



Trade Notes

INSIDE

Introduction	1	Dumping experience in Kenya	4
Anti-Dumping Agreement	2	Remedy for Dumping	5
Determination of Dumping and Dumping margin	2	Status of Anti-dumping Laws	6
Anti-dumping: Some statistics	3	Application in Kenya	6
		Recommendations and Way Forward	6

ANTI-DUMPING AS A TRADE REMEDY: The Way Forward for Kenya

By Trade Programme Team

Introduction

In the international trade arena, there are occurrences that may make a country feel disadvantaged or injured in the course of conducting trade with other countries. Such injuries could result in small and infant industries of a country closing down due to inability to compete with the imports and loss of employment due to closure of companies. There are several trade remedies that can be adopted to deal with such situations: anti-dumping duties, safeguard measures, and countervailing duties. The focus here will be on anti-dumping duties. The World Trade Organization's (WTO) General Agreement on Tariffs and Trade (GATT) 1994¹ provides the framework under which anti-dumping duties can be used. Kenya, who is a member of the WTO since 1995, can apply anti-dumping duties as long as she adheres to the rules governing anti-dumping as stipulated in Article 2 of the GATT 1994 on anti-dumping, commonly known as the WTO Agreement on Anti-dumping. The focus of this Bulletin is on the rules guiding anti-dumping and its application to Kenya.

1.1 What is Dumping?

According to the WTO Agreement on anti-dumping, a product is considered "dumped" when it is introduced

into the commerce of another country at less than its normal value. According to Bossche (2005), dumping is condemned but not prohibited in WTO law. Dumping is an informal name for the practice of selling a product in a foreign country for less than either its price in its domestic country, or the cost of making the product. It occurs when manufacturers export a product to another country at a price either below the price charged for the same or 'like product' in its home market, or in quantities that cannot be explained through normal market competition. Like products, in the context of anti-dumping, refers to characteristics of the said product in all aspects; identical, or that has closely resembling attributes. Dumping can largely be categorized into two: the motivation of the exporter and the characteristics of the circumstances that underlie them. Strategic and predatory dumping fall under this category; while in the second category, there is monopolizing and non-monopolizing dumping which include market expansion, cyclical, and state trading dumping.

2. The Anti-dumping Agreement

The WTO Agreement on Anti-dumping provides for the right of contracting parties (who are Member states of the WTO) to apply anti-dumping measures, i.e., measures against imports of a product at an export price below its "normal value" (usually the price of the product in the domestic market of the exporting country) if such dumped imports cause or threaten to

¹This was signed in 1994 and brought into being the WTO, albeit with changes to the agreement that have been made over the years to date.



cause injury to a domestic industry in the territory of the importing country.

The Anti-dumping Agreement strengthens the requirement for the importing country to establish a clear causal relationship between dumped imports and injury to the domestic industry. The examination of the dumped imports on the industry concerned must include an evaluation of all relevant economic factors bearing on the state of the industry concerned. The Agreement confirms the existing interpretation of the term “domestic industry”. Subject to a few exceptions, “domestic industry” refers to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

The Agreement sets out conditions for ensuring that all interested parties are given an opportunity to present evidence. Therein, provisions on the application of provisional measures, the use of price undertakings in anti-dumping cases, and on the duration of anti-dumping measures have been strengthened. Thus, a significant improvement over the existing Agreement consists of the addition of a new provision under which anti-dumping measures shall expire five years after the date of imposition, unless a determination is made that, in the event of termination of the measures, dumping and injury is likely to continue or recur.

The Agreement also calls for prompt and detailed notification of all preliminary or final anti-dumping actions to a Committee on Anti-dumping Practices. The Agreement will afford parties the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives, and to request the establishment of panels to examine disputes. The Agreement, thus, is wholesome and has covered a majority, if not all, of the areas that are most likely to cause commotion between Members states seeking to use the provisions outlined therein.

3. Determination of Dumping and Dumping Margin

In order to determine dumping and the margin of dumping, a consideration of the Normal Value, the Export Price, and the Constructed Export Price of the like product has to be undertaken. Normal value

refers to the comparable price at which products under investigation are sold in the ordinary course of trade in the domestic market of the exporting country. Export price, on the other hand, is the price paid for the products by the first independent buyer, whereas Constructed Export Price is used where there is no reliable price because of association or a compensatory arrangement between the exporter and the importer or a third party. It may be constructed on the basis of the price at which imported products are first resold to an independent buyer.

Dumping =	Normal Value – Export Price
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Dumping margin on the other hand is the difference between the normal value and the export price of the goods under complaint/investigations. It is expressed as a percentage of the export price, i.e.,

Dumping Margin =	Normal Value - Export Price
	Export Price

The export price and the normal value of the products must be compared at the normal level or in the ordinary course of trade, which is mostly done using the ex-factory prices, and should be carried out within a reasonable period of time.

3.1 Injury and its Determination

“Injury” is taken to mean material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of an industry, and has to be interpreted in accordance with the provisions of Article 3 of the WTO Anti-dumping Agreement. Bearing this in mind, determination of injury is based on positive evidence and involves an objective examination of both:

1. The volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products; and
2. The consequent impact of these imports on domestic producers of such products.

²Article 3 of the WTO Anti-dumping Agreement is titled ‘Determination of Injury’, and explains how this is carried out as well as the parameters to look out for.

Other than the common factors such as dumping in the local industry and cheap prices of imported products, it is required that other factors that may have led to the stagnation or collapse of the local industry in question be considered. Such factors may include;

1. Contraction in demand for the product,
2. Changes in consumption patterns of the product,
3. The level of competition between local and foreign producers of the product in question,
4. Productivity of the local industry,
5. Technological changes, and
6. Other factors affecting local prices.

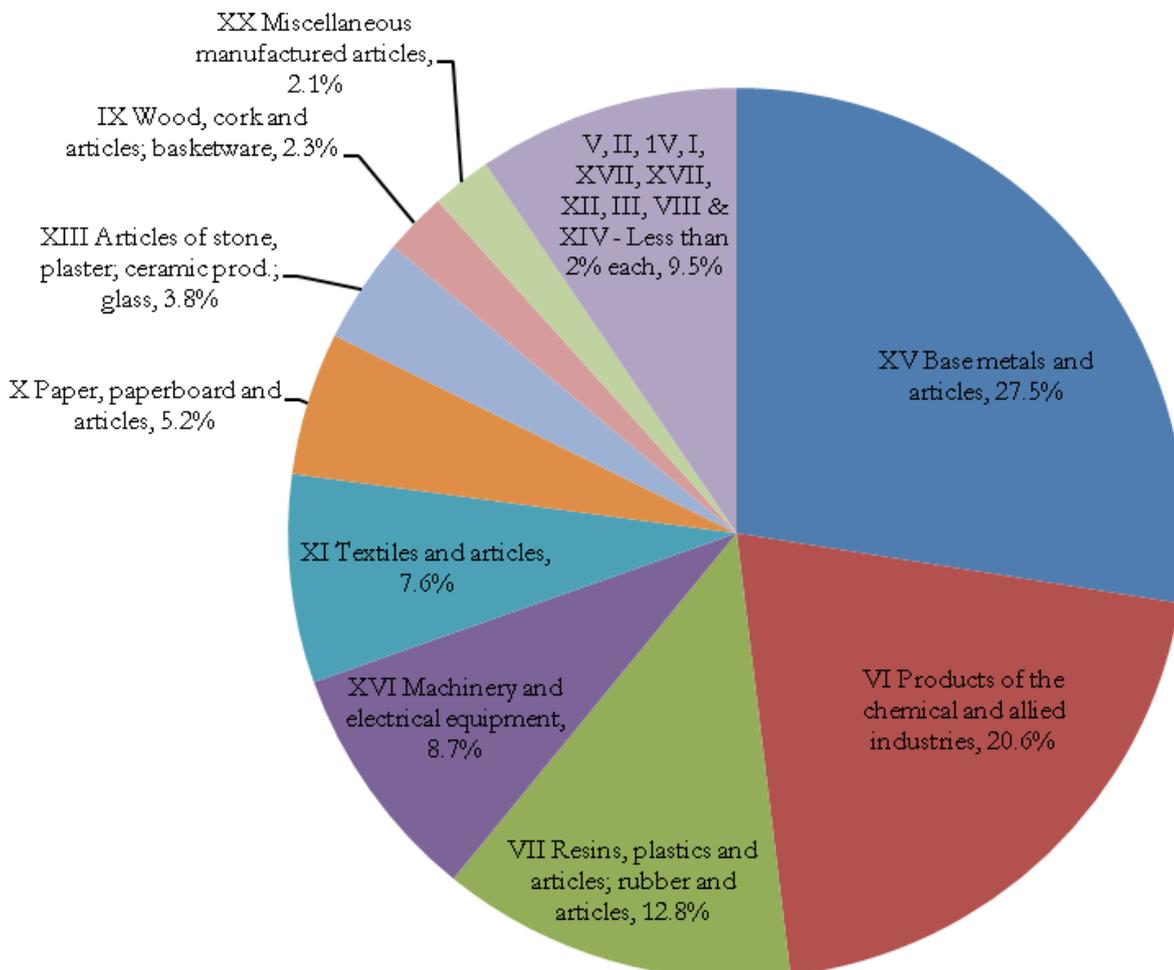
4. Anti-dumping: Some Statistics

The rules and regulations that govern anti-dumping are articulated in Article VI of the WTO Agreement on anti-dumping. Other than issuing concrete guidelines as to what is considered as dumping, it outlines the

rules and regulations through which countries that are aggrieved in this manner may seek redress. The rules governing the application of such measures are currently provided in an Anti-dumping Agreement that was concluded at the end of the Tokyo Round held between 1973 and 1979. Further negotiations during the years 1986 to 1994, commonly referred to as the Uruguay Round, resulted in a revision of this Agreement (signed in 1995), and addressed many grey areas in which the previous agreement lacked precision and detail, and thus led to improvement of the rules and regulations of the anti-dumping laws.

It is important to note that, as represented in the Figure 1, there are a number of anti-dumping initiations from the various sectors that are prone to dumping that have been lodged with the World Trade Organization for the period since its formation in January 1995 to December 2011.

Figure 1: Sector Anti-dumping Initiations, January 1995 – December 2011



Source: WTO Website.





A look at the top 5 country initiatives in terms of anti-dumping initiations, India leads with a total of 656 initiations, followed by United States of America with 458, and The European Union, Argentina, and Australia with 437, 291, and 235 initiations respectively. Other countries that have had anti-dumping initiations include China with 191 initiations and Canada with 155 initiations. In Africa, the countries that have made anti-dumping initiations are South Africa with 216, Egypt which has made 70 anti-dumping initiations, and lastly Morocco, which has made 1 initiation as per the records with the WTO.

4.1 Kenya's Legal Framework on Anti-dumping

Going by other country initiatives and practices (India, Canada, and South Africa) as pertains to cases and anti-dumping initiatives, it is clear that various bodies in each of these countries are tasked with the function of conducting anti-dumping investigations, yet all are in conformity with the Anti-dumping Agreement. In the case of India, which has lodged 656 anti-dumping initiations with the WTO, its basis for initiating anti-dumping investigations is anchored in the Indian Customs Tariff Rules, 1995³, which forms the legal basis for anti-dumping investigations and for the levy of anti-dumping duties. With this in place, the Ministry of Commerce in India is tasked with the duty of conducting investigations into cases of dumping. As for Canada, the process of conducting anti-dumping investigations is carried out by the Office of the Director General, anchored by the International Trade Tribunal that was formed through the Canadian International Trade Tribunal Act, 1985⁴. Canada has, since the WTO came into being, made 155 anti-dumping initiations. Lastly for the three countries in focus, South Africa has the same duties being carried out by the International Trade Administration Commission, formed through the International Trade Commissions Act of South Africa, 2002⁵. South Africa has made a total of 216 anti-dumping initiations in the period of existence of

the WTO.

In the Kenyan case, legal framework that can be applied in governing anti-dumping is captured in the Customs and Excise Act 2010, Laws of Kenya, which was borne as a result of the revised Act of 2001. According to Kenyan Law under the Customs and Excise Act 2010 Cap 472, Article 125 outlines that goods shall be considered as dumped:

- If the export price of the goods exported to Kenya is less than the comparable price, in the ordinary course of trade, for the product when destined for consumption in the exporting country; or
- If the importation of the goods causes injury to or retardation of a Kenyan industry.

4.2 Kenya's Institutional Framework on Anti-dumping

For Kenya, the ministry of trade is the institution tasked with the steering of anti-dumping cases. It has not, since its inception, carried out any anti-dumping investigations and as such, not much can be said of it. However, we can learn from experiences of other countries, such as South Africa, which have utilized the provisions of the WTO by having in place strong institutions that look into anti-dumping. There is need, therefore, to look into the existing legal and institutional framework for trade remedies in Kenya, overview of WTO trade remedy instruments and the draft trade remedy laws. On the same note, discussions around the roles of investigation authority, options for its institutional structure and establishing existence of dumping, subsidies and import surges, should also be looked into in depth.

5. Dumping Experience in Kenya

Looking at Figure 1, it is important to note that, the top 5 leading sectors in terms of anti-dumping initiations: base metals and articles; chemical and allied industries; resins, plastic and articles; machinery and electrical equipment; and textile and articles, are key sectors in any economy. As an example, one of the key sectors and industry in the

³Sections 9, 9a, 9b and 9c of the Indian Customs Tariff Act, 1975 as amended in 1995, and the Indian Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995.

⁴Is the legal Act that brought into being the Canadian International Trade Tribunal as is outlined under Section 3.1 of the Act.

⁵The International Trade Commissions Act of South Africa, 2002 establishes this body under Section 7 and outlines its mandate and duties.





Kenyan economy in the late 1980s was the textile industry. It is important to note that second hand clothing, commonly referred to as 'mitumba' has hurt Kenya's textile industry (Voice of America)⁶, and the effects are still being felt to date. Mitumba were first brought into Kenya in the late 1980s, the time when the textile industry was experiencing a boom. Soon thereafter, economic liberalization policies that included mass importation of used clothing led to the virtual collapse of the textile industry in the early 1990s. This meant job losses to many a Kenyan worker thereby leading to lowering of living standards and quality of life. Nonetheless, with the signing of AGOA in the year 2000, the export portion of the textile industry was revived and gave a lifeline to this industry and has continued to give hope to those involved in the production and manufacture of clothes, not only for export purposes but also for local consumption.

It would be important to consult widely with the private sector, the business community, government officials, as well as civil society organizations, in order to try and establish if indeed there are current cases of dumping in Kenya. This can be done through investigations that should be carried out by a competent body that is tasked with this duty.

6. Remedy for Dumping

As contained in the WTO Anti-dumping Agreement, an anti-dumping application needs to be supported by 25% of the local producers by domestic production volume, and those producers expressing a view on the application must also constitute at least 50% of all producers expressing either support or opposition to the application. In order to minimize or halt the negative effects of dumping, an aggrieved party/country may impose any of these remedies: anti-dumping duty, or price undertakings. It is, however, required that the following conditions must be met in order to apply any of these remedies:

- Establish that there is dumping,
- Show of causal link, between the imports (dumped products), and
- Proof of injury to the domestic market (i.e., closure/collapse of local industries).

6.1 Anti-dumping Duties

Under Article 9 of the WTO Agreement on anti-dumping, the decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition is permissive in the territory of all Members, and that the duty is less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry. It should also be noted that, it is stipulated that the anti-dumping duty shall not exceed the margin of dumping.

6.2 Price Undertakings

As defined by the WTO, it is an undertaking by an exporter to raise the export price of the product to avoid the possibility of an anti-dumping duty. As outlined in Article 9 of the WTO Anti-dumping Agreement, there are rules and regulations that govern offer and acceptance of price undertakings, taking into account that a determination of existence of dumping has been undertaken. It further establishes the principle that such undertakings between an exporter and the importing Member, to revise prices, or cease exports at dumped prices, may be entered into to settle an investigation, but only after a preliminary affirmative determination of dumping, injury and causality has been reached.

It also establishes that undertakings are voluntary on the part of both exporters and investigating authorities. In addition, an exporter may request that the investigation be continued after an undertaking has been accepted, and if a final determination of no dumping, no injury, or no causality results, the undertaking shall automatically lapse.



⁶Reported by Voice of America as contained in the report on this website <http://honnemadeitinafrica.com/secon-hand-clothing-burting-kenyas-textile-industry/4026/>



7. Status of Anti-dumping Laws Application in Kenya

The remedies to dumping, as outlined above, are seldom applied in the Kenyan context. Among the reasons as to why this is so are:

- Financial constraints
From the onset, it is easy to see that the costs associated with conducting anti-dumping investigations are quite huge. Kenya has not allocated resources per se to this area, therefore is unable to make use of these clauses to tackle cases of dumping, if any is detected.
- Inadequate expertise and weak technical know-how on anti-dumping
In as much as there are rules and regulations that try to look into issues of dumping, not many are well versed in the area. There is need to carry out capacity building so as to raise awareness and level of expertise on this subject.
- Failure to undertake investigations due to lack of data
In order to conduct successful anti-dumping investigations, data from the country that is being accused of dumping has to be collected. This is lacking in the Kenyan case as it requires more funds and goodwill, as well as technical know-how.

1. Taking lessons from other country practices; it is imperative that an independent anti-dumping body that will be tasked with the duty of identifying dumping cases well in advance be set up. It will be tasked with identifying instances of dumping and therefore, proactively, taking steps to stop such before the effects are large. This body should be given powers to conduct investigations even without sanctions from the minister, but with his/her knowledge. The minister can play an overseer cum managerial role, albeit ceremoniously, thereby allowing the body to operate without interference from the government.
2. Carrying out of comprehensive anti-dumping investigations requires financial support. It is therefore imperative that the government of the day allocates adequate resources to enable the body set above carry out this duty amicably.
3. Undertake to carry out capacity building to enhance knowledge of the officers that are, or will be tasked with the duty of carrying out anti-dumping investigations.

8. Recommendations and Way Forward

For Kenya to be able to take full advantage of the remedies that are available to members of the WTO as relates to anti-dumping, it must first prove that there exist cases of dumping in the country. This, as has been shown, is not an easy task and requires, other than expertise in the area, financial support in order to realize. From the foregoing, it is imperative that Kenya takes steps to strengthen its anti-dumping laws so as to curtail the fall and closure of its local industries that can be attributed to dumping. This can be done through the following ways:



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