter four undertakes to look at a comparative study of jurisdictions which have effectively enacted domestic legislations regulating how subsidies and countervailing measures can be regulated. As such it dwells on their successes but also look at their weaknesses and legal framework so as to access whether their successes if localized can be tenable in the local circumstances.

Lastly, Chapter five provides an overall summary and conclusion of the research topic. It highlights the general overview of the research topic. It also enumerates the proposed recommendations that can be applied to improve the existing regime.

## **CHAPTER TWO**

### **THE LEGAL FRAMEWORK OF THE SUBSIDIES AND COUNTERVAILING DUTIES**

#### **LAW IN KENYA**

##### **2.1. Introduction**

The need to increase Kenya's market share in trade has led to the exploration of international and regional trade opportunities. In these sorts of arrangements, trading partners enter into binding legal and institutional arrangements to govern their relationships. Included in these arrangements are the provisions governing the relationship of trade liberalization and subsidies.<sup>49</sup> Trade subsidies are governed by the SCM Agreement, GATT and the Agreement on Agriculture. The legal and institutional frameworks are governed by the various legal and institutional texts at the global level and at the regional level.<sup>50</sup>

This chapter undertakes to discuss the legal framework of the subsidies and the countervailing duties law in Kenya. It intends to lay down the particular laws both international and domestic which inform the application of the use of subsidies and countervailing duties in Kenya. Particular emphasis is put on the specific national legislation which affects the use of subsidies and countervailing duties in Kenya. To this end this chapter points out the specific provisions of the Kenya Trade Remedies Act which regulates the use of subsidies and countervailing duties in Kenya. Various policies and programs employed by the government which are tailored to influence these twin policies are also interrogated.

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<sup>49</sup> Balassa B., "Incentive Policies and Agricultural Performance in Sub-Saharan Africa, Working Paper No. 77, The World Bank (1988).

<sup>50</sup> Corden M., "The Structure of a Tariff System and the Effective Protective Rate", The Journal of Political economy, Vol 74 No.3 1966.

In the international platform, the legal regulations which deeply affect Kenya's interaction with these policies emanates from the WTO.<sup>51</sup> WTO is the international umbrella body which regulates international trade practices in the world. However, the basic provisions on applications of subsidies and countervailing measures as laid out in GATT 1994 and the SCM Agreement protocol.<sup>52</sup> The provision of these twin protocols significantly affects the subsidies and countervailing program employed by the Kenyan government in its interaction with other member countries in the international trade platform.

On the international front, this chapter examines the Agreements which emanates from the WTO of which Kenya is a member and in particular the SCM Agreement and GATT which are the key agreements which regulate international trade.

Aware that the Kenyan government is a party to different treaties with its economic partners as relates to issues of harmonizing common laws regulating subsidies and countervailing duties, this chapter specifically examines the agreement endorsed by the government under the banner of the East African Community Customs Regulation. The Chapter intends to look into the specific provision of this protocol with an aim to defining to what extent and effect it affects the application of subsidies and countervailing duties in Kenya.

Kenya is a member of key economic platforms. This includes the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the WTO. These international and regional economic pillars largely influence the regulation of subsidies and countervailing duties by Kenya and its partner states. Membership to these organizations has

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<sup>51</sup> Glenday G and David Ndii, "Export Platforms in Kenya" in Kimenyi Mbaku and Mwaniki N., eds *Restarting and Sustaining Economic Growth and Development in Africa: The Kenyan Case*, Ashgate Publishing 2003.

<sup>52</sup> Ibid.

particularly propelled Kenya to undertake substantial trade liberalization initiatives. This includes but is not circumscribed to the application of subsidies to facilitate trade interaction between itself and the other member countries.

Regulation of subsidies and countervailing duties in Kenya is informed by a plethora of laws. There exists a rather strong body of laws which sufficiently encompass this unfamiliar terrain.<sup>53</sup> The principal legislation on the application of subsidies and countervailing duties in Kenya is the recently enacted Trade and Remedies Act 2017. The regulation of these twin policies are informed by a number of significant objects. Key among them is the economic partnerships blocks to which Kenya ascribes to.

The foregoing discussion outlays the backbone of the legal framework of subsidies and countervailing duties in Kenya. The preceding part traverses the legal basis of regulation of subsidies. It canvasses the specific legislations, treaties and protocols detailing and highlighting specific provisions which are of fundamental importance in as far regulation of subsidies and countervailing duties is done by Kenya and its international trading counterparts.

## **2.2. International Legal and Institutional Framework**

### **2.2.1. The World Trade Organization**

The WTO is the only organization tasked to oversee with the management of international trade. It develops regulations of trade amongst nations at a global or at the regional stage. At the core of the WTO agreements, are bulks of negotiated agreements ratified by municipal laws. Its key object is to assist the merchandisers, importers, and exporters to carry out their businesses in a

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<sup>53</sup> Supra note 51

fair and level platform.<sup>54</sup> Its basic purpose is to compel member nations to make transparent and trade free of barriers.

The WTO was established at the historic Uruguay Round of Trade Talks in 1994<sup>55</sup> where it parties mutually made an accord that there was urgent and compelling desire to transform GATT to a permanent establishment. The Uruguay Round was around of Trade Talks of GATT negotiations which commenced in Uruguay in 1986. It was intended to promote free trade among member states. This event was the inception of the WTO and consequently a chain of multilateral agreements.<sup>56</sup> The WTO is tasked to provide a platform for trade negotiations, arbitrating over trade conflicts and monitoring efficacious trade policies. It also administers WTO agreements, offers technical assistance and necessary aids to non-developed countries and monitors national trade policies.<sup>57</sup>

The WTO is an extremely powerful institution. It has strong anti-subsidy policies which were formulated to promote international trade by militating against trade-distorting subsidies and further entrenching dispute-settlement mechanisms for resolving subsidy-related disputes.<sup>58</sup>

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<sup>54</sup> Available at <<http://www.who.int/trade/glossary/story098/en/>> (Last accessed on 20<sup>th</sup> October 2018).

<sup>55</sup> Creation of the Dispute Settlement Understanding was one of the central objects of Uruguay Round of Talks. See World Trade Organization, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 1999. Available at <[http://www.wto.org/English/docs\\_e/legal\\_e.htm](http://www.wto.org/English/docs_e/legal_e.htm)> (Last accessed on 20<sup>th</sup> October 2018).

<sup>56</sup> The main pillars of the WTO are the multilateral trade agreements including amongst others the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Trips (TRIPS).

<sup>57</sup> Available at <[http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm)> (Last accessed on 19<sup>th</sup> October 2018).

<sup>58</sup> Anti-subsidy measures take the form of import duties on the subsidized products at issue. The measures are intended to be remedial rather than punitive. They are supposed to offset the value of the benefit of the subsidy to the foreign producers, so that it no longer confers a competitive advantage. They are not intended to punish offending government or their countries exporters. Anti-subsidy actions may be adjudicated at both the national and multilateral levels.

In order to ensure compliance with its rules, WTO discourages distortive trade practices while allowing members states to reap maximum benefits to its provisions for their advantages as long as abusive practices are not incorporated.<sup>59</sup>.

The WTO oversees the dispute resolution process regarding the GATT and subsequent multilateral agreements entered into under WTO auspices.<sup>60</sup> In addition to WTO agreements, the principal sources of WTO law are decisions by the WTO's Appellate Body to which panel decisions can be referred. The decisions by the Appellate Body are highly persuasive.<sup>61</sup>

At the international level, the legal text governing trade and subsidies is found in the agreement establishing the WTO and its various annexes.<sup>62</sup> The WTO framework encourages the progression of international trade. It accomplishes this by availing the following: An executive mechanism which is basically the Director-General and the Secretariat acting in their administrative capacity; a legislative apparatus consisting of the Ministerial Conference and the General Council leading in their decision-making capacity; and lastly an enforcement arm for a code of conduct monitoring the international trade regulations and practices of the involved nations. The afore-illustrated structure forms the General Council acting in its capacity as the Dispute Settlement Body.<sup>63</sup>

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<sup>59</sup> Ibid 57

<sup>60</sup> Ibid 55

<sup>61</sup> Ibid 57.

<sup>62</sup> Article III of the Marrakesh Agreement establishing the WTO

<sup>63</sup> Ibid Article IV

The Agreement stipulates that WTO shall promote the enactment, management and operational capacity and furtherance the targets of the Agreement. It also avails the structure for the enactment, management and operation of the multilateral trade Concords.<sup>64</sup>

A platform for trade related negotiations with regards to multilateral trade relations is provided by the WTO for member nations. In addition, it provides a platform for member states who have entered into mutual specific agreements relating to their multinational trade relations and the enactment of such negotiations, as may be determined upon by the Ministerial Conference.<sup>65</sup>

The need therefore to balance international trade between different cadres of developed and developing Member States have shaped up and influenced to a great extent the WTO Subsidy rules over the years.<sup>66</sup>

### **2.2.2. The General Agreement on Tariffs and Trade**

The Uruguay Round of the General Agreement on Tariffs and Trade (GATT) introduced monumental trade liberalizations into major branches of the world trading mechanism. Achievements of the Round of the General Agreements ranges from the agreements<sup>67</sup> to control the usage of sector-specific government subsidies to production and exportation of almost all internationally traded commodities among others.<sup>68</sup>

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<sup>64</sup> Keyfitz R and Wanjala J., “Optimal Tariff Refrom for Kenya” Technical Paper 91-05, Ministry of Planning and National Development 2009 p. 24.

<sup>65</sup> World Bank, “Growth and Competitiveness in Kenya” World Bank Africa Region, Private Sector Division 2010 p.2

<sup>66</sup> Ibid.

<sup>67</sup>The Agreement on Subsidies and Countervailing Measures and the Agreement on Agriculture.

<sup>68</sup> Meredith Crowley, The Agreement on Subsidies and Countervailing Measures: Tying One’s Hand through the WTO, Federal Reserve Bank of Chicago (2006).

During the Uruguay Round, governments made a comprehensive determination to the three types of subsidies namely; export subsidies, production subsidies, and Research & Development (R&D) subsidies. In extension, they also made an agreement to outlaw the use of all export subsidies. Cognizant to the fact R&D subsidies are instrumental in the technological processes, governments okayed the employment of R&D subsidies by member States. However, concerning the use of domestic production subsidies, the governments had some underlying reservations.<sup>69</sup>

### **2.2.3. The Agreement on Subsidies and Countervailing Measures (SCM Agreement)**

The SCM Agreement which is an annex to the first treaty of WTO addresses two topics which are closely related to each other; subsidies and countervailing measures.<sup>70</sup> Previously, the SCM Agreement was encrusted in GATT 1947, which harbored certain restrictions relating to subsidies and countervailing measures. This created an impetus on the need to formulate an agreement which is specifically designed to address matters concerning subsidies. It has fundamentally changed the international trade landscape by introducing better laws which are fashioned to promote better trade policies. It is a key legal instrument for Kenya. Its application and usage is envisaged in Article 2 of the Constitution.<sup>71</sup>

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<sup>69</sup> Ibid.

<sup>70</sup> The SCM Agreement became operational on 1<sup>st</sup> January 2005.

<sup>71</sup> Article 2(5) of the Constitution states that the general rules of international law shall form part of the laws of Kenya.

The SCM Agreement addresses two related issues that entails, the disciplines controlling the provision of subsidies; and the disciplines dealing with the application of the countervailing remedies to compensate harm caused by subsidized imports.<sup>72</sup>

Multinational disciplines are basically laws regulating the viability of a subsidy in terms of its approval to Member State could be enforced with the aegis of the stipulated WTO Dispute Settlement Mechanism. On the other hand, countervailing duties are a unilateral instrument. They may be implemented by a Member State after a necessary evaluation by that Member State and with a guarantee that the conditions spelt out in the SCM Agreement are complied with.

At the outset, the SCM Agreement connotes subsidy as fiscal and or financial contributions by either a state, entity or governmental institution within the dominion of a Member State which confers specific interest to the Member State.<sup>73</sup> ‘Financial contributions’ and ‘benefit’ are separate legal components of the concept of subsidy that commands in depth interrogation.<sup>74</sup> Whereas the term ‘Financial contribution’ corresponds to an action taken by the state the ‘benefit’ contextually focuses on the ultimate receiver.<sup>75</sup> The ‘financial contribution’ is determined by the ‘the exact finances remitted by a state and are not limited to amounts approved by their budgets for the respective year. Benefits are non-existent in the abstract. On the contrary, they are received and enjoyed by either a beneficiary or a recipient. Rationally a ‘benefit’ arises only if a person has in fact received an intended support. In broader sense, this term implies that there must be a recipient. The benchmark to detect a ‘benefit’ is the marketplace where the

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<sup>72</sup> Subsidies and Countervailing Measures : Overview, *Agreement on Subsidies and Countervailing Measures (SCM Agreement)* available at [http://www.wto.org/english/tratop\\_e/scm\\_e/subs\\_e.htm](http://www.wto.org/english/tratop_e/scm_e/subs_e.htm) accessed 13th December, 2018.

<sup>73</sup> Article 1 of the SCM Agreement.

<sup>74</sup> Santiago Ibanez Marsilla, Recent Stimulus Packages and WTO Law on Subsidies, *World Custom Journal* Volume 3 Number 2 2010.

<sup>75</sup> WTO AB Report, Canada-Aircraft.

beneficiary gains in the market where he would not have gained if market forces were left to determine the market trends.<sup>76</sup>

It is further worth noting that benefit does not have to be a competitive benefit. What this means is that it is unnecessary to argue that subsidy leads to a lower cost of production incurred by the recipient.<sup>77</sup> In other terms, this means that the benefit must be detectable in the matter, as opposed to the object (that is, the goods). For example the ‘beneficiary could be the business entity itself or its shareholders.<sup>78</sup>

The Agreement further stipulates that for it to be operational, a subsidy must bear the requisite “specificity” in relation to the provisions of Article 2.<sup>79</sup> Hence it must cause adverse effects.<sup>80</sup> Actionable subsidies are also underscored by an element of serious prejudice on the domestic industry of another member state.<sup>81</sup> The instrument also lists subsidies which are prohibited.<sup>82</sup> Thus they should not be used by any Member State. These include subsidies which affect export performance and on the other hand subsidies which affect the consumption of local goods over imported ones.<sup>83</sup> According to the agreement they are automatically deemed to be specific.

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<sup>76</sup> Ibid.

<sup>77</sup> Supra note Sabtiago.

<sup>78</sup> Ibid.

<sup>79</sup> Article 2 discusses the specificity of subsidies. It is similar to the provisions of Regulation 8 of the EACCU. See as discussed above in supra note 58.

<sup>80</sup> Article 5 SCM Agreement.

<sup>81</sup> Article 6 of the SCM Agreement.

<sup>82</sup> Article 3 of the SCM Agreement.

<sup>83</sup> The SCM Agreement should be construed in light of Article XVI GATT. Nevertheless, General Interpretative note to Annex 1A states that “In the event of disagreement between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A as the “WTO Agreement”), the provision of the other agreement shall prevail to the extent of the conflict.

Due to the limited scope of the SCM Agreement, it covers only subsidies which might materialistically hinder the international trade law. These excludes the agricultural goods because these are independently governed by the by the provisions of the Agreements on Agricultural goods.<sup>84</sup>

There are various types of subsidies in existence at the international market. These subsidies differ and depend on the usage and application by various countries. These kinds of subsidies are all recognized in the international platform.<sup>85</sup> However, their usage propels application of countervailing duties to remedy their effects. While some subsidies invite application of high countervailing duties other are to a large extremely harmless hence they invite little or no application of countervailing duties.<sup>86</sup>

Pursuant to the SCM Agreement, there are three different kinds of subsidies.<sup>87</sup> These subsidies are dichotomized in terms of specificity, purpose and nature. Subsidies that are out rightly prohibited are referred to as “red-light subsidies”.<sup>88</sup> This majorly entails complete prohibition of export subsidies. Export subsidies are prohibited because they offer unfair advantage to exported commodities in the international market. They do not invite application of countervailing measures as they are outlawed.<sup>89</sup>

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<sup>84</sup> Article 2 of the Agreement on Agriculture

<sup>85</sup>Fingerand K.M. and Schuknecht L., “Trade, Finance and Financial Crisis: Special Studies 3, World Trade Organization, Geneva, 1999.

<sup>86</sup>Fingerand K.M. and Schuknecht L., “Adjusting to Trade Liberalization: The Role of Policy, Institutions and WTO Disciplines,” Special Studies 7, World Trade Organization 2003.

<sup>87</sup>*Ibid.* The author points out that prior to looking at prohibitions on utilisations of CVDs, it is imparative to comprehend the framework under which they operate. In this framework, subsidies are put into one of three categories. The categories are often referred to in terms of a traffic light metaphor.

<sup>88</sup> Article 3 the SCM Agreement. The red light category of subsidies are prohibited. Thus CVDs cannot be imposed on them.

<sup>89</sup> John Whalley, *What can the Developing Country Infer from the Uruguay Round of Models for Future Negotiations*, Pangestu(2000).

The second category is subsidies that are not prohibited but which at times are configured to countervailing measures. They are known as “yellow-light subsidies”.<sup>90</sup> They are subject to the use of related compensatory duties. This is because they violate GATT principles, or cause serious injury or prejudice to the members in other countries.<sup>91</sup>

The third categories of subsidies are those that are neither outlawed nor dependent on countervailing measures. They are referred to as “green-light subsidies”.<sup>92</sup> Green light subsidies are permitted irrespective of any fiscal contribution or specificity test. The main subsidies given green-light under this category are the subsidies used in research, disadvantaged areas and the ones employed to help in the adoption of existing facilities for ecological requirement.<sup>93</sup>

It is worth noting that adjustment related government subsidies or advantages that are not specific and subsidies that are not widely available within an economy are neither prohibited<sup>94</sup> nor actionable.<sup>95</sup> The presumption is that the mentioned subsidies cause relatively little contortion in the distribution of resources and are therefore permissible.

The SCM Agreement has established guidelines on its Members use of subsidies. This is in light of the fact that subsidies can contort the conditions and expected effects of international trade if not controlled. This can easily lead to division of labor. In view of this danger the SCM

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<sup>90</sup> Article 5 the SCM Agreement. Subsidies in yellow-light category are actionable. They are subject to imposition of countervailing duties if they violate GATT or cause injury to a Contracting Party. Ideally, one can only use CVDs for the yellow-light subsidies.

<sup>91</sup>Ibid

<sup>92</sup> Article 8 the SCM Agreement. Subsidies in green-light category are non-actionable. As such no CVDs can be imposed to combat their effect.

<sup>93</sup>Ibid.

<sup>94</sup>Collier P. and Venables J., International Rules for Trade in Natural Resources, *Journal of Development Economics* 2010. .

<sup>95</sup>All specific subsidies that are not prohibited are actionable subsidies, with enterprise specificity, industry specificity and regional specificity.

Agreement establishes measures and mechanisms of promoting transparency.<sup>96</sup> It does this through providing frameworks for countries to examine other countries' subsidies plans and probe them in a transparent way.

The SCM Agreement seeks to discipline and regulate the application of subsidies by member countries of the WTO to restrain any adverse impact on other members. It also specifies the types of actions which a country can take and the procedure to be followed, if it faces adverse impact of subsidies granted by other countries. The WTO agreement on SCM Agreement explicitly mentions that a member country can either seek the withdrawal of even a permitted subsidy that is provided by another member country through the Dispute Settlement if it causes material harm or retardation of a domestic industry or can also launch its investigations to charge a further duty on subsidized imports.<sup>97</sup>

SCM Agreement further obligates states to give notices delineating crucial parameters of all precise subsidies.

Further SCM Agreement expounds on the substantive requirements that must be met before imposing compensatory measure, as well as a comprehensive procedural requirement relating to the conduct of a countervailing enquiry plus the obligation and the sustentation of countervailing measures.<sup>98</sup> An inability to respect the conditions set out in Part V, whether substantive or procedural, can be referred to conflict settlement and may lead to eventual annulment of the

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<sup>96</sup> Vermulst E, "Countervailing Duty Law and Practice Revisited," *Legal Issues of Economic Integration* 2010 p. 21.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

measure.<sup>99</sup> A Member is required to give evidence before imposing a countervailing measure. Countervailing measures can only be imposed where it has been established that there is a direct correlation between the following entities; subsidized imports, impairment to a local industry, and a causal link between the subsidized imports and the injury.<sup>100</sup>

The criterion of evaluating the existence of a specific subsidy is set out in first Part of the Agreement. Nonetheless, the criterion to establish any impairment and causation before countervailing measures are taken is set out in the SCM Agreement. Notably the SCM Agreement stipulates that the effects of subsidies can be cumulated together with effects from other countries, conglomeration of the effects of subsidized imports from at-least one Member where specified criteria are fulfilled.<sup>101</sup>

Further, SCM Agreement stipulates rules contains regarding:

- i. the imposition of preliminary and final measures;
- ii. the determination of the existence and amount of a benefit;
- iii. initiation and conduct of countervailing investigations;
- iv. the duration of measures and
- v. the use of undertakings.

The main thrust of these rules is to facilitate some transparency when it comes to investigations by ensuring that all concerned parties are afforded the rules of natural justice to champion for

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<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

their interest, and that investigating authorities are sufficiently furnished with all material information and can thus reach a correct determination.<sup>102</sup>

The SCM Agreement further provides for special and preferential treatment of disadvantaged Members States. It stipulates that developed countries members which are not eligible for special and differential treatment are permitted three years commencing from the date which they enter into the SCM Agreement to gradually terminate prohibited subsidies. The said subsidies ought to be notified within a prescribed period of 3 months of the admission into force of the WTO Agreement for the notifying Member.<sup>103</sup>

The SCM Agreement requires that Member States to give notice on all specific subsidies to the SCM Committee. Notifications are required every three years with update notifications in the interposing years. The notifications are subjugate to broader review and discussion by the SCM Committee. All members are required to appropriately apprise the SCM Committee of any changes in its domestic laws that affect the Agreement.<sup>104</sup>

As discussed, the SCM Agreement creates three basic classes of subsidies. These categories are composed of; the prohibited, actionable, and non-actionable subsidies. These 2 categories of subsidies are disallowed - subsidies contingent on export performance (“export subsidies”); and subsidies contingent, on the preference of domestic to imported goods. These subsidies are prohibited because they are intended to directly affect trade. Actionable subsidies are not prohibited.

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<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

## **2.3. The Regional legal and Institutional framework**

### **2.3.1. Treaty for the Establishment of the East African**

The Treaty defines "subsidy" as a financial contribution by Government or any public body within the territory of a Partner State or whether there is any form of income or price support in the sense of Article XVI of GATT 1994.<sup>105</sup> The operationalization of the Treaty is governed by the principles that shall govern the practical achievement of the objectives of the Community. Of relevance to subsidy is the liberalization efforts based on asymmetrical and proportionate applications.<sup>106</sup> To this end, the Treaty envisages the development and adoption of an East African Trade Regime and co-operate in trade liberalization and development.<sup>107</sup> The procedural aspects in the attainment of trade liberalization which in essence calls for eventual elimination of trade barriers including subsidies is the formation of a Customs Union.<sup>108</sup>

### **2.3.2. The East African Community Customs Unions (Subsidies and Countervailing Measures) Regulations**

Kenya is one of the founding nations and pillars of the EAC. It subscribes to the EAC Customs Union Regulations. This is the main trade policy instrument for the EAC. Others are the EAC Custom Management Act 2004 and the EAC Customs Management Regulation 2006. These laws provide for the implementation of several trade policies. More notably, they advocate for the gradual extermination of domestic tariffs, formulation of a Common External Tariff (CET) amongst East African countries and instauration of EAC Rules of Origin and other commerce - related aspects and prescribed legal framework.

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<sup>105</sup> Article 1 of the EAC Treaty.

<sup>106</sup> Ibid Article 7

<sup>107</sup> Ibid Article 74

<sup>108</sup> Now established under the East African Customs Union Protocol.

The Key object of these subsidiary legislations is to enforce the provision of Articles 17 and 18 of the Protocol<sup>109</sup> and to further guarantee that there is homogeneity amongst the Involved nations in the Imposition of subsidies and compensation measures and also to further lay a basis for a process that is equitable, limpid, answerable, predictable and in consistence with the provision of the EAC Protocol.<sup>110</sup>

The Regulation explicitly provides that it be applied in tandem with the existing public legislation of the Concerned Partner States.<sup>111</sup> Its application shall therefore be harmonious with the existing domestic laws through the use of principle of complementarity. It further stipulates that in the event an inquisition is launched by a Participating State against a non participating country, only the WTO Agreements may specifically apply in order to avoid conflict of laws.<sup>112</sup> This shall also extend to investigations or reviews which are commenced by Partner States after the coming into force of the protocols.<sup>113</sup>

### **Provisions of the Regulation on Subsidy**

The Regulation underlines that a subsidy subsists where there is a direct monetary injection by a foreign State, entity, organization or state body within the territorial-dominion of a Partner State.<sup>114</sup> It further goes ahead to outline the principles to be applied when ascertaining the existence of such a subsidy. These principles are entrenched on the general requirement for

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<sup>109</sup>Ibid, Regulation 3. Protocol means the Protocol on the Establishment of the East African Community Customs Union (2004). Article 17 of the Agreement forms the substratum of the Protocol as it sets procedures of investigating subsidies and countervailing measures against a member country which adversely affects business/industries of a member state. Article 18 lays the perimeter of collecting and tendering such evidences.

<sup>110</sup>Ibid, Regulation 2.

<sup>111</sup>Ibid, Regulation 4.2.

<sup>112</sup>Ibid, Regulation 4.5.

<sup>113</sup>Ibid, Regulation 4.1.

<sup>114</sup>Ibid, Regulation 7(1).

specificity when granting subsidy to business enterprises or industries.<sup>115</sup> The Regulation draws clear and specific perimeters of determining instances where subsidy is only given to a specific sector. This is to promote transparency and to curtail instances of abuse of the policy.

The Regulation equally outlines subsidies which are expressly prohibited. These include subsidies which affect performance of locally exported products<sup>116</sup> or the use of local products over foreign goods.<sup>117</sup> However, the fact that a subsidy is given to an entity which exports shall not in itself be sufficient for the action to be prohibited subsidy.<sup>118</sup> The running factor is that such subsidies shall only be considered prohibited if they are explicitly geared to curtail export of commodities or enhance performance of domestic goods over the imported goods by imposing restrictive or undercutting mechanisms to thwart competition.

Given that the fundamental objective of the Regulation was fashioned to promote transparency, it clearly spells out the provision that a Partner State shall not sanction usage of subsidies as a trade measure to militate against the products of another Partner State.<sup>119</sup> Adverse effects in this context connote: serious harm to the local industry of a Partner State; serious preception to the Pursuits of another Partner State<sup>120</sup> and invalidation or stultification of profits to other Partner States under the GATT protocol.<sup>121</sup>

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<sup>115</sup>Ibid, Regulation 8.

<sup>116</sup>Ibid, Regulation 9.1.a.

<sup>117</sup>Ibid, Regulation 9.1.b.

<sup>118</sup> Ibid.

<sup>119</sup>Ibid, Regulation 11.1.

<sup>120</sup> Pursuant to Regulation 12.1 “serious prejudice is deemed to exist in the case of:

- (a) Subsidies to cover losses accrued by a firms operations process.
- (b) Subsidies to cover operating losses incurred by firm that are not onetime nor recurrent and cannot re occur and are given as a temporary solution as long term solutions are developed and to avoid acute social problems; and
- (c) Direct cancellation of debts including the cancellation of government-held debts and grants to cover debt repayment.

Save for enumerating actionable subsidies,<sup>122</sup> the Regulation equally outlines what comes within the meaning of non-actionable subsidies.<sup>123</sup> These are the class of subsidies which entails assistance for research activities. They are not an extrapolation of the conventional scientific and technical knowledge related to industrial or commercial targets of the industry. Assistance to deprived areas within the dominion of a Participating nation is also included, and so is the assistance to enhance the infusion of existing facilities to new ecological requisites.<sup>124</sup>

### **Provisions of the Regulation on Countervailing Measures**

On application of countervailing measures, the Regulation directs that a Partner State may employ countervailing measures.<sup>125</sup> Such measures are only applicable after exercising due diligence to determine the extent of subsidy imposed by the granting authority of the Partner State.<sup>126</sup> Investigations must be conducted pursuant to provisions of the Regulation in order to ascertain the extent of subsidy applied.<sup>127</sup> It however outlines that a countervailing measure shall

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Serious biasness shall however not be found in instances where a subsidizing country shows that the subsidy in question has not yielded any of the effects listed below.:

- (a) The accruing results of the subsidy is to subvert or hinder the imports of similar product of a Partner country into the market of the subsidizing Partner State;
- (b) The accruing results t of the subsidy is to subvert or hinder the exports of similar products of a Partner State from a market of a foreign country;
- (c) The accruing results of the subsidy is a serious price cut by the subsidized product as compared with the price of the same product of a Partner State in the same market or serious price reduction, price depression or lost sales in the same market; or
- (d) The accruing results of the subsidy is addition in the world market share of the subsidizing nation in a particular subsidized primary nation.

<sup>121</sup>Ibid, Regulation 11.2.

<sup>122</sup> According to Part IV under Regulation 11 of the EACDU actionable subsidies comes within the meaning of specific subsidies which directly influence the performance of export businesses or local businesses in domestic market. They are fashioned to lend specific advantages at the behest of competing commodities from Partner States or foreign countries.

(a) <sup>123</sup>Ibid, Regulation 14.1

<sup>124</sup>Ibid 14.2.

<sup>125</sup> See Regulation 16.1.

<sup>126</sup> Ibid, Regulation 16.2

<sup>127</sup> See also Regulation 6.2.

be applicable exclusively under the conditions contemplated in Articles 17 and 18 of the Protocol.<sup>128</sup>

According to the Regulation, domestic industries are empowered to initiate investigation process to look into the following: the existence, degree and implication of any averred subsidy.<sup>129</sup> The application by the domestic industry for investigation must be accompanied by sufficient and cogent evidence showing the existence of a subsidy and the extent (degree); damage therein confines of the Regulation and a causative nexus among the subsidized imports and the perceived impairment.<sup>130</sup> Mechanical procedure and steps to be followed when ascertaining the existence of such subsidies are enshrined in the Act.<sup>131</sup> It must be proved that the existence of such subsidy will pose material injury to the domestic producers.<sup>132</sup>

During the investigation process, in order to guarantee the rules of natural justice, the regulations provide that the offensive state, entity or public body must be requested to give clarification.<sup>133</sup>

In the circumstances it is ascertained that a country has indeed granted subsidy to an enterprise or industry, clear and transparent rules are used in computing the aggregate subsidy with regards to the benefits to the receiving entity.<sup>134</sup> However, in computing such calculations provision of equity capital, loan and loan guarantees by the government are not included as long as they are not conferring benefits.<sup>135</sup>

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<sup>128</sup> See also Regulation 6.1. Regulation 6.2 states that a Partner country may apply countervailing measures following an inquiry instituted and carried out in line with the provisions of the Regulation.

<sup>129</sup> Ibid, Regulation 17.1

<sup>130</sup> Ibid, Regulation 17.2.

<sup>131</sup> Ibid, Regulation 18 and 19.

<sup>132</sup> Ibid, Regulation 21.8.

<sup>133</sup> Ibid, Regulation 19.1.

<sup>134</sup> Ibid, Regulation 20.

<sup>135</sup> Ibid.

For the intents of determining injury, the quantity of the subsidized commodity imported and the effects on the value in the local market and the impingement of the subsidized imports on local producers are considered when considering the extent of the countervailing duty to employ.<sup>136</sup> The investigations can be halted if the offending state of the exporting state consents to obviate or restrain the subsidy or if alternatively the exporter accepts to adjust its prices so that the probing authority is contented that the harmful result of the subsidy is abolished.<sup>137</sup>

If the outcome of the investigation affirms the existence of subsidy and the extent of the injury caused then a Partner State may levy a countervailing duty unless the subsidy or subsidies are retracted.<sup>138</sup> Thereafter, a Committee is tasked to determine whether the countervailing duty to be imposed in entirety of the subsidy cost-wise or not.<sup>139</sup> Countervailing duty cannot however be imposed on an imported good in excess of the amount of subsidy found to exist.<sup>140</sup> Further, the Regulation only remains in force to counter the effect of the injury. Once the injury has been diminished or eliminated the subsidy is supposed to be withdrawn.<sup>141</sup>

The EACCUR tries to address the contemporary challenges of subsidies and countervailing measures in international trade. It is nevertheless tailored only for trade within the EAC member countries. It establishes various committees, structures, procedures and lays threshold which should be considered when handling issues affecting trade in EAC within realms of subsidies and countervailing duties.

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<sup>136</sup>Ibid, Regulation 21.1(a) and (b).

<sup>137</sup>Ibid, Regulation 24.1. This is otherwise referred to as “price undertakings”.

<sup>138</sup>Ibid, Regulation 25.1.

<sup>139</sup>Ibid, Regulation 25.2.”...It is desirable that the imposition shall be permissive in the territory of all Partner States, that the duty shall be less than the total amount of subsidy where such lesser duty would be adequate to remove the injury to the domestic industry...”

<sup>140</sup>Ibid, Regulation 25.4.

<sup>141</sup>Ibid, Regulation 27.1.

### **2.3.3. The East African Community Competition Act, 2006**

In 2004, the East African Community Council of Ministers adopted East African Competitions Policy subsequently the East African Legislative Assembly enacted the East African Competitions Act in 2006. The Act seeks among others to promote fair trade and ensure consumer welfare and to establish the East African Community Competition Authority.<sup>142</sup>

The Authority consists of five Commissioners, one commissioner from each Partner State and has powers to: Gather information; Investigate and compel evidence, including search and seizure of documents; Hold hearings; Issue legally binding decisions; Impose sanctions and remedies; Refer matters to the Court for adjudication; Develop appropriate procedures for public sensitization.<sup>143</sup> The Act limits the powers of EAC Partner States to unilaterally impose subsidies that are likely to tilt the trade balance in favour of a particular country. The Act requires Partner States to notify the Authority before granting any subsidy and where the Authority considers that the subsidy threatens or distorts competition it shall communicate its decision to Partner State.<sup>144</sup> Partner States dissatisfied with the decision of the Authority may refer the matter to Court and the decision of the Court is binding.<sup>145</sup> The Act also prescribes punitive measures for violating provisions within the Act.

## **2.4. Kenya's Legal and Institutional Framework**

### **2.4.1. The Constitution of Kenya, 2010**

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<sup>142</sup> Godwin Muhwezi Bonge: Briefing Paper: Towards EAC Competitions Law and Policy, available at <http://eabc.info/node/696> accessed on 28/3/2012

<sup>143</sup> Article 42 of the East African Community Competition Act, 2006

<sup>144</sup> Ibid Article 15

<sup>145</sup> Ibid

The Constitution of Kenya has significantly changed the status of international law instruments ratified in Kenya into a source of law in Kenya. Prior to the promulgation of the new constitution,<sup>146</sup> the sources of law on Kenya were the constitution; Acts of parliament; some specified UK statutes; the common law, doctrines of equity and statutes of general application in force in England on 12th August 1897; and finally customary law.<sup>147</sup> Thus, international law and principles was considered not to form part of Kenyan law unless they were domesticated. In other words, Kenya adhered to the dualist principle of international law. The Constitution has adopted a monist principle of application of international law. In this regard, the Constitution provides that international treaties and conventions that are ratified by Kenya shall form part of the laws of Kenya.<sup>148</sup> Further, the general rules of international law form part of the law of Kenya. The implication of the monist approach is that the provisions of international law instruments providing for trade liberalization and subsidies are now law in Kenya.

#### **2.4.2. The Kenya Trade Remedies Act<sup>149</sup>**

Regulation of subsidies in the Kenyan municipal law is novel as the Kenya Trade Remedies Act No. 32 of 2017 came into force in August 2017. The Act provides for the establishment of the Kenya Trade Remedies Agency to investigate and impose anti-dumping, countervailing and trade safeguard measures. This Act has provisions which are designed to lend some minimum

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<sup>146</sup> 27<sup>th</sup> August, 2010.

<sup>147</sup> Section 3 of the Judicature Act, Cap 8 of the Laws of Kenya.

<sup>148</sup> Constitution of Kenya, section 2.

<sup>149</sup> The Kenya Trade Remedies Act, No. 32 of 2017, Laws of Kenya is an Act of Parliament to provide for the establishment of the Kenya Trade Remedies Agency; for the investigation and imposition of anti-dumping, countervailing and trade safeguard measures and for connected purposes.

legal assistance as regard matters of subsidies and countervailing duties in the international trade.<sup>150</sup>

This Act is specifically meant to regulate the use of trade remedies in the country. The Act was enacted as a result of continued outcry by the local market of increased import of subsidized products in the country. The Act seeks to overhaul the entire system by setting up a more elaborate institutional framework. Its objects are to enable the Government to take necessary action to protect domestic industries from foreign competition and unfair trade practices arising from dumping, subsidization and import surges.<sup>151</sup>

A subsidy is defined to include any financial or other commercial benefit that has accrued or will accrue, directly or indirectly, to persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export, or import of goods, as a result of any scheme, programme, practice, or thing done, provided, or implemented by a foreign government or a body of the foreign government, but does not include the amount of any duty or internal tax imposed on goods by the government of the country of origin or country of export from which the goods, because of their exportation from the country of export or country of origin, have been exempted or have been or will be relieved by means of refund or drawback;<sup>152</sup>

Countervailing measures on the other hand is defined as a special duty levied for the purpose of

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<sup>150</sup> Jane Kiringai, "Trade Policy and Transport in Kenya", Credit Research Paper No. 6 2011 p. 5. Accessed at <https://www.nottingham.ac.uk/credit/documents/papers/06-11.pdf> (On 11 November 2016).

<sup>151</sup> Walter Amoko & Beryl Rachier, No Dumping Here; available at <https://www.oraro.co.ke/wp-content/uploads/2018/06/Legal-Kenyan-Issue-6.pdf> (Last accessed on 11<sup>th</sup> Decemberr 2018)

<sup>152</sup> The Kenya Trade Remedies Act, Section 2

offsetting any subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise;<sup>153</sup>

The Act provides for the establishment of the Kenya Trade Remedies Agency<sup>154</sup> whose functions are to<sup>155</sup>:-

- (a) investigate and evaluate allegations of dumping and subsidization of imported products in Kenya;
- (b) investigate and evaluate requests for application of safeguard measures on any product imported in Kenya;
- (c) advise the Cabinet Secretary on the results and recommendations of its investigations;
- (d) initiate and conduct public awareness and the training of stakeholders on its functions and on trade remedies;
- (e) publish and disseminate manuals, codes, guidelines, and decisions relating to its functions; and
- (f) perform such other functions as the Cabinet Secretary may assign to it

The Management of the Agency is vested on the Board of Directors and the Act goes on to provide for constitution of the Board, the qualifications for appointment to the Board, tenure and powers of the Board.

The Act has given the Cabinet Secretary the power to impose Countervailing measures on a foreign country where it has been found that there are goods dumped in the country or on subsidized goods imported in the country.<sup>156</sup>

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<sup>153</sup> Ibid.

<sup>154</sup> Ibid, Section 3

<sup>155</sup> Ibid, Section 5.

The Act further provides that a person can make an application for the investigation or evaluations of alleged dumping or subsidized exports in Kenya or of imports that have caused or threaten to cause serious injury to an industry in Kenya.<sup>157</sup>

The Investigation officers are appointed by the Board to carry out investigation duties.<sup>158</sup> They have the power of to enter and search under warrant any premises that are within the jurisdiction of that court issuing the warrant.<sup>159</sup> The Act has laid down the guidelines for conducting investigations for purposes of determining whether or not there is need to impose countervailing measures.

The Agency has powers to obtain information, where it may in writing and within a specified period, direct any person to provide the Agency with any information relating to an investigation or evaluation in a prescribed form.<sup>160</sup> The Agency can term information disclosed to it as confidential. This shall be done in writing setting out the grounds for the information to be treated as confidential information.<sup>161</sup> In addition the Act restricts the Agency from disclosing to any unauthorized person information that is confidential until the Agency determines the extent to which confidentiality shall be extended regarding the information.<sup>162</sup>

The Act has provided guidelines on the conduct of investigations and the determination of the imposition of countervailing measures. For an application for investigations to be considered, it must show the existence of a subsidy, the injury suffered and the casual link between the subsidy

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<sup>156</sup> Ibid, Section 23(1).

<sup>157</sup> Ibid, Section 24 & 25

<sup>158</sup> Ibid, Section 30

<sup>159</sup> Ibid, Section 33

<sup>160</sup> Ibid, Section 27

<sup>161</sup> Ibid, Section 28

<sup>162</sup> Ibid, Section 29

and the injury. It provides that for a subsidy to be actionable, it must be specific and prohibited.<sup>163</sup>

Though the Act has impressive provisions for the use of Trade Remedies, it is unfortunate that since it came to force, the Trade Remedies Agency is yet to be established and empowered to conduct its duties. It is proper to note that for the Act to be functional, it is imperative that the Agency is in place and running. The lack of the Agency therefore continues to stifle the enforcement of the Act.

## **2.5. Conclusion**

This chapter has discussed the principle legal instruments which regulate the application of subsidies and countervailing duties in Kenya and the EAC at large. It has analyzed the specific legal instruments which operate in Kenya and the EAC. It has further examined the specific WTO agreements which regulate the use of these twin policies at the international platform.

Whereas these provisions have by a large extent attempted to resolve the problems faced in the regime of subsidies and countervailing duties much still needs to be done. This is especially witnessed by the lack of the Trade Remedies Agency to enforce the aforementioned regulations. As such there are still stifling problems faced in the local sector especially injury to domestic industries. The next chapter is dedicated to espousing these fundamental challenges which are faced. It highlights the problems and discusses them in details.

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<sup>163</sup> Ibid, Schedule II

## **CHAPTER THREE**

### **SETBACKS EXPERIENCED BY THE KENYAN GOVERNMENT IN THE EFFECTIVE USE OF SUBSIDIES AND COUNTERVAILING MEASURES**

#### **3.1. Introduction**

This chapter seeks to interrogate the use of subsidies and countervailing measures by the government. In order to adequately understand the use of these policies in Kenya, this chapter seeks to mirror the actual engagement of these policies to the international standards enshrined in the various legal instruments discussed in the previous chapter. Reference is greatly paid to the international legal instruments which Kenya subscribes to owing to its membership in various international and regional economic platforms.

This chapter also addresses the manner in which Kenya uses these vital trade policies in its interaction with other Member States. It seeks to appraise the recourse employed by the Kenyan government so as to determine whether they are plausible or not.

Whereas the previous chapter clearly acknowledged that the lack of a functional institution to adequately regulate the use of these trade policies has posed fundamental challenges in imposition of these trade remedies in Kenya, this chapter intends to go beyond detail by clearly outlining what specifically these challenges are. This chapter as much as possible intends to enumerate the stifling challenges which hinders optimum application of subsidies and countervailing remedies in Kenya.

### 3.2. Subsidies and Countervailing Measures as Trade Remedies

Governments today are under substantial pressure to subsidize particular industries or firms within industries. This is out of a natural desire to maintain employment, to improve economic development in particular regions, and to increase exports. Often, it is hard to resist the pleas of an ailing industry for help while at the other end of the spectrum, governments are tempted to intervene for the purpose of giving domestic firms a bigger role in industries that develop new technologies and have a promise of creating future wealth.<sup>164</sup>

Trade remedies are permissibly used under certain conditions and requirements. They are proactive measures used to counter increasing imports or unfair competition embodied in dumped or subsidized importations in a Member's State. These measures are, however, very often used for protection of domestic industry.<sup>165</sup> They are ordinarily employed where it has been established that external entrepreneurs have resorted to unjust trade tactics. Their usage and application have strong basis in law as they are envisaged in various agreements and protocols.<sup>166</sup>

Contingent protections include anti-dumping measures, subsidies and countervailing measures. Anti-dumping measures<sup>167</sup> and countervailing duties ideally counteract unfair relative low prices

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<sup>164</sup> Barbara J. Spencer, "Countervailing Duty Laws and Subsidies to Imperfectly Competitive Industries," in Robert E. Baldwin, Carl B. Hamilton and Andre Sapir *Issues in US-EC Trade Relations*, University of Chicago Press 1998.

<sup>165</sup> Ludmilla Sterbova, "Role of International Trade Rules in the Current Economic Crisis," University of Economics Prague E-Leader Tallin 2009.

<sup>166</sup> Wilkie Farr and Gallagher P, "Barriers to African Exports: Current Problems and Future Risks," 2006. Available at <http://www.givengain.com/unique/tralac/pdf/20060922> (Last accessed on 21st October 2018).

<sup>167</sup> UNCTAD, Impact of Anti-dumping and Countervailing Duties Actions. Available at <http://www.unctad.org/Templates/Page.asp?intItemID=2028&LANG=1> (Last accessed on 20<sup>th</sup> October 2018). According to the report the types of goods which are typically dumped are those produced by capital-intensive industries. The report further illustrates that anti-dumping measures are implemented to level the playing field between domestic and foreign producers in the same market. They are oftenly used to promote fair trade. Whereas dumping is not prohibited by any WTO agreement, compelling concerns arises in instances where dumping causes or threatens to cause serious injury to the domestic manufacturers of products which are the same or similar to products imported.

in the market caused by the imported goods. They are meant to cushion the local industries from the stiff competition posed by the cheap imports. These relatively lower prices are caused by dumping of goods by foreign entities or intensive subsidization by the said foreign entities. The objective of these measures is to restrain either the size of the disposal or the subsidization.<sup>168</sup>

Countervailing duties on the other hand are applied to restore fair competition in international market when foreign goods produced by the competitors are being subsidized. The net effect of subsidized goods is that they bring about skewed competitive leverage over local manufacturers, usually weakening local prices. Through the introduction of countervailing duties, the obligation applicable to subsidized imports is increased, reinstating any instability brought about by the subsidization.<sup>169</sup>

The usage of subsidies has risen throughout the world to achieve specific government objectives and policies. This is chiefly because they serve a variety of policy objectives. The best domestic commercial policies are often embedded on well thought subsidy programs.<sup>170</sup> Subsidies can take the form of grants, tax immunity, low-interest financing, investments and export credits. There exists other types of subsidy measures,<sup>171</sup> however, in terms of beneficiaries; they are grouped into two primary categories. These are non-specific subsidies<sup>172</sup> and specific subsidies.<sup>173</sup>

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<sup>168</sup>Tsengiwe, S. "The Complexities of Trade Remedies," Princlloo 2009. Available at <<http://www.tariffandtrade.co.za/archives/NB/200904035D16%20%20Complexities%20ofTrade%20Remedies%.pdf?PHPSESSID=urxcjutgs>> (Last accessed on 20<sup>th</sup> October 2018).

<sup>169</sup>Trade Law Chambers. "Trade Remedies," WTO 2009. Available at<<http://www.tradelawchamber.co.za>> (Last accessed on 22<sup>nd</sup> October 2018).

<sup>170</sup> Robert Z. Lawrence and Nathaniel Stankard, *Should Export Subsidies be Treated Differently*, Wilhelm Kohler 2003.

<sup>171</sup> There are six primary categories of subsidies divided by purpose. i.e export subsidies; subsidies contingent upon the use of domestic over imported goods; industrial promotion subsidies; structural adjustment subsidies; regional development subsidies; and research and development subsidies.

<sup>172</sup> This refers to non limited subsidies to specific businesses or industries.

<sup>173</sup> This refers to businesses and industries specific subsidies.

Governments routinely resort to employing the use of subsidies in order to offset imbalances in market. Ordinarily, this arises where there is imminent threat posed by imported goods from a foreign jurisdiction on the growth and development of domestic industries producing more or less the same commodity.<sup>174</sup> Subsidies are also used in instances where need arises to avail resources to the downtrodden and underprivileged. This usually covers up for instances where there is overwhelming market failure. Thus, they are engaged in affirmative programs if such business enterprises exist in defined economically disempowered areas.<sup>175</sup>

### **3.3. Measures taken by the Kenyan Government to adequately use these Trade**

#### **Remedies**

As Kenya seeks to entrench its position as an economic giant in Eastern and Southern Africa, it has resorted to the use of trade remedies to control and stimulate growth of its vibrant economy. In doing so, it has implemented a number of policies fashioned at supporting and administering the growth of a dynamic export-led economy the key one being the enactment of the Kenya Trade Remedies Act 2017.

Comprehensive trade reforms undertaken by Kenya within the context of EAC, COMESA and by extension WTO were all geared towards establishing a common external tariff for all foreign commodities imported into the Community and specifically Kenya. Though this was intended to facilitate trade amongst Member States it consequently uncovered the lid on domestic companies by exposing them to unfair competition from foreign companies. This propelled the government

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<sup>174</sup>Supra note 168.

<sup>175</sup>Ibid.

develop practical recourse and fallback options within the purview of the law in order to model protection for the local enterprises.<sup>176</sup>

The COMESA Agreement provides detailed provisions regarding the implementation of trade remedies and safeguards. Implementation is also subject to the regulations made by the Council, set out in the Trade Remedy and Safeguard Regulations.

The government in its attempt to protect growth and development of infant and established industries has undertaken diverse measures to shield domestic businesses from the upsurges of international trade upheavals.<sup>177</sup> In order to prevent collapse and decline of local industries and businesses the government many a time resort to granting subsidies to struggling firms particularly during times of economic recession. This cushions them from the imminent economic meltdown posed by threat of strong competition offered by foreign firms. Such subsidies typically help struggling firms to restructure in order to survive in the longer term.<sup>178</sup>

In the presence of crisis or market failures governments uses subsidies to stimulate domestic industry and consumption and to facilitate adjustment, promote export and/or to protect employment. This is informed by the WTO provisions concerning subsidies which contain disciplines targeted at “leveling the playfield”, by accrediting the right of Member States to use subsidies as a policy tool while concurrently restricting the usance of subsidies that unjustly resort trade or prepossess foreign traders.<sup>179</sup>

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<sup>176</sup>*Ibid.*

<sup>177</sup> *Supra* note 1.

<sup>178</sup> Tabitha Kiriti Ng’ang’a, “Non-Tariff Measures in Kenya: A Case Study” in T W Ng’ang’a and J A. Okelo (Eds.), *Trade Discourses in Kenya: Some Topical Issues*, University of Nairobi: Nairobi (2012) p. 84.

<sup>179</sup>*Ibid.*

Subsidy actions and the subsequent countervailing measures utilized by the government are recognized in the WTO agreements.<sup>180</sup> National laws, regulation and procedures and applications are permitted by the WTO for purposes of promoting transparency, which is one of the objects of the WTO agreements, before a country applies these trade policies, they are expected to notify the WTO on their intention to invoke this trade remedies. Usually this notification flows from the reliance of domestic provision. It must however be consistent with the standards set out in WTO agreements. Kenya has for instance placed heavy reliance on its policy statements and domestic regulation and procedure to invoke utilization of these trade remedies.<sup>181</sup>

Subsidy and countervailing action taken by the government are communicated to other WTO Members. This is singularly informed by The Agreement on Implementation of Article VI of the GATT which states categorically that:<sup>182</sup>

Each Member shall take all necessary steps, of a general or a particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question, and each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.<sup>183</sup>

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<sup>180</sup>Oscar R., A “New Trade” Theory of GATT/WTO Negotiation, *Journal of Political Economy* 119:122-152 2011.

<sup>181</sup>Ibid 178.

<sup>182</sup> See Article 18.4 and 18.5 of the GATT provision.

<sup>183</sup>Ibid.

The above-mentioned provision is similarly echoed by the COMESA Regulations on Trade Remedies and Safeguards. Kenya being a member of the COMESA Community strictly adheres to its provisions. The provision explicitly provides that:

Prior to initiating the first action, a Member State should have developed a framework for enforcing and identified a competent authority to form an inquiry into the existence of the pre-conditions for safeguard, countervailing and anti-dumping action.<sup>184</sup>

The COMESA Agreement provides detailed provisions regarding the implementation of trade remedies and safeguards. Implementation is also subject to the regulations made by the Council, set out in the Trade Remedy and Safeguard Regulations. Countervailing duties can be implemented against the imports of a member country or third country to offset the effect of a subsidy<sup>185</sup>

The foregoing provisions are fundamental as they guide the procedure and the manner in which Kenya invokes application of these remedies. However, it is also important to note the manner in which the country responds to subsidy action implemented by other countries. There are definite, regular and legal measures which guide the response of the government in such scenarios.

The government responds to subsidies in four basic ways. Firstly, it has the option of offsetting subsidies by imposing subsidies on our own domestic products. Secondly, it has the option of doing nothing by not choosing to resort to any other trade remedies. This is usually informed by the economics of free market. Thirdly, it can conduct bilateral and multilateral negotiations on subsidy reforms with the countries imposing subsidies. Fourthly, it can develop and use

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<sup>184</sup>Article 13 COMESA Regulation on Trade Remedies and Safeguards.

<sup>185</sup> Ibid Article 52.2 and 52.4

legitimate anti-subsidy disciplines. This is the most plausible recourse in addressing problem of trade-distorting subsidies.<sup>186</sup>

The above options exercised by the government are referred to as anti-subsidy disciplines. They adequately provide the lever of counter measuring subsidies. This is because they discourage subsidies by removing recipients potential export gains and publicly attainting subsidized products.<sup>187</sup>

These actions also eliminate the attractiveness of foreign subsidies by labeling them as illegal. They can further embark on following laid down procedure to neutralize the benefits attached to those subsidies.<sup>188</sup>

### **3.4. The Role of Trade Remedies in Regional Trade Agreements**

Regional trade agreements have spawned in light of the formation of various economic platforms.<sup>189</sup> It has been further catapulted by the compelling need to enhance economic growth and development through elimination of multiple trade barriers and technicalities by the member states of the EAC. The key agenda of these instruments is to remove obstacles promoting growth and establishment of intra-regional trade.<sup>190</sup> To expedite the process of regional trade integration, efforts must be put to reduce and expel f non-tariff barriers and the promote trade facilitation.<sup>191</sup> However, the evacuation of intra-regional tariffs and non-tariff barriers has created compelling and genuine concerns on the need to come up with cogent policies geared to protect the local

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<sup>186</sup>Supra Note 178

<sup>187</sup>Pauwelyn J., The Puzzle of WTO Safeguards and Regional Trade Agreements, *Journal of International Economic Law* 7:109-142 2004.

<sup>188</sup>Ibid.

<sup>189</sup> McGovern Edmond, *International Trade Regulation*, Globefield Press, Globefield, England 1995.

<sup>190</sup>Ibid.

<sup>191</sup> Prusa T. J. and Skeath S., "The Economics and Strategic Moves for Antidumping Filings," National Bureau of Economic Research Working Paper Series 2001.

industries from the effect of increased imports from other member states.<sup>192</sup> The upshot of this is propelled by the attendant desire to curtail the effects of serious injury and harm posed to the local industries if adequate measures are not taken by the government and domestic industries. Hence, in regional trade agreements the usage of trade remedies are provided for to counteract negative consequences posed by foreign imports<sup>193</sup>

Most regional trade agreements are tailored to promote harmony, consistency, certainty and limpidity of trade barriers. They assist governments to administer protective measures in impartial manner.<sup>194</sup>

### **3.5. Challenges faced in Application of these Trade Remedies**

Despite the fact that a subsidy is widely beneficial to the related industry, in most instances it does not benefit the country as an entity. The cost to taxpayers usually more than outweighs the gains to workers and firms who receive the subsidy. As a result subsidies do not essentially result in a national gain. Instead only a few firms earning high profits reap proceeds from these policies because of the entry barriers imposed by the government.<sup>195</sup>

The negative effect of using subsidies and countervailing measures is better evidenced by the financial crisis of 2008 which created an impetus on governments to adopt massive stimulus packages that included the use of subsidies for domestic industries. This led to funneling of huge

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<sup>192</sup>Teh R., Prusa T. J. and Budetta M., "Trade Remedy Provisions in Regional Trade Agreements," WTO Economic Research and Statistics Division, Staff Working Paper 2007.

<sup>193</sup>Supra note 191.

<sup>194</sup>Supra note 192.

<sup>195</sup> Brander James and Barbara Spencer, Export Subsidies and International Market Share Rivalry, *Journal of International Economics* 18: 83-100 1985.

amounts of fund hence causing economic uncertainty and breeding ground of corruption. This led to the international trade to be awash with trade-distorting subsidies.<sup>196</sup>

Practically, in spite of the measures put in place to liberalize trade, the use of subsidies and countervailing duties is still faced with lot of challenges and setbacks. This is attributable to diverse reasons. International trade is riled with numerous procedures and secrecy practiced by Member Countries amongst others. These setbacks are however cross-cutting. They are not only unique to Kenya but they affect different countries in equal measures. This part particularly purposes to list some of the problems crippling the use of these trade policies

### **3.5.1. Misuse of Policies due to Vested Interests**

It has been argued that most countries use trade remedies to administer protection regimes in favour of their commodities.<sup>197</sup> This is supported by the evidence that the use of these remedies are many a times tailored to benefit only specific businesses from decline or to enhance their growth and profit making margin. This presents the real but possible and unimagined fear of using these measures to protect vested commercial interests by the influential people in the government. This indicates gross instances of abuse and misuse of these novel policies to advance vested or personal aggrandizement or otherwise by the influential people in the government.<sup>198</sup>

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<sup>196</sup>Julien Chaisse, Debashis Chakraborty and Animesh Kumarr, "Analyzing the Disputes on Countervailing Measures: Implication for the Current WTO Negotiation," University of Hong Kong 2011.

<sup>197</sup>Waincymmer J., *Implications for Anti-dumping and Countervailing*, Princeton 2001.

<sup>198</sup>Wikie Farr and Gallagher L., "Barriers to African Exports: Current Problems and Future Risks," Trade Law Center for Southern Africa 2006. Available at [http://www.givengain.com/unique/tralac/pdf/20060922\\_Geneva.ppt](http://www.givengain.com/unique/tralac/pdf/20060922_Geneva.ppt) (Last accessed on 26<sup>th</sup> October 2018).

Notably falling under this purview includes measures imposed by the government to neutralize fair competition posed by foreign industries. This is a contemporary form of tariff barriers to advance the competitive position of home-grown industries through giving them undue advantage in a competitive platform.<sup>199</sup> Of particular interest are the large multi-national firms with significant worldwide market share mostly prevailing upon the government to impose subsidy conditions or strict countervailing duties against foreign companies which tries to penetrate their market. This ensures that they maintain dominance at the behest of providing commodities of competitive quality at reasonable prices.<sup>200</sup>

Countervailing duties are also at times misused by states to ward off lawfully valued imports from other foreign states.<sup>201</sup> Several countries including Kenya usually adopt ill formulated countervailing duty laws in order to impose protectionist policy in reaction to valid internal policies of other states. These purported policies seriously distort international trade under the guise of applying valid trade policies.<sup>202</sup>

### **3.5.2. Complexity of Rules**

GATT and WTO agreements underscore that Member States should strive to implement the provisions of the agreements as relates application of subsidies and countervailing duties. However, given the particular nature and environment in which these agreements were midwived, most African countries have not been able to domesticate provisions of these agreements. Equally so, most African countries have not been able use the instruments availed to

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<sup>199</sup>*Ibid.*

<sup>200</sup>*Ibid.*

<sup>201</sup>*Ibid.*

<sup>202</sup>William K. Willcox, "GATT-Based Protectionism and the Definition of a Subsidy," B.U. International Law Journal 1998.

them under the various agreements because of the meticulous procedure and red tape enshrined in the agreements. This is largely attributed to the overly complex procedures envisaged in the agreements.<sup>203</sup>

Most African countries have not played an active role in implementing trade remedies or resolving the disputes arising out of trade remedies because of the complex rules and regulations governing the trade remedies. .<sup>204</sup>

The lack of participation by most African countries has been based on the lack of expertise, knowledge, financial and legal capabilities to implement these policy statements. Because of these technicalities Kenya is yet to even enact a sectoral regulation regulating the use of these trade policies in Kenya.<sup>205</sup> It is worth noting that most African countries do not apply trade remedies largely because as opposed to European and Middle East countries they do not produce industrial products. The agricultural goods which form the bedrock of most African countries are managed by different set of laws.<sup>206</sup>

### **3.5.3. Disobedience of Obligations due to Weak Sanctions**

Another possible factor leading to gross violation and disobedience of the subsidy and countervailing duty laws in the WTO is that these laws are deemed to be soft laws. This is because their implementation solely depends on individual will of various countries. They do not

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<sup>203</sup> Robert Mordhorst, *International Trade Administration verse International Trade Commission: The Scope of Antidumping/Countervailing Duty Investigation*, *Mason University Law Journal* 1986.

<sup>204</sup> *Supra* note 1.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

impose strong sanctions against Member Countries who violate their provisions. This leaves wide discretion for economic power house countries to float the provisions of the Agreements.<sup>207</sup>

Similarly the WTO which is tasked with solving disputes does not have adequate mechanisms to enforce its decisions. Their decisions are only persuasive and are not binding upon the member countries. This reality discourages countries from reporting violations of the law to the Dispute Settlement Committee. Basically, this counteracts the effectuality of the SCM Agreement and greatly disfavors Member Countries which do not have the resources to repel unfair trade practices.<sup>208</sup> More so, these countries lack the capability to investigate other applying trade-distorting subsidies. In retaliation, they equally impose trade remedies without informing the WTO. Ultimately this propagates breach of international obligations.<sup>209</sup>

Despite the requirement that Member States should present notifications of their subsidies biannually this obligation is only followed half-heartedly. This presents a sad picture and generally compounds monitoring of subsidies.<sup>210</sup> Even for the countries which oblige to this provision, there is severe mistrust of underreporting and distortion. Possible reason for underreporting is attributable to the bottlenecks that underpinning in the notification procedure. The procedure is perceived to be too complicated and burdensome.<sup>211</sup> There are also uncertainties as to what information should be reported. Coupled by the deliberate fear of self-

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<sup>207</sup> Chad P. Brown and Meredith A. Crowley, "Trade Reflection and Trade Depression," Davis Law Review 2007.

<sup>208</sup> Ibid.

<sup>209</sup> Michael Thone and Stephan Dobroschke, *WTO Subsidy Notifications: Assessing German Subsidies under the GSI Notification Template Proposed for the WTO*, International Institute for Sustainable Development 2008.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

incrimination most countries opt not to obey this obligation. This greatly erodes the spirit of enabling transparency in international trade.<sup>212</sup>

#### **3.5.4. Procedural Obstacles Imposed by Member States of the EAC**

Whereas members of the EAC Community undertook to eliminate all forms of bottlenecks in order to promote trade, there is still suspicion that countries are secretly employing countervailing duties to shield their jurisdiction from upsurge of foreign commodities.<sup>213</sup>

Trade in the EAC is hampered by procedural obstacles imposed by individual countries. Although the EAC Customs Union has made some progress, there exist signs to suggest that, despite the assurances made by the partner nations to eliminate trade barriers and countervailing duties, there are still grim obstacles to trade in the region caused by a myriad of factors ranging from high cost of doing business to lack of co-operation between Partner States. They remain to escalate the cost of undertaking business in the region and have adversely affected trade and collaboration.<sup>214</sup>

#### **3.5.5. Trade Remedies Promote Anti-Competitive Behavior**

Subsidies have adverse implication on competition especially where they have a mixed impact on firms in a market. The first risk to competition is that the subsidy increases the possibility for anti-competitive tendency by firms. This might ensue if subsidy compels the recipient firm to increase its market share significantly to a level where it represses competition. This is usually

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<sup>212</sup>Ibid.

<sup>213</sup>Supra note 1.

<sup>214</sup>Ibid.

arises where entry barriers are increased such that the potential future competition is prevented.<sup>215</sup>

The second risk is that subsidy might subvert the mechanisms to create efficiency in the market. For instance, the recipient firm could be under less financial pressure to be competitive or a subsidy may result to an inefficient firm staying in the market. Alternatively, competitors not in receipt of aid could be forced to leave the market, or forced to instigate extreme measures to ensure short-term survival instead of long-term prosperity.<sup>216</sup>

Similarly, the import of supporting individual firms and businesses is that it leads to the supplanting of other activities. This arises particularly where resources are inadequate. Instead of choosing horizontal measures which promote growth, the government involvement in business through granting subsidy works towards inhibiting competition. This is particularly epitomized when a very large subsidy is designed to benefit only a few firms. This raises competition concerns and further stunts growth of the economy and hence do not ultimately promote growth and development of both established and infant industries. This tends to distort trade regionally and internationally.<sup>217</sup>

### **3.5.6. Lack of Transparency**

Whereas one of the key objectives of the various economic platforms in which Kenya subscribes to is to promote transparency, few attempts have been made by Member Countries of the EAC for instance, towards the same. There is a severe lack of transparency regarding subsidies as countries rarely breakdown such information by the sectors receiving them. Publicly available

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<sup>215</sup> Martin Khor, *Implication of Some Rules on the Realization of the MDGs*, Third World Network 2005.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid.

information is also incomplete with regard to country coverage. This hinders direct comparison between countries. As such, no-direct comparison can be made between countries regarding the frequency measures applied by each of them.<sup>218</sup>

### **3.6. Weaknesses on the East African Community front**

The concept of economic subsidies within the East African Community legislative and institutional framework is wanting. The EAC Treaty defines "subsidy" as a fiscal input by state or any public body within the dominion of a Partner State.<sup>219</sup>

The Protocol on the formation of East African Customs Union defines subsidy to mean assistance by a government of a Partner State or a public body to the production, or export of specific goods, assuming the form of either direct payments, such as loans or grants, or of measures with equivalent effect, such as guarantees, operational or support services or facilities, and fiscal incentives.<sup>220</sup>

While this definition is explicit, it tends to be too broad with the net effect of gagging the government of the partners' states from performing some of their financial program. The main impediment to this method is that beneficiaries of, for example, a cash transfer or a tax grant, are not automatically the elemental recipients of the policy.

Though the East African Community envisages an eventual total elimination of subsidies, it allows a five year program within which countries are allowed to practice subsidies based on

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<sup>218</sup> Eric Supper, "Policy Issues in International Trade and Commodities Studies Series No.1: Is there Effectively a Level Playing Field for Developing Countries Exports," United Nations Conference on Trade and Development Geneva 2001.

<sup>219</sup> Article 1 of the EAC Treaty.

<sup>220</sup> Article 1, The Protocol on the formation of East African Customs Union

some conditions.<sup>221</sup> It is however, my opinion that the five year program is not adequate for a country to practically make its product it seeks to subsidize to be much competitive in the international market. Instead of pegging the allowance on years, the allowance should be pegged on the practical measures that have been taken in order to make a product or service competitive in the international market.

The EAC laws also provide that the Community may impose a countervailing obligation on any import to eliminate the effect of subsidies.<sup>222</sup> The Treaty further stipulates that countervailing duty must be equivalent to sum of approximated subsidy.<sup>223</sup>

The application of the safeguard measures in consistence with Customs Union of EAC (Subsidies and Countervailing Measures) Regulations; permit the Member States to employ precautionary measures when there is an upsurge of foreign imported products.<sup>224</sup> It is my take that this provision makes trade expensive. Countries should instead allow for selected subsidies based on a member country's competitive advantage in the agricultural sector since that is where subsidies are mostly administered.

On dispute settlement on the administration of subsidies, the EAC legislations are inadequate. There is no independent, competent and professional body that can solve disputes among partner states on the administration of subsidies.<sup>225</sup> Instead what the laws provide is a mere political body which is not professional and impartial and that can easily be influenced. The East African

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<sup>221</sup> Ibid, Article 11

<sup>222</sup> Ibid, Article 18 (1) (a)

<sup>223</sup> Ibid, Article 18 (1) (b)

<sup>224</sup> Article 25, Customs Union of EAC (Subsidies and Countervailing Measures) Regulations

<sup>225</sup> Article 5, East African Community Customs Union (Dispute Settlement Mechanism) Regulations

Community Competition Act, 2006 limits the powers of EAC Partner States to unilaterally impose subsidies that are likely to sway the trade balance in favour of a particular country.<sup>226</sup>

The Act stipulates that: Partner States shall before granting any subsidy notify the Authority; where the Authority considers that the subsidy threatens or distorts competition it shall communicate its decision to Partner State; Partner States dissatisfied with the decision of the Authority may direct the matter to Court.<sup>227</sup> Decision of the Court is binding. The Act prescribes punitive measures for violating provisions within the Act including a fine, imprisonment, Cease and desist order; Compensation (damages), Nullification of agreement. The appointment process of the Authority and the Court members are however not done in a competitive and professional manner hence the incompetence and partiality envisaged.

### **3.7. Weaknesses within the WTO Legal and Institutional Framework**

The WTO legal framework is the major instrument that governs the administration of subsidies. The concept of subsidies as captured in its legal framework is also borrowed by other countries including the East African Community Countries. The definition of the term “subsidy” by the SCM Agreement is similar to the GATT definition. In this definition there is reference made to GATT 1994. As such the legal and institutional weaknesses that will be captured under this section will also be relevant and applicable to the challenges faced by the EAC member countries.

The main challenges encountered in the WTO legal framework are in terms of the conceptual framework on the definitional terms and their applicability. The other is how the WTO provisions have captured the very central theme of the developing countries like Kenya in

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<sup>226</sup> Article 15, The East African Community Competition Act, 2006

<sup>227</sup> Ibid.

pursuing their development strategies. Particular attention must be paid to how these provisions yield adequate policy space to disadvantaged countries with regard to their objective to encourage economic development.

On definitional problems or challenges, the definition of the term “subsidy” by the SCM Agreement poses a number of challenges. How do you determine what amounts to financial contribution? How does one determine what amount to government support? And how does one determine what amounts to a conferring of a benefit? The sum of it all is that these terms make the trade and the practice of subsidies ripe for disputes which are to be decided by the courts. Courts are normally involved in judicial activism which normally leads to different forms of interpretations hence lack of coherence.

In the case of Canada Feed-in tariff. Ontario launched its feed-in tariff program (FIT Program) in 2009 with a view to increase the generation of wind and solar photovoltaic (PV) electricity in Ontario by entering into electricity purchase contracts that provided guaranteed fixed prices over 20 or 40 years. Ontario imposed a local content requirement as a condition for entering into FIT Program contracts: a certain percentage of the wind turbines or solar panels used to generate the electricity had to be produced in Ontario<sup>228</sup>. The European Union alleged that it appears that a subsidy is granted under the measures because there would be a financial contribution or a form of income or price support, and a benefit is thereby conferred. It is also claimed that the subsidy would be a prohibited subsidy under Articles 3.1(b) and 3.2 of the SCM Agreement because it appears to be provided “contingent ... upon the use of domestic over imported goods”, namely

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<sup>228</sup> Alexandre Genest, The Canada—FIT Case and the WTO Subsidies Agreement: Failed Fact-Finding, Needless Complexity, and Missed Judicial Economy. Available at [https://www.mcgill.ca/mjsdl/files/mjsdl/10-2\\_genest.pdf](https://www.mcgill.ca/mjsdl/files/mjsdl/10-2_genest.pdf) Last accessed 13th December 2018.

contingent upon the use of equipment for renewable energy generation facilities produced in Ontario over such equipment imported from countries such as the European Union.<sup>229</sup>

Both the Panel and the Appellate Body reached an impasse and were unable to decide the claim that the FIT Program violated Article 3.1(b) of the SCM Agreement by providing a subsidy made conditional upon the use of domestic over imported electricity generation equipment.<sup>230</sup>

The use of the word financial contributions as already discussed is challenging. The difficulty of identifying and pinpointing the exact type of subsidy which have been used by the government is practically difficult owing to the unlimited options the government can use to support an industry, market or business. It is also difficult to highlight who constitutes a government because of the fact that certain autonomous institutions can make independent unilateral decisions without consulting the national government. Further, this begs the question what if that the financial contribution is granted by a body where the government has substantial shares but the decision is made independent of government coercion by the independent Board of Directors in line with a body's objectives? It is also difficult to determine when a benefit has been conferred. Governments have several financial and tax related programs that are meant to benefit the ordinary people. There are the domestic support programs, tax exemptions amongst other options.

On specificity element, the SCM Agreement do not state explicitly what specificity refers to in the context of the recipients or the beneficiaries of the subsidies. It further does not state how to establish the scope of beneficiaries of a subsidy is limited to certain enterprises or to a specific region as opposed to non-specific.

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<sup>229</sup> Ibid

<sup>230</sup> Ibid

On export subsidies the SCM Agreement postulates that subsidies directly targeting imports or exports competition are distortive and should not be used. The Agreement does not make room for exceptions in this case which developing countries might want to exploit to further their development agenda.

More important in this discussion is the use of subsidies as a trade remedy to fast track economic development and how the WTO legal and institutional framework is not adequate in this pursuit. The Special and Differential Treatment provisions include specification of instances under which some developing countries are allowed to impose export subsidies to manufactured goods. I argue in this thesis that this requirement for special and differential treatment is too stringent and impractical.

The periodic extensions provided are not practical and are too unpredictable for investors for example, to enable consolidation of long term investments decisions. The extensions are also unnecessary burden on the part of a country seeking for such extensions. The extensions should not be pegged on years but on a tangible evidence of existence of measures that are geared towards making a country competitive in the international market. Such measures should include value addition abilities, irrigation systems that will eventually make agricultural products competitive in international markets even without the application of subsidies. The flexibility of these periods and extensions are not unlimited as thought.

### **3.8. Conclusion**

This purpose of this chapter was meant to unveil the fundamental problems affecting the use of subsidies and countervailing duties in international trade. It has attempted to highlight the stifling challenges which affect these noble trade measures. It has as much as possible attempted to

mirror the contemporary practices to the international policy standards envisaged in law to guide the application of these trade remedies. What has clearly emerged in this chapter is that developing countries are still a long way to go as long issues of subsidies and countervailing measures are concerned.

The next chapter purpose to conduct a comparative study with a jurisdiction with better sectoral legislation which regulates the use of these trade remedies. It seeks to highlight what can be copied from a country which has domesticated these provisions with an aim to learning some of their best practices. Because of its better domestic legislation, this research will attempt to make a comparative study with the legal regime in the European Union and Brazil

## **CHAPTER FOUR**

### **A COMPARATIVE ASSESSMENT OF EUROPEAN UNION AND BRAZIL TRADE REMEDIES LAW AND PRACTICE**

#### **4.1. Introduction**

This chapter conducts a comparative study of the European Union as a trading block and Brazil as some of the jurisdictions that have effectively used subsidies and countervailing measures as trade remedies. It specifically undertakes to study how these trade remedies are effectively used to protect the domestic industries in the European Union and Brazil against the upheavals of the international trade. Towards this end this chapter interrogates particular policy, legal and institutional mechanisms which have been used by the European Union and Brazil government towards implementation of these trade policies. It elaborately investigates the measures which these jurisdictions have put in place to ensure that they address the challenges that cripple the efficiency of the use of subsidies and countervailing measures without compromising international trade policies.

In order to explicitly highlight the fundamental differences between the Kenyan policies and the regulations in place in EU and Brazil, this chapter further highlights the specific sectorial legislations which govern the use of subsidies and countervailing measures in these jurisdictions. Salient features of these municipal laws are addressed and the ways in which they have contributed towards optimum utilization of the trade remedies are also highlighted.

Importantly, this chapter highlights various challenges which these jurisdictions are grappling with. Meticulous analysis is done on the merits of these challenges. This shall enable

consideration of cogent rules and policies if Kenya is to enforce policies and enact sector specific legislation tailored to address the application of these trade remedies in Kenya.

#### **4.2. Background of these Systems**

Brazil and the European Union have been recognized as active users of the trade remedies mechanisms. This has been practically possible for them because of their definite and sector specific trade remedies law and policies which they continuously invoke to protect domestic industries.<sup>231</sup>

These jurisdictions specifically use thorough, conscientious and comprehensive subsidies and countervailing measures to protect domestic businesses, enterprises and industries from the turmoil's of international trade. This elevates them as shining examples of how legal and institutional policies can be used to adequately regulate trade remedy laws in tandem with the international obligations.<sup>232</sup>

As is the norm with jurisdictions of best practices, both the EU and Brazil use diverse practices and policies to shield and cushion their industries from the crippling effects of unfair trade practices they are exposed to.<sup>233</sup> Whereas these jurisdictions are on equal footing with developing countries like Kenya in as far implementation of international obligations are concerned, they have meteorically and successfully developed advanced measures and mechanisms of complying with their obligations within the parameters envisaged in the

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<sup>231</sup> Theresia Charles Numbi, "The Implementation of Countervailing Measures in Tanzania: Challenges and Constraints," University of Western Cape. A thesis submitted in partial fulfillment of the requirements for the degree of Magister Legum in the Faculty of Law. Available at [http://etd.uwc.ac.za/bitstream/handle/11394/2182/Numbi\\_LLM\\_2013.pdf?sequence=1](http://etd.uwc.ac.za/bitstream/handle/11394/2182/Numbi_LLM_2013.pdf?sequence=1) (Last accessed on 1<sup>st</sup> November 2018).

<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

international trade agreements as developing countries like Kenya continue to fumble and lurch in a quagmire of confusion.<sup>234</sup> The following part seeks to explore the unique and particular features which these jurisdictions employ. Much emphasis is laid on their legal system as it the backbone which informs the intricate application of policies and mechanisms.

### **4.3. The European Union and the World Trade Organization**

The European Union (EU) has been a member of the WTO from 1995. The EU is currently constituted of 28 Partner nations who are also members of the WTO in their own individual rights. In specific, it is a unilateral customs union with a single trade policy and tariff.<sup>235</sup> It exercises multilateral policies and decisions in as far as trade obligations are concerned. The European Commission, being its decision-making arm, represents all the member nations in all WTO conventions.<sup>236</sup>

It has received recognition as a dynamic utilizer of World Trade Organization dogma. Of much importance is its use of the Dispute Body to resolve stalemates and seek advisory opinions all in a bid to protect the economy of its Member States from unfair trade practices.<sup>237</sup>

#### **4.3.1. The European Union Approach to Subsidies and Countervailing Measures**

In order to implement the SCM Agreement,<sup>238</sup> the EU Council adopted Regulation on Protection against Subsidized Imports. It is the singular legislation used by the EU as a whole to tackle

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<sup>234</sup>Ibid.

<sup>235</sup> See World Trade Organization, "The European Union and the WTO," WTO Geneva 2012. Available at <[http://www.wto.org/english/thewto\\_e/european\\_communities\\_e.htm](http://www.wto.org/english/thewto_e/european_communities_e.htm)> (Last accessed on 29th October 2018).

<sup>236</sup> Ibid.

<sup>237</sup> Ibid. Evidence indicate that the EU has participated in 99 cases as a Complainant, 85 cases as a Respondent and 191 cases as a third party.

<sup>238</sup> Agreement on Subsidies and Countervailing Measures. It was conceived in 1994 in the Uruguay talks.

harmful subsidy practices.<sup>239</sup> Other than the provisos on the descriptions and computation of subsidies, this Guideline is standardized with regard to those on anti-dumping, more specifically with relation to:

- i. the processes of initiation;
- ii. the determination of injury;
- iii. the description of an EU industry; and
- iv. the obligation of temporary and absolute actions, along with the dissolution of proceedings.<sup>240</sup>

Thus, this Regulation is at the epicenter of addressing subsidy practices within the entire EU. This Regulation unambiguously provides for the application of countervailing duties to offset any subsidy granted for products imported into the EU which causes or are likely to distort the EU market at the disadvantage of the EU commodities.<sup>241</sup>

When an EU industry establishes that imported goods are subsidized and have the potential to injure the domestic EU industry producing similar product, the Regulation dictates that the Council can make a formal complaint with the EU Commission for purposes of seeking redress.<sup>242</sup> These complaints can be made by either a natural or juridical person.<sup>243</sup> Upon receipt

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<sup>239</sup>Ibid, 235.

<sup>240</sup> See HKTDC, “Guide to Doing Business with EU-Germany, UK, France and Italy.” Available at <<http://info.hktdc.com/euguide/2-10.htm>> (Last accessed on 30<sup>th</sup> October 2018).

<sup>241</sup>Article 1(1) of the European Union Council Regulation no. 597/2009. See also European “Anti-subsidy measures” available at <[http://europa.eu/legislation\\_summaries/external\\_trade/r11006\\_en.htm](http://europa.eu/legislation_summaries/external_trade/r11006_en.htm)> (Last accessed on 30<sup>th</sup> October 2018).

<sup>242</sup> See European Commission, “The EU’s Anti-subsidy policy,” WTO Geneva (2013). Available at <<http://ec.europa.eu/trade/taking-unfair-trade-defence/ant-subsidy/complaints/>> (Last accessed on 30<sup>th</sup> October 2018).

<sup>243</sup>Ibid.

of such complaint, proceedings are promptly initiated to establish the veracity of such affirmations.<sup>244</sup>

Where no complaint has been raised but a member state is in possession of evidence of trade distorting tactics with the potential to hurt the EU industry, it must promptly communicate the existence of that proof to the Commission.<sup>245</sup> When drafting the grievance it must specifically contain any countervailing measures which can be undertaken to offset the subsidy. It must also include any actual injury and the nexus between the alleged subsidy and the injury being suffered. Where necessary this evidence should be endorsed by government institutions or credible organizations. .<sup>246</sup>

It is also worthy to note that complaints can only be made in regard of commodities only. Complaint cannot be made in regard to services as they are not subject to anti-subsidy laws.<sup>247</sup>

The EU Commission is the institutional body required to initiate anti-subsidy investigations.<sup>248</sup> If the investigations confirm that the imported products enjoy subsidy and that actual injury has been suffered or is likely to be suffered by the EU domestic industries and further that there is a nexus between the impairment sustained by the EU local industry and the subsidized imports the EU Commission may impose countervailing measures if it is in the best interest of the Community<sup>249</sup>

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<sup>244</sup>Article 10(1) of the European Union Council regulation no 597/2009.

<sup>245</sup> Ibid.

<sup>246</sup>Supra note 244

<sup>247</sup> See European Commission, “Trade Defence”. Available at <<http://ec.europa.eu/trade/tackling-unfair-trade/trad-defence/anti-subsidy>> (accessed on 30<sup>th</sup> October 2018).

<sup>248</sup>Ibid

<sup>249</sup>Ibid

This measure includes an impermanent security or bond on the imports in dispute. The EU is obligated to commence and conclude investigations within nine (9) months from the date the investigations were launched. If it establishes that the definitive measures are warranted, the Council of the EU is bound to impose the countervailing measures within a period of thirteen months.<sup>250</sup>

As per the EU practice, determinate measures are usually applicatory for duration of five (5) years.<sup>251</sup> However, EU countries may, during this period, lobby an interim reassessment if there is a *prima facie* exhibit to show that measures are not any more required.<sup>252</sup> In relation to monitoring measures in force, the Custom Authorities of the EU countries is responsible for the collection of countervailing duties.<sup>253</sup> This is done with the aid of different bodies such as the European Fraud Prevention Agency and the Tax Commission and Customs departments.<sup>254</sup>

These stringent measures completely deter non-member countries from engaging in unfair trade practices with the EU countries because of the grave and punitive measures applied in terms of remedial measures.<sup>255</sup> Even importantly, where a country decides to violate international trade obligations when carrying out trade with the EU the existence of definite laws dictate what procedures and actions ought to be taken. Decisions are therefore not made unilaterally depending on the different scenarios. This has fundamentally worked to the advantage of the EU

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<sup>250</sup>Ibid

<sup>251</sup>Article 18(1) of the European Union Council regulations no 597/2009.

<sup>252</sup> Supra note 247.

<sup>253</sup> See European Commission, “Monitoring”. Available at <<http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy/Monitoring>>( Last accessed on 30th October 2018).

<sup>254</sup> Ibid.

<sup>255</sup>Mavroidis P., *The Law and Economics Contingent Protection in the WTO*, United Kingdom: Edward Elgar Publishing (2010).

as non-member countries are well aware of the penalties that they are likely to be slapped with. This bars them from engaging in trade undercutting.<sup>256</sup>

#### **4.3.2. Conditions for Imposition of Countervailing Measures**

There are certain prerequisite requirements that must be met before remedial measures are taken against subsidy programs. These are the primary conditions which determine the threshold of determining whether to impose countervailing duty to contain a specific subsidy practice:

##### **i) Specificity**

The Regulations stipulates that for any subsidized products to be imported into the EU, the product must be one which also enables the EU to apply countervailing measure. In a nutshell only subsidies which bear some specificity can be exposed to the countervailing measures.<sup>257</sup>

##### **ii) Injury**

The Regulations stipulate that there must be material injury caused by the imported goods. This is the threshold of measuring harm. This basically entails quantifying the volume of imported subsidized goods and the accompanying price of the said good. To ascertain the extent of injury the EU is obligated to establish whether there is significant increase in the imported commodities.<sup>258</sup> This is measured by the market share and the profit margins amongst others.

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<sup>256</sup> Santa Maria A., *European Economic Law* 2<sup>nd</sup> Ed, Netherlands: Kluwer Law International (2009).

<sup>257</sup> Of the European Union Council regulation no 597/2009 and Article 3 of the SCM Agreement.

<sup>258</sup> See European Commission, "Conditions," EU Bulletins 2009. Available at <<http://ec.europa.eu/trade/tackling-unfair/trade-defence/anti-subsidy/conditions>> (accessed on 30<sup>th</sup> October 2018). See also Article 8(3) of the European Union Council regulation no. 597/2009.

### **iii) Casual Link**

There must be a nexus between the effect of the subsidized goods and the reduction of sales on the domestic goods produced by the local domestic goods. Causal link is one of the elements considered prior to imposing countervailing measures.<sup>259</sup>

### **iv) Community Interest**

The EU regulation stipulates that the countervailing measures imposed by the EU Member States must not be against the interest of the EU in general and the other Member States in particular. Although this is not a requirement in the regulations of WTO, it ensures the total fiscal interests in the EU are taken into consideration, including domestic industries manufacturing similar products. In order to create a level play field amongst the EU community industries that use the imported product carries the burden of producing relatively expensive consumable products.<sup>260</sup>

### **4.3.3. Overlook of the EU System**

The foregoing analysis underscores the key tenet of the EU subsidy and countervailing Measures. From the above discussion, clear and definite measures taken by the EU before applying countervailing measures in response to a subsidy are drawn from the Regulation. The Regulation thus forms the plank of the laws used by the EU to regulate application of subsidy and countervailing measures within their jurisdiction.

Although, reliance is also placed on the WTO, the EU has acknowledged that in order to adequately ensure proper protection of domestic industries and spur growth within an economic

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<sup>259</sup>Supra note 256.

<sup>260</sup>Article 31 of the European Union Council Regulation no 597/2009.

block, compelling need arises to form sectorial legislation to regulate measures and conditions which are likely to be applied.

#### **4.4. Brazil and the WTO**

Since its assenting to the WTO on 1<sup>st</sup> January 1995 Brazil has been an active participant.<sup>261</sup> Whereas Brazil is in the strict sense not a developed country it has nonetheless participated as an active member of the Cairns Group.<sup>262</sup> This is despite the immense challenges and obstacles it initially faced in establishing laws to regulate this trade policies. When the introducing of a new multilateral round of trade talks was placed on the agenda during the formation of GATT Brazil campaign for the inclusion in the agenda a set of lofty goals concerning market access and the trimming or eradication of export and domestic support schemes,<sup>263</sup> which subsidies are categorized under “domestic support schemes.”<sup>264</sup>

Brazil has been a vocal leader of the G-20 that represents developing countries, interests in the WTO. Even prior to forming the G-20 group Brazil stood up for including matters critical to the developing countries at the WTO, including the most pressing issue of barriers to trade, as well as the treatment of rules covering trade remedies.<sup>265</sup> Regarding the use of the WTO dispute

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<sup>261</sup> See World Trade Organization, “Use of Trade Remedies in Brazil,” WTO Geneva 2012. Available at <<http://www.wto.org/CountryProfile/WSDBCPView.aspx?Language=E&Country=BR>> (Last accessed on 31<sup>st</sup> October 2018)

<sup>262</sup>Hornbeck JF, “Brazil Trade Policy and the United States,” CRC Report for Congress 2006. This is a group of countries which have formed an alliance of both developing and developed countries exporting farm produce

<sup>263</sup> See World Trade Organization, “Brazil and the G-20 Group of Developing Countries,” WTO Geneva 2012. Available at <[http://www.wto.org/english/res\\_e/bookp\\_e/ease/e.htm](http://www.wto.org/english/res_e/bookp_e/ease/e.htm)> (Last accessed on 31<sup>st</sup> October 2018).

<sup>264</sup>*Ibid.*

<sup>265</sup> Supra note 262

mechanism Brazil also has a very promising record: it has appeared as a third party in 132 cases, as a respondent in 16 cases and as a complainant in 32 cases.<sup>266</sup>

#### **4.4.1. The Brazil approach to Subsidies and Countervailing Measures**

The statute concerned with guidelines and supervision procedures in the imposition of subsidies and countervailing measures in Brazil is a Rescript of Subsidies and Countervailing Measures.<sup>267</sup> The Decree is an enshrinement of a provision that directs that a countervailing measures be implemented to compensate for subsidies that are granted to imported goods which as a result causes injuries to the local industries producing similar goods.<sup>268</sup>

Additionally, the Minister of State responsible for Finance together with the Minister in charge of Industry and, through a joint act, should establish the degree of the subsidy programs and the damage suffered by the domestic industries after which they may proceed to enforce countervailing measures as provided by the decree. The findings of the report are hinged on the outcomes of the Secretariat of External Trade (SECEX) in the Ministry of Industry and Trade which affirm the verity of subsidies and injury arising thereof.<sup>269</sup>

SECEX is the organization In Brazil responsible with guiding administrative proceedings on subsidy and countervailing measures as per the requirements of the Decree.<sup>270</sup>

According to the Decree subsidy are deemed to have been applied when there is any form of income in the exporting state, that contributes either directly or indirectly, to the increment

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<sup>266</sup> World Trade Organization, Brazil and the WTO" available at [http://www.wto.org/english/thewto\\_e/countries\\_e/brazil\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/brazil_e.htm) (accessed on 14th December 2018).

<sup>267</sup> Decree No 1.751 of 19<sup>th</sup> December 1995.

<sup>268</sup> Article 1 of Brazil Subsidies and Procedures for the Application of the Countervailing Measures Decree No. 1.751 of 1995.

<sup>269</sup> Ibid, Article 2.

<sup>270</sup> Ibid, Article 3.

of exports of any merchandise to Brazil. Subsidy may also be deemed to have been applied if it has been established that there is considerable financial injection by the government within the territory of the exporting country.

Brazil applied the SCM Agreement definition of subsidies and the definition of the term fiscal contribution.<sup>271</sup> This provision generally invokes the application of the WTO and consequently implies that the WTO agreements are applied in unison with its domestic legislation.<sup>272</sup> The Decree further outlines the threshold before imposing countervailing measures which are that there must be injury of domestic industries, casual link and specific subsidies.

The Decree empowers all persons, legal and non-legal, to request for investigations into certain products which are being used to distort the market trends. This can be done by means of a petition in writing and in accordance with the procedures established by SECEX.<sup>273</sup> It is worth noting that the Decree recognizes that the federal government of Brazil may on its own motion commence investigative proceedings if there is proof of existence of injury, casual link and subsidy.

The procedure after commencing investigations is that SECEX shall be mandated to invite industry players if the petition has a course for concern or not. It is thereafter expected to invite the affected company to file its response. This open forum is mandated to enable as many people as possible to file or register their responses. The rationale is to enable application of the rules of natural justice to enable SECEX arrive at a correct determination. .<sup>274</sup>

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<sup>271</sup>Ibid, Article 4.

<sup>272</sup>Supra note 231.

<sup>273</sup>Ibid, Article 21.

<sup>274</sup>Ibid, Article 28(2).

Notably, the Decree stipulates that where only 25% of the domestic producers support the petition, SECEX may make a decision to reject the petition wholesomely and close the case entirely. The threshold for investigation is that there must be overwhelming evidence of the petition and this is likely felt by the domestic industry who must then file responses during investigations.<sup>275</sup>

An outstanding trait that distinguishes Brazil's subsidies and countervailing measures law from other countries lies on the issue of defense. The Decree provides that in the course of investigation, the groups and the concerned state administrations shall have an adequate chance to safeguard their interests afore the adoption of stipulated actions.<sup>276</sup> This provision is hinged on the principle of natural justice. It avails opportunity to countries to defend the import of their subsidy before they can be slapped with countervailing duties.<sup>277</sup> It also allows SECEX to suspend investigation if the subsidies under investigation have been withdrawn by the offending country.<sup>278</sup>

#### **4.5. Specific Rules of the EU and Brazil Countervailing Measures Law which Kenya may borrow**

From the measures put in place by the EU and Brazil, there are specific rules which if Kenya is to adopt a trade remedies law, they must certainly consider. They are a discussed below:

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<sup>275</sup>Ibid, Article 30(1).

<sup>276</sup>Ibid, Article 41.

<sup>277</sup>Supra note 231.

<sup>278</sup>Macrory FP et al., *The World Trade Organization: Legal Economic and Political Analysis*, United States of America: Springer, 2005.

#### 4.5.1. Lesser duty rule

Duties should only be imposed to the level sufficient for the riddance of the injury budding from the subsidy<sup>279</sup>. The decision whether to impose the full duty or lesser amount can only be determined by the relevant investigating authority after it has weighed the extent of the injury caused. The duty applied should be commensurate to the harm suffered. In fact the SCM Agreement recommends that the duty to be applied should be high enough just to remove the injury.<sup>280</sup>

It is worthy to note that only fewer countries implement the lesser duty rule. In particular the EU routinely calculate the subsidy margin and the injury margin then uses the least of the two as a punitive of countervailing duty.<sup>281</sup> Currently outside the EU this principle is also applicable in South Asia, Brazil, South Africa and India.<sup>282</sup>

#### 4.5.2. Community Interest Test

This generally entails reconciliation of conflicting interests with those of the Community.<sup>283</sup> The application of the community interest test can be explained as a balancing of competing interests with the interests of the community industry being given special weight. This principle is normally skewed towards accommodating the interest of the Community.<sup>284</sup>

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<sup>279</sup> Macrory FP et al The world Trade Organisation: Legal Economic and Political Analysis (2005)721

<sup>280</sup> Center for Trade and Development, *South Asian Yearbook of Trade and Development*, New Delhi: Pengan (2009)

<sup>281</sup> Debroy B & Charkraborty D, "Anti-Dumping: Global Abuse of a Trade Policy Instrument," India: Academic Foundation (2007).

<sup>282</sup> Ibid.

<sup>283</sup> Stanbrook C & Bentley P, *Dumping and Subsidies: Law and Procedures Governing the Imposition of Anti-dumping and Countervailing Duties in the European Community*, Netherlands: Kluwer Law International (1996).

<sup>284</sup> Ibid.

This test will generally trigger an introduction of countervailing measures if the interest of the consumers, domestic industries and consumer are at variance with those of the imported goods from other jurisdictions.<sup>285</sup>

#### **4.5.3. Best information available rule**

The European Union Regulation constitutes the finest information available rule that enables the Commission to formulate its findings concerning subsidization, injury and casual link on consideration of the facts existing.<sup>286</sup> This test can be applied even where the undertakings accused of subsidized import are not willing to interpret. In this circumstance the Commission is permitted to use the limited information it has in its possession.<sup>287</sup>

This test can be used to avoid conducting unnecessary lengthy never ending investigations when the afflicted parties are committed to stall the investigation. Under this circumstance the Commission may fall back on the Community interest to conclude its investigations.<sup>288</sup>

#### **4.6. Conclusion**

This chapter has demonstrated that subsidies on imports strain trade and consequently emboldens the risk of significant injury to domestic firms in the Kenyan government but also to other foreign governments. In order to nurture a distinct, domestic and home-made response unique to the local prevailing challenges need arises for the government to enact legislation on subsidies and countervailing measures so as to counterbalance the outcome of unfair trade remedies.

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<sup>285</sup>Giannakopolous KT, *Safeguarding Companies Rights in Competition and Anti-dumping/Anti-Subsidies Proceedings*, Netherlands: Kluwer Law International (2004).

<sup>286</sup>Ibid.

<sup>287</sup>Ibid.

<sup>288</sup>Ibid.

In specific, the chapter has carried out a comparative appraisal of two active users of countervailing measures - the EU and Brazil. It has showcased the particular aspects which propels the duo jurisdictions to exemplary succeed in the enactment of countervailing measures in addressing with subsidization.

After assessing the existing challenges and restraints on the enforcement of trade remedy procedures in Kenya and the outcome of the comparative assessment, the following chapter presents a summary and conclusion of the study. It highlights key recommendations that should be considered by Kenya in order to maximize its gains on the use of trade policies.

## **CHAPTER FIVE**

### **FINDINGS, CONCLUSION AND RECOMMENDATION**

#### **5.1. Introduction**

This is the final chapter of this study. It focuses on the summary and conclusion in respect of the foregoing chapters. It briefly outlines an overview of each chapter highlighting the salient features of the chapter. It also focuses on the effect of lack of legislation and proper policies to regulate subsidies and countervailing measures as trade remedies in Kenya. Particularly, it intends to emphasize and underscore some of the crippling challenges which have marked the application of these trade remedies in Kenya. Lastly, this chapter also makes appropriate recommendations which if adopted will go a long way in ensuring that the application of these trade remedies can be done in a proper manner within the parameters envisaged in the international agreements and obligations which Kenya subscribes to.

#### **5.2. Summary and Conclusion**

Chapter one set the stage for the basis of this study. It laid out minuscule details about the study by contextually defining the scope of the paper and properly outlining the objectives and the importance of the research paper. The idea was to shed light on the study, highlight its significance and set out what aimed to accomplish.

Chapter two on the other hand is a conceptual framework chapter. It elaborately and extensively discusses the legal framework of the subsidies and countervailing duty laws in Kenya. This chapter begins by acknowledging the steps Kenya has made by enacting sectorial legislation to regulate the use of these trade remedies. It goes ahead to look at the basic fundamental rules and

policies employed by the government to govern the application of these trade remedies. The chapter further looks at the body of foreign laws and agreements. This informs our international obligations as regards these trade policies. This part principally discusses the import of the East African Community's Customs Union Regulations as it regulates the application of subsidies and countervailing measures within the precincts of the EAC boundaries. This chapter further discusses the import of the GATT principles and the WTO Agreements and its subsidiary protocols particularly the SCM Agreement in regard to the extent to which they inform Kenya's application of these trade remedies. This chapter in ascertaining Kenya's fidelity to these obligations greatly underscores the fact that these body of laws does not entirely aids Kenya's application of these trade remedies because of a plethora of reasons key amongst which is the fact they are merely deemed to be soft laws and hence are not wholly binding.

The consequent chapter which is chapter three delves into a critical analysis of looking at the impact of these trade remedies in Kenya's domestic industry. While it acknowledges that Kenya being a founder member of the WTO and despite being entitled to use all the trade remedies available to her to defend her trade rights, it underlines that she has falteringly choked up her every opportunity to invoke multi-lateral trade obligations. This part proceeds to enumerate vitiating factors which have synonymously underlined Kenya's failure to optimally use these trade policies. It outlines several issues which has led to this appalling status quo and similarly highlights the consequences of those effects to the Kenya domestic market and international domestic at large. This chapter being the heartbeat of this study has primarily undertaken to look into the rigours and contours which specifically affect the Kenyan market.

Chapter four has looked at a comparative assessment of two jurisdictions. It has undertaken to study the system in place in the EU and Brazil because of the exemplary and shining measures they have enforced to ensure that they fully utilize the application of these measures without undermining their international obligations whatsoever. It particularly dwells on their successes by looking at the salient features in each of the jurisdictions. This chapter interrogates the particular policy mechanisms which have been used by the European Union and the Brazil government towards implementing these trade remedies. It elaborately mirrors the measures which these jurisdictions have put in place to ensure that it addresses the challenges that cripples the efficiency of the use of subsidies and countervailing measures without compromising the international trade policies. This chapter in undertaking study has specifically looked at the sectorial legislations which regulates the use these twin policies within their jurisdiction. It has highlighted the specific conditions which these jurisdictions consider before applying subsidies and countervailing measures.

### **5.3. Recommendations**

Following the constraints and challenges experienced by the application of countervailing measures in the EU and Brazil, listed hereunder are the recommendations made:

#### **5.3.1. General Recommendation**

The existing legal, policy and regulatory structure on the implementation of subsidies and countervailing measures has to be retreaded by the actual establishment of the Trade Remedies Agency in accordance with the Kenya Trade Remedies Act for regulating the application of these trade remedies measures in Kenya. The appointment of the Management Board should be done immediately in order to address the numerous pitfalls and setbacks currently compounding the

utilization of these policies in Kenya. This will go a long way in not only curtailing the arbitrary and unilateral application of these policies by the responsible government officials but it will also enhance application of a cogent body of laws in a defined and guided manner through stipulating the necessary procedures which ought to be followed before these policies can be enforced. Towards this end, the government should expediently fast track the enforcement of the Trade Remedies Bill in Parliament. This Bill will largely address most of the challenges enumerated in this study.

### **5.3.2. Specific Recommendation**

Aside from the general recommendation, there exist other specific recommendations which work in tandem with the general recommendation.

#### **1. The Kenyan Government**

The Government of Kenya is a major institution when it comes to international economic relations and other related matters. For this reason, the study recommends to the government the following precautions to enable the operationalization of subsidies and countervailing measures from unjust trade prices or when there is an involvement of use of these trade remedies:

##### **i. Utilizing available technical assistance**

Due to the overly complex nature of the international trade policies and their applications as discussed in the foregoing, the Government clearly requires technical and legal advice on the application of the numerous World Trade Organization Agreements specifically the ones pertaining to the use of subsidies and countervailing measures. The Government should seek the

technical assistance from WTO and other organizations such as, the Advisory Centre on Trade Law (ACWL) located in Geneva and the World Bank.

**ii) Enhancing alliance between state and the private sector**

Alive to the fact that most companies and firms forming part of the larger market and industry are largely private owned, the government should promote strong alliance between government agencies and the private sector. There should be enhancing information awareness by the private sector on the measures that the government can take to spur the growth of local companies without misusing the trade remedies. Companies should be encouraged to rationalize any misshapen, for instance the implementation of subsidies and countervailing measures. However, in the instance that co-operation is lacking between the two, the issue of biased trade practices may not be resolved effectively in the foreseeable future.

**iii) Fostering solid collaboration among institutions involved in trade, inter alia, academic institutions, non-governmental organizations, trade associations as well as trade law chambers.**

The Government should undertake to up skill more state officials; officials of all cadres in order to improve required knowledge which can be utilized appropriately to champion the interests of the Government and domestic industries within the realms of international trade. This will enable optimal utilization of these trade remedies without distorting the market forces or offending other international trade partners.

The Trade Remedies Agency is tasked assist in resolving claims and disputes arising out of conflict with other countries. The unit should be composed of lawyers, economists and trade

experts. These units can also cooperate with academic institutions to assist in development of a competent pool of reliable trade experts in Kenya.

## **2. Institute a commitment to negate exploitation of the Agreement**

Cognizant of the consequences of anti-dumping measures on trade, the WTO members should expressly own up to their obligation of creating and operating both fair and limpid domestic operations in order to discourage any exploitation of anti-dumping measures.

## **3. Strengthen the definition “domestic industry”**

The existing agreement refers to domestic industry as “... the domestic producers as a whole of the like products or to those of them whose collective output of the products constitute a major proportion of the total domestic production of those products.”

Through this definition, a few actors of a specific local industry could trigger a disruptive inquiry. To rectify such a position, it’s this study recommendation that the definition ought to be toughened by adding a specification to the effect that the “domestic industry” must cover more than 50 percent of the overall local production of similar goods. If that is not the case, a petition to launch a probe on dumping should be rendered inappropriate.

## **4. Impede “chain complaints” for a predetermined period**

This study recommends that the World Trade Organization should introduce a measure to avert the so-called “chain complaints,” because they expose corporations to consecutive new grievances when an enquiry has absolved the firms of the same or similar charges in previous grievances.

A significant number of chain complaints are lodged with an intention of bruising exporters. Chain grievances amount to a grave abuse of the Agreement, sabotaging the initial object of the anti-dumping remedies.

To eradicate such abuse, it is this study recommendation that a provision directs that no new grievance can be wedged against products that bear some similarity from any particular state for predetermined period (for instance, 2 years) post inquiry conclusion with no convictions of dumping.

#### **5. Heighten the consideration of “Public Interest”**

Under the Agreement, industrial users and representative consumer organizations are to be granted with the chance to avail relevant data to the course of investigation of dumping, causality and injury. The study has established that a mere capability to provide data to state agencies inadequate per se. On that basis, this study recommends that WTO members should resolve to heighten the consideration of the public interest. This is to ensure that a few industries do not seek these trade remedies just to enrich themselves but to ensure that the decisions made by the Trade Remedies Agency and the Cabinet secretary are sound and for the benefit of the public as opposed to specific industries. Public interest encrusts the benefits of relevant consumers and producers, prior to the implementation of anti-dumping measures.

#### **6. Strengthen the functions of the WTO panel**

The roles of WTO disagreement board on anti-dumping cases are restricted to evaluating the impartiality or suitability of fact verification by member investigative authorities. This study recommends that WTO members should accord Conflict panel wider jurisdiction.

If a panel discovers that anti-dumping measures have been unjustly enforced, the Agreement should bear requirements for dismissing anti-dumping measures, rebating the collected duties, and undertaking necessary compensation within a reasonable duration.

Further, the WTO Dispute Settlement Body does not have an actual means of enforcing its decisions. Rather, States are given authority to impose countervailing measures on the offending state. This has contributed to the lack of participation by member states in the dispute resolution mechanism.

## **7. Anti-dumping and Competition Policy**

Finally, this study issues a recommendation that the available anti-dumping investigation procedures and measures be generally buttressed to critically mirror the significance of competition policy, and take into consideration local market structure and domestic competition.

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