

**SPECIAL AND DIFFERENTIAL TREATMENT AND
TECHNICAL ASSISTANCE IN TRADE REMEDIES**

Submission by Kenya

The following communication, dated 26 June 2006, is being circulated at the request of the Delegation of Kenya.

1. Introduction

This proposal seeks for the extension of Special and Differential Treatment to Developing countries to facilitate the initiation of investigations for the application of anti-dumping and countervailing measures. It also seeks for the Adoption of an Understanding or a Decision Identifying and Supporting Technical Assistance needs of Developing Countries for the Building up of Technical Capacities for the application of Trade Remedy laws.

2. Background and objective

The Agreement on Anti-Dumping Practices (ADP) authorizes countries to apply anti-dumping measures to imports that are being dumped. Likewise the Agreement on Subsidies and Countervailing Measures permits countries to levy countervailing duties on imports that benefit from subsidies granted by the governments of the exporting countries. The two Agreements however lay down an important rule that such anti-dumping and countervailing measures can only be applied, if after investigations undertaken on the basis of a written complaint, it is established that dumped or subsidized imports are causing injury to the complaining domestic industry and that there is a causal link between such imports and injury to the industry.

The experience of Kenya and some of the other African countries in the region which have some inadequate legal framework and have been unable to establish institutional framework for the investigations of complaints, shows that manufacturing industries and agricultural producers in their countries which are being injured by dumped or subsidised imports are not able to take full advantage of the right which the two agreements confer on them to petition for investigations for the following reasons.

First the rules require that the application for such investigations should be accompanied, in the case of application for the levy of anti-dumping and countervailing duties detailed information on the prices charged by the exporters (export prices) in the importing market and the prices charged by them for sale in their home markets (home market prices). While information on export prices is readily available in the importing countries, they find it extremely difficult to collect information on prices charged by the exporters in their home markets.

Second, both the Agreements require applicants to establish “standing” for making petition, by establishing *inter alia* that the application has the support of producers, which account for at least 25 per cent of the total production. It is often difficult for the affected producers to establish such standing, as in many industrial sectors, where production is undertaken on small-scale basis, the number of producers is large. The producers are also not organized as associations. Establishment of standing is particularly difficult, in the case of agricultural products, where production is undertaken by hundreds or thousands, if not millions of small-scale farmers, who are poor and often illiterate.

3. Proposal for the clarification of the rules and for adoption of an understanding on decision on technical assistance

Against this background, the delegation of Kenya proposes that special and differential treatment should be extended to developing countries by:

- Clarifying the relevant provisions in the Agreement on ADP and SCM to recognize that the governments of developing countries may have to assist their affected industries and agricultural producers in bringing cases before the investigating authorities, where they consider that there are reasonable grounds to believe that increased dumped or subsidized imports are causing injury to the domestic industry, and
- Adopting a Decision or an Understanding under the provisions of the two Agreements specifying the technical assistance needs of developing countries for the implementation of their rules.

3.1 The existing rules in the Agreements relating to the initiation of investigations

The Agreements on ADP and SCM contains analogous provisions laying0 down rules on how “investigations” should be initiated. These are contained in Art. 5 of the ADP Agreement and Art. 11 of the Agreement on SCM.

- Paragraph 1 of these two Articles states that “*an investigation to determine the existence, degree and effect of any alleged dumping or subsidy shall be initiated upon a written application by or on behalf of the domestic industry.*” This is followed in para 2 that enumerates the nature and type of evidence that must be included in the application which include such elements as, dumping or subsidy, injury to the domestic industry and causal link between dumped imports and injury.
- An exception to the above rule is provided by Para 6 in the two Articles. It states that “*if, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping or subsidization, injury and a causal link, as described in para 2, to justify the initiation of an investigation.*”

3.1.1 Proposals for clarification of the above rules

It is proposed that the above provisions should be clarified to provide that:

- The “specific circumstances” (referred to in para 6 of Art. 5 of ADP Agreement and of Art. 11 of the SCM Agreement) which make it difficult for the industry affected by dumped or subsidized imports, to apply for the anti-dumping or countervailing measures, exist in a large number of developing countries, including those which are least developed and small economies.
- Because of this, the governments of these countries have to play a more active role:

- In assisting their manufacturing industries and agricultural producers in collecting evidence that is needed for inclusion in the application for imposition of anti-dumping and countervailing measures, and
 - By taking initiative for requesting the investigating authorities to initiate investigations where there are reasonable grounds to believe, on the basis of the information collected, that there is sufficient evidence to suggest that increased imports are causing injury to the domestic industry and the industry has no technical capacity to apply for investigations.
- For collection of such evidence the governments could exercise surveillance of trends in imports and the prices of products that are alleged to be injured by dumped and or subsidised by the manufacturing industry or agricultural producers. Such surveillance could be exercised by:
 - Requiring the customs administration to provide on transaction-by-transaction basis, data on volume of imports and their prices or product or products put under surveillance.
 - Adopting systems for licensing of imports of such products
 - Where a licensing system is adopted for the surveillance of the imports, the importers shall be required to submit in their application for licences, information on quantities to be imported, the import price and the price at which the product is being sold in the domestic market of the exporting country.
 - Such licences should be issued automatically and shall not be used for restrictive purposes. The provisions of the WTO Agreement on licensing procedures, which require that automatic licences should be issued within a period of 10 days, shall apply to such licensing systems.
 - The governments of countries which use the services of Preshipment Inspection Companies may use the services of these companies to obtain information on prices, of the products put under surveillance in the domestic market of the exporting country.
 - The information collected under the surveillance mechanism shall be published and could be used as evidence in support of applications to the investigating authorities for initiation of investigations:
 - By the affected domestic manufacturing industry or agricultural producers or
 - By governments, where application for initiation of investigations is made by them.

4. Adoption of an Understanding or a Decision on Technical Assistance.

Both Doha and Hong Kong Ministerial Declaration emphasise the importance of adopting programmes for providing aid for trade which focus on the needs of the beneficiary countries and reflect their priorities. (See para 38 of the Doha Ministerial Declaration and para 53 of the Hong Kong Ministerial Declaration). Taking into account this mandate provided by the two Declarations, it is suggested that a Decision or Understanding should be adopted, as an integral part of the ADP and SCM Agreements identifying the areas in which assistance may have to be provided for enhancing the technical capacities of developing countries for the implementation of the rules of the Agreements on ADP and SCM. Some of the areas in which assistance may be needed are indicated below:

- Establishment of legal and institutional framework that is needed for the application of anti-dumping and countervailing measures to countries which have not been able to establish such framework and for training of personnel in undertaking investigations according to the procedures prescribed by the two Agreements
- Establishment of mechanisms or the surveillance of imports of products that are alleged to be causing injury to domestic manufacturing industries or agricultural producers with a view to assisting them in collecting evidence on trends in imports and their prices;

- Establishment of “regional investigating authority” for investigations of complaints from manufacturing industry and agricultural producers in countries belonging to a regional economic grouping;
 - Training of lawyers, accountant and other professionals in the application of trade remedy laws (viz. Agreements on ADP, SCM and safeguards).
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