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Trade Remedies in Africa: Experience, Challenges and Prospects

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Trade Remedies in Africa: Experience, Challenges, and Prospects

Ousseni Illy[1]

Abstract

Trade policies in Africa have been studied extensively. Most of the works in this field, however, take the form of overall appraisal of such policies and their effects on the development of the continent as a whole. The aim of the present study is slightly different. It tries to explore and assess the experiences and constraints of African countries in a specific area of trade policy, which is trade remedies (anti-dumping, countervailing, and safeguards), and subsequently raises the question of the eventual role of these instruments in the backing of industrial policy on the continent. It concludes that trade remedies are important for African countries although many challenges lie ahead on the way to their use by the vast majority of these countries. Some solutions such as regional investigating bodies are proposed as alternatives ways in order to make trade remedies more affordable for African countries.

Key words: Africa, anti-dumping, countervailing, industrial development, safeguards, trade policy, trade remedies, WTO.

1. Introduction

Trade remedies – or trade defence – are contingent measures enacted to defend local producers in certain circumstances. They take three principal forms: anti-dumping measures, countervailing measures and safeguard measures.

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Anti-dumping (AD) measures are typically tariffs in addition to ordinary customs duties that are imposed to counteract certain unfair pricing practices (price undercuts) by foreign companies that injure or threaten to injure domestic producers of like or directly competitive products[2]. Countervailing (or anti-subsidy) measures are tariffs in addition to ordinary customs duties levied in order to offset "unfair" advantages gained by foreign exporters through bounties or subsidies bestowed on them by their governments, again when they cause or threaten to cause material injury to a domestic competing industry[3]. Finally, safeguard measures are temporarily trade restrictions, typically tariffs or quotas, which are imposed in response to overwhelming import surges, as usually a result of trade concessions, that cause serious injury (or threat thereof) to competing domestic producers[4].

The origin of these measures goes back to at least the sixteenth century. Jacob Viner, the first scholar to have conducted a comprehensive study on the subject of dumping, describes the case of a sixteenth century English writer who charged foreigners with selling paper at a loss to smother the infant paper industry in England[5]. Furthermore, as early as 1776, the renowned British economist Adam Smith discussed in detail the custom of granting official bounties on exports and referred to practices which today would be described as dumping[6]. Finally, following complaints in the early years of American independence that English manufacturers "dumped" their products into the United States with the deliberate objective of "crushing" young American industries, Alexander Hamilton, the first US Secretary of the Treasury, declared in his Report on Manufacturers that the "greatest obstacle encountered by new industries in a young country is the system of export bounties maintained by foreign governments"[7].

[2] A. O. Sykes, "Trade Remedy Laws" (John M. Olin Law & Economics Working Paper, No. 240, April 2005), p. 2.
[3] *Ibid.*
[4] *Ibid.*
[5] J. Viner, *Dumping: A Problem in International Trade* (Chicago: Chicago University Press, 1923), p. 35.
[6] A. Smith, *Inquiry into the Nature and Causes of the Wealth of Nations*, Book IV, Chapter V.
[7] A. Hamilton, "Report of the Secretary of the Treasury on the Subject of Manufacturers", 1791; quoted in Viner 1923, op. cit., p. 37.

However, it was not until the beginning of the nineteenth century that the first countermeasures were taken against such practices. They were primarily directed against state subsidies, which had been a favourite instrument of trade policy since the days of mercantilism[8].

The principle of trade remedies is somewhat controversial, particularly from the economic rationale. Indeed, some economists regard trade remedies as disguised protectionism (if not blatant protectionism), against the idea of free trade, and above all, counterproductive for welfare (be it on the national level or global level)[9]. Others on the contrary maintain that trade remedies are useful instruments, in particular for insuring a fairer international trading system in the absence of global competition rules, and providing relief and space for adjustment for troubled domestic industries[10]. Moreover, their role in sustaining industrial development has long been emphasised by businesspeople and policymakers alike[11].

Developed countries have traditionally been the main users of trade remedies. Examination of early figures of the General Agreement on Tariffs and Trade (GATT, the World Trade Organisation – WTO forerunner) shows that up until around the 1980s, developing countries were virtually absent in the trade remedy activity. However, in recent years, we have witnessed an increasing presence of developing countries in trade remedy use to the point that today developing countries represent collectively more than 60% of global trade remedy actions, with India and Brazil among the leading users (WTO 2010). On the target side, developing countries also are becoming the principal targets of trade remedy measures by both developed

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[8] J. F. Beseler and A. N. Williams, *Antidumping and Anti-subsidy Law: The European Community* (London: Sweet and Maxwell, 1986), p. 3.

[9] See, among others, J. M. Finger, "The Origins and Evolution of Anti-dumping Regulation", Working Paper, The World Bank (WPS 783), October 1991; A. Sykes, "Trade Remedy Laws", John M. Olin Law & Economics Working Paper No. 240, 2005; P. C. Mavroidis, P. A. Messerlin and J. M. Wauters, *The Law and Economics of Contingent Protection in the WTO* (Cheltenham: Edward Elgar, 2008); T. Voon, "Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements", Georgetown Business, Economics & Regulatory Law Research Paper No. 1504030, November 2009.

[10] See J. F. Beseler, A. N. Williams, *Anti-dumping and Anti-subsidy Law: the European Communities*, (London: Sweet and Maxwell), 1986; T. P. Stewart,, "Administration of the Antidumping Law: A Different Perspective", in Richard Boltuck and Robert E. Litan (eds), *Down in the Dump: Administration of the Unfair Trade Laws*, (Washington, DC: Brookings Institution), 1991, pp. 288-330; G. C. Hufbauer, and H. F. Rosen, *Trade Policy for Troubled Industries* (Washington, D.C: Institute for International Economics), 1986; etc.

[11] See Hamilton's 1791 Report quoted above and Comments made by Canadian Finance Minister in 1904 during the adoption of the country's first AD law (see below).

and developing countries. As a matter of example, China has become the single biggest target of anti-dumping actions in the world (WTO 2010).

There are two primary explanations for the limited use of trade remedies by developing countries prior to the 1980s. First, before the 1980s, many developing countries had high tariffs which gave them sufficient and natural protection, and thus little need for trade remedy measures. Second, many developing countries were not too much acquainted with these instruments and therefore did not have enough expertise to handle them properly.

Although developing countries are now using trade remedies to a much greater extent, so far, African countries have not played a significant role in this area. Only four countries – Egypt, Morocco, South Africa, and Tunisia – have functional trade remedy mechanisms on the continent and have ever employed such measures to defend their domestic producers. Although this is hardly a surprise when one takes into account the overall Africa's poor WTO participation record, it may be useful to find out the underlying reasons of this particular case and above all, devise solutions to address it. Indeed, trade remedies are becoming increasingly vital for poor countries, including African countries. The survival of (beleaguered) local industries and producers under the pressures of tariffs dismantling the world has been experiencing since the 1940s and foreign unfair trade practices such as dumping and subsidies is even more at stake here that manufacturing, which used to account for up to 20 per cent of Gross Domestic Product (GDP) in many countries and provide thousands of jobs in the 1970s and 1980s represents barely 6 per cent in most countries today[12]. And the situation keeps on worsening; hence the urgent need to devise strategies to defend local remaining manufactures and promote new ones.

Indeed, Africa has no choice but to industrialise (or re-industrialise) and diversify its economies. This is even more so now that the continent has one of the fastest growth rates of population and urbanisation in the world, requiring large number and different kind of jobs, as well as the volatile and declining terms of trade for commodity products. The question is no longer *if* but *how* Africa can achieve rapid industrialisation, especially under the new rules of the

[12] D. Njinkeu and C. C. Soludo, "Industrialising Africa using WTO Framework", *Preparing for the WTO 2000 Negotiations*, The World Bank Research and Capacity-Building Project, Chap. 5; also, R. Sandrey and H. Edinger, "China's Manufacturing and Industrialization in Africa", African Development Bank (AfDB), Working Paper No. 128, May 2011.

game, i.e. in an ever open world, without protection, and lesser state interventionism. As it is well-known, industrialisation took place in virtually all other parts of the world behind high tariff walls and state interventionism[13], and Africa would be therefore the only region in history that would have to industrialise without these instruments. Mastering "smart protection" tools such as trade remedies is therefore crucial for this continent, if it were to develop a genuine and viable industrial policy. Encouragingly, there are signs that African countries are recognising the importance of the issue. In 2008, they called on the WTO for more flexibility in the area of trade remedies, and for technical assistance for the establishment (or strengthening) of local trade remedy frameworks on the continent[14].

The remainder of this paper is structured as follows: section 2 sheds light on the three types of trade remedies in examination through *inter alia* an overview of their history, mechanisms and international legal regimes, and the policy debate surrounding them; section 3 systematically reviews the use of trade remedies by and against African countries from 1995 to 2011; section 4 probes the underlying reasons for the limited use of these measures on this continent; section 5 deals with the contentious issue of whether or not African countries should engage further in trade remedy actions, section 6 describes the challenges in this regard, section 7 tries to draw some lessons from the experiences of the traditional users in Africa, i.e. South Africa and Egypt, and finally section 8 concludes.

2. Trade remedies: A general overview

The survival of domestic producers under the pressure from foreign competition and unfair trade practices has for long been one of the greatest concerns of governments. Trade remedies belong to the early strategies devised by many states to deal with this problem, and anti-dumping and countervailing measures were the first instruments invented in that regard. As regard to safeguard actions, they are more recent and their origin is attributed to the first free trade agreements of the United States.

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[13] H. - J. Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem), 2002; E. S. Reinert, *How Rich Countries Got Rich - And Why Poor Countries Stay Poor* (London: Constable), 2007.

[14] See WTO document TN/RL/GEN/154 entitled "Special and Differential Treatment and Technical Assistance in Trade Remedies", ACP and African Groups, WTO, 25 February 2008. In this document, the ACP and African Groups called in particular for flexibility and technical assistance for the establishment of trade remedy mechanisms in their countries.

This section gives a brief history of each of the three types of trade remedies (i.e. anti-dumping measures, countervailing measures, and safeguards), the prevailing international legal environment regarding these measures and the policy debate surrounding their use.

2.1. Anti-dumping measures

Even if the term "dumping" has been in use in the English language since the Middle Ages[15], it is not up until the beginning of the twentieth century that it began to be used in connection with international trade. It was then applied to describe the attitude of the producers of one country that sell their products in another country at unusually low prices[16].

Economists traditionally see dumping as international price discrimination. Viner contends that "one essential characteristic of dumping is price discrimination between purchasers in different national markets"[17].

Price discrimination is typically defined as a firm charging significantly different product prices to two or more customers even though there are no significant differences between the costs to the seller of supplying those customers[18]. It was first a domestic concern, and various national antitrust laws prohibit it[19].

For a firm to be able to engage in price discrimination, it must have some degree of control over the market price, which means that it is generally the act of a monopolist[20].

There are two essential economic arguments for prohibiting price discrimination. First, a monopolist's total output may decrease when it shifts from a single-price policy to a discriminatory pricing policy, which might in turn exacerbate the scarcity and impose greater welfare losses on society[21]. Once the monopolist price-discriminates between the two markets, some existing customers will be forced out of the higher-priced market, and new customers will

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[15] According to Beseler and Williams, the term was meant at that time to describe the act of getting rid of something unwanted quickly, usually rubbish (Beseler and Williams 1986, p. 41).
[16] J. Viner, *Dumping*, *op. cit*., p. 1.
[17] *Ibid.*, p. 4.
[18] M. Trebilcock and R. Howse, *The Regulation of International Trade*, 3rd Ed. (London: Routledge, 2005), p. 250.
[19] [19] *See*, for example, Canada, Competition Act, R.S.C. 1985, ch. C-34, s. 50(1)(a), (b); USA, Clayton Act, as amended by the Robinson-Patman Act, ss 2, 3; 15 U.S.C. 13 (1988).
[20] M. Trebilcock and R. Howse, *op. cit*., p. 250.
[21] *Ibid.*

be attracted to the lower-priced market. The total output produced and sold will decrease if the higher-priced market forces more customers than the lower-priced market attracts[22].

The second argument for the prohibition of price discrimination derives from the consideration from two forms of social costs imposed on society. The first costs are those that the monopolist incurs in segregating its markets and computing its customers' elasticities of demand. If price discrimination was to be prohibited, resources invested in administering the price discrimination scheme could be put to socially beneficial uses such as product innovation, plant expansion, or research and development. Second, it has been pointed out that the lure of monopoly profits induces competing sellers to seek monopolies. In this "monopoly contest", firms may invest resources up to their expected monopoly profits. The monopoly rents gained by the ultimate winner may be wholly offset by the socially wasteful expenditures of the competing firms[23].

The motive of international price discrimination (i.e. dumping) is unclear. Some economists suggest that one of the aims is to maintain domestic prices in the country of origin, by disposing of surplus stocks, or by exporting surplus production, while continuing to produce at full capacity[24]. The motive might also be to maximise short term profits by exporting at a price which is slightly higher than the marginal cost of the product though lower than its average cost[25]. Another motive, and one which is condemned by some economists and businesspeople, is what is called "predation", where the exporter sets its export prices at non-remunerative levels to drive rivals out of the market or deter new firms from entering, with the view to recouping its losses afterwards by raising prices[26]; or pursue the more modest objective of inducing these competitors to share the market on his terms[27].

The phenomenon of dumping has long been known, as stated earlier. However, it is not until the end of the nineteenth century that dumping became a real source of worry in

[22] *Ibid.*
[23] R. Posner, "The Social Costs of Monopoly and Regulation", *Journal of Political Economy* (1975) 83, p. 807.
[24] J. F. Beseler and A. N. Williams, *Antidumping and Anti-subsidy Law*, op.cit., p. 44.
[25] *Ibid.*
[26] G. Niels, "What is Antidumping Policy Really About?" *Journal of Economic Surveys*, 2000 (Vol. 14, No. 4), pp. 475-476.
[27] J. Viner, *Dumping*, op. cit., p. 23.

international trade. The growth of the phenomenon was made possible, according to Viner, with the rise of large scale production, using expensive plant and equipment, which enabled producers to establish monopoly positions on their domestic markets[28].

Special legislations dealing with dumping began to be adopted at the turn of the twentieth century[29].

The first anti-dumping law was born out in Canada in 1904 amidst concerns that US steelmakers were unfairly aggressive and were dumping rails into the Canadian market and that this was harming Canadian steel industry[30]. Canadian then Finance Minister, in presenting his proposed approach to the problem in June 1904, explained the situation as following:

> "We find today that the high tariff countries have adopted that method of trade which has now come to be known as slaughtering, or perhaps the word more frequently used is dumping; that is to say, that the trust or combine, having obtained command and control of its own market and finding that it will have a surplus of goods, sets out to obtain command of a neighbouring market, and for the purpose of obtaining a neighbouring market will put aside all reasonable considerations with regard to the cost or fair price of the goods; the only principle recognized is that the goods must be sold and the market obtained...
> This dumping then, is an evil and we propose to deal with it."[31]

The substance of the proposed regulation, which finally became the Article XIX of the Canadian Customs Act of 1904, reads as follows:

> "Whenever it appears to the satisfaction of the minister of customs, or any officer of customs authorised to collect customs duties, that the export price or the actual selling price to the importer in Canada of any imported dutiable article, of a class or kind made or produced in Canada, is less than the fair market value thereof, as determined according to the basis of value for duty provided in the Customs Act in respect of imported goods subject to an *ad valorem* duty,

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[28] *Ibid.*, p. 35.
[29] *Ibid.*
[30] J. Michael Finger, "The Origins and Evolution of Antidumping Regulation", Working Paper, the World Bank (WPS 783), October 1991, p. 3.
[31] Quoted in Finger, op. cit., p. 4.

> such article shall, in addition to the duty otherwise established, be subject to a special duty of customs equal to the difference between such fair market value and such selling price."[32]

The Canadians were followed soon by New Zealand (1905), Australia (1906), South Africa (1914), and the United States (1916), which enacted their own laws to deal the phenomenon. After that, a slack period was observed until 1921, when Great Britain passed its first anti-dumping law[33].

After World War I, an outburst of anti-dumping legislations took place, and a number of countries including Canada, New Zealand, Japan, Germany and Romania introduced laws which authorised an increase of duties by administrative acts when their domestic industry was threatened by abnormal or unreasonable foreign competition[34]. Although these enactments did not refer specifically to dumping, they were able to be used as antidumping instruments. In view of this trend, the League of Nations felt compelled to address itself to the issue. It did so by commissioning Jacob Viner to prepare a study on the subject[35].

It is against this backdrop that in 1947 the newly created General Agreement on Tariffs and Trade (the GATT) took up the subject and formulated the first international rules prescribing the conditions under which anti-dumping actions could be taken. These rules have been reaffirmed and further developed by the WTO.

The internationally accepted legal definition of dumping is that contained in the WTO agreements, which in turn was influenced by the definitions of the earlier national anti-dumping laws describe above. According Article VI of GATT 1994, a product is considered to be dumped if its export price is lower than its normal value. The Uruguay Round Agreement on implementation of Article VI of the GATT 1994 (known as the Anti-dumping Agreement) assumes on its part that a product is exported under its normal value when its export price is less than the comparable price for a like product when sold at home for domestic consumption in the

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[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*
[35] See J. Viner, *Memorandum on Dumping* (Geneva: League of Nations, 1926).

ordinary course of trade[36]. Thus, the legal definition of dumping is not restricted to international price discrimination as is that of economic theory discussed above.

It is important to note that dumping is not banned in itself within the framework of the WTO. WTO Members are under no obligation to prevent their firms from engaging in dumping. Article VI of GATT 1994 simply provides that "dumping (…) is to be condemned, *if it causes or threaten material injury to an established industry (...) or materially retards the establishment of a domestic industry*."[37] The remedy for dumping, however, lies entirely with the importing country, which has to initiate a formal investigation before deciding to apply anti-dumping measures.

Anti-dumping measures are by far the most trade remedy used today. From 1995 to June 2011, some 3922 such actions had been carried out by WTO Members, of which more than 2500 ended up in AD measures being imposed (WTO, 2011).

2.2. Countervailing measures

The phenomenon of subsidisation – as for dumping – has also long been known in international trade. As mentioned previously, as early as 1776, Adam Smith discussed the custom for states of granting bounties on exports, and Hamilton in his 1791 Report on Manufacturers drew the attention to the possibility that unofficial bounties were being given by combination of foreign producers and that they could harm US efforts in building its national industry. It is also worth noting that the first tentative countermeasures against international unfair trade practices were primarily directed at states subsidies, which, according to Beseler and Williams, had been a favourite instrument of trade policy since the days of mercantilism[38].

The first modern anti-subsidy law dates back to the US Tariff Act of 1897. The US Tariff Act of 1930 strengthened the law, authorising the Department of the Treasury to impose additional duties to offset any "bounty or grant" bestowed on imported merchandise[39].

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[36] See Anti-dumping Agreement, art. 2, para. 1.
[37] See Article VI:1 of GATT 1994 (emphasis added).
[38] See J. F. Beseler and A. N. Williams, op. cit., p. 3.
[39] A. O. Sykes, "Trade Remedy Laws", op. cit., p. 48.

There are typically three situations in which subsidies can distort international trade, but only in one can countervailing action be used directly to address any resulting "unfair advantage". First, if country A subsidises its exports to country B, causing domestic producers in country B to be disadvantaged, country B can respond by levying countervailing duties on country A's exports to neutralise the subsidy. However, if country A subsidises its domestic production, whereby disadvantaging the exports of country B in that country, the only action country B can take is to respond with equivalent subsidy, or complaint of nullification or impairment of trade concessions through the WTO dispute settlement body. Finally, if country A subsidises exports to country C, disadvantaging country B's exporters there, again, there is little that country B can do unilaterally other than to react with similar subsidies, or through complaint before the WTO.

In contrast to the generally hostile view of anti-dumping measures taken by most liberal economists, commentaries on countervailing laws are more mixed. Critics such as Sykes assert that subsidised imports, as any other cheap imports, are beneficial to the importing nation, as the consumers' gains will always overweigh the benefit of any countervailing duty on the national economy[40]. This view favours openness to subsidised imports, and suggests that the proper policy response for the importing country should be "sending a thank you note to the embassy"[41].

Advocates of anti-subsidy laws on the other hand offer two main explanations over the necessity of countervailing measures. First, subsidies are thought to distort comparative advantage, thereby leading to the inefficient allocation of global economic resources[42]. Second, subsidies are also seen as being unfair and unbalancing the "playing field" in favour of foreign producers[43]. Therefore, countervailing laws or actions are needed to discourage such wasteful practices and to "level the playing field".

The international rules governing the activity of countervailing actions are provided for by the WTO Agreement on Subsidies and Countervailing Measures (SCM). Countries seeking to take countervailing actions should carry out formal investigation and prove the existence of a

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[40] Ibid., p. 54.
[41] Paul Krugman, quoted in A. Sykes, p. 54.
[42] M. Trebilcock and R. Howse, *The Regulation of International Trade*, op. cit., p. 282.
[43] R. Hudec, "Mirror, Mirror on the Wall: The Concept of Fairness in United States Foreign Trade Policy", *Proceedings of the Canadian Council on International Law*, 1990, p. 88.

subsidy, as defined in the Agreement, an injury caused to their domestic producers, and finally a causal link between the subsidised imports and the injury to the domestic producers[44].

Countervailing measures are much less used by states as compared to anti-dumping. Between the years 1995 and June 2011, only 262 countervailing actions were reported to the WTO Committee on Subsidies and Countervailing Measures, compared to the near 4000 anti-dumping actions initiated during the same period. This might be due to the decreasing use of subsidies by states over recent years, at least export subsidies on merchandises. Countervailing actions are also sensitive, politically, as some states might consider them as intrusion in their domestic policies.

2.3. Safeguard measures

Trade concessions often result in increase in imports. A rapid increase in imports may, in turn, cause a significant strain on the competing industry in the importing country, leading to acute economic and social problems, as collapse in one industry may have spill-over effects on other industries and economic sectors of the country. Bearing this in mind, it has been for long a practice for states to include what is often referred to as "escapes clauses" in their trade agreements. Typically, such clauses allow the parties to temporarily suspend their commitments when they are faced with economic difficulties as a result of the concessions or unforeseen developments. The use of the term "escape clause" (or "safety valve") referring to a provision for safeguard measures seems justifiable since the provision allows the parties to "escape" (at least temporarily) from their commitments.

Safeguard clauses are somewhat more recent in international trade relations, compared to anti-dumping or countervailing laws. The first bilateral trade liberalisation agreements, which go back to the middle of the eighteenth century, did not have such clauses, so that in the absence of any possibility to suspend commitments in adverse situations (periods of crisis for instance), countries breached the agreement or simply terminated it[45].

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[44] Art. 11.2 of the Agreement on SCM.

[45] P. VAYSSIERE, *Les systèmes de sauvegarde du GATT-OMC et les Communautés européennes (CE ; CECA)*, Thèse, Université Paris XII, 2000, p. 6.

The modern era of safeguard regimes stems from the beginning of the United States Reciprocal Trade Agreements Programme of the Trade Act of 1934, which launched the programme of US trade liberalisation[46].

The safeguard clause, as in the form known today, was first introduced in the US-Mexico Reciprocal Trade Agreement of 1942. Indeed, in this agreement, both parties agreed that "if, as a result of unforeseen development and of the concession granted on any article enumerated and described in the schedules annexed to [this] Agreement, such article is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar articles, the Government of either country shall be free to withdraw the concession (...)"[47].

This clause was replicated in number of subsequent international trade agreements, including the GATT in 1947.

Safeguard actions have also been debated, particularly from the economic standpoint. Some scholars argue that their effects tend to be negative. Sykes contends that safeguard measures afford protection to industries that have difficulties meeting foreign competition, thus delaying the contraction of these industries, and impeding the transfer of resources from declining industries to others where comparative advantage may lie[48]. Similarly, Trebilcock and Howse insist on the high cost of trade protection that safeguards would constitute, and prefer alternative measures such as industrial subsidies or labour market adjustment policy to restructure those industries incapable of meeting foreign competition[49].

However, other scholars and practitioners are more positive, suggesting that safeguards can be beneficial to the domestic industry.

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[46] J. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge: MIT Press, 1991), p. 153.
[47] See US-Mexico Agreement on Reciprocal Trade, December 23, 1942, Article XI, 57 Stat. 833, 845-866; quoted in Lee Yong-Shik, *Safeguard Measures in World Trade: The Legal Analysis* (The Hague, London: Kluwer Law International, 2003), p. 5.
[48] A. Sykes, "Trade Remedy Laws", op. cit., p. 17.
[49] M. Trebilcock and R. Howse, *The Regulation of International Trade*, op. cit., pp. 315-320.

Hufbauer and Rosen have studied the effectiveness of various programmes for facilitating adjustment of US industries being impacted by import competition. Their study focused on three trade policies: special trade protection, such as exceptional restraints on imports that go well beyond normal border or tariff restrictions; trade-related adjustment assistance to labour in affected industries; and escape clause relief, i.e. safeguard measures.[50] They found that among the various policies, safeguards were the most effective at inducing adjustment. Of the sixteen industries examined, ten received tariff increases, two obtained orderly marketing arrangements that limited imports from principal supplier, and the other four secured quota protection. The adjustment of these firms was relatively successful since twelve no longer needed protection, one even adjusted by expanding, and the remaining contracted to a competitive core activity[51].

Moreover, safeguard clauses are viewed as being a support for trade liberalisation. Kenneth Dam observed that "the GATT escape clause is a useful safety valve for protectionist pressures"[52]. In his view, the safeguard clause, in addition to being prerequisite for essential US participation in the GATT, encouraged trade liberalisation more generally. Further, according to him, the GATT escape clause "encourages cautious countries to enter into a greater number of tariff bindings than would otherwise be the case"[53]. It is indeed well-known that deeper and broader trade liberalisation will be undertaken by governments when they know that they can suspend the obligations subscribed when unforeseen developments occur, having – or threatening – serious damages on their economy. Without any possibility to "escape" under such circumstances, fewer governments would be willing to sign trade liberalisation agreements.

Contrary to anti-dumping and countervailing measures, safeguards do not address any unfair trade practice.

A range of international disciplines provided for in the WTO Agreement on Safeguards governs the application of safeguard measures. Among others, safeguards should be applied on a

[50] See G. C. Hufbauer and H. F. Rosen, *Trade Policy for Troubled Industries* (Washington, D.C: Institute for International Economics, 1986).
[51] *Ibid.*, p. 46.
[52] K. Dam, *The GATT: Law and International Economic Organisation* (Chicago: University of Chicago Press, 1970), p. 106.
[53] *Ibid.*, p. 99. See also J. Kucik, and E. Reinhardt, "Does Flexibility Promote Cooperation? An Application to the Global Trade Regime", *International Organization*, Summer 2008, pp. 477-505.

non-discriminatory basis, i.e. irrespective of the source of the product[54], and compensation (typically in trade concessions in other sectors) should be given to the affected countries. Furthermore, safeguards are time-limited (eight years, including any extension) with "holiday" provisions (at least two years) preventing an immediate re-imposition.

Moreover, the WTO Agreement on Agriculture contains a special safeguard mechanism (SSG) designed for agricultural products. This mechanism is based on volume and price triggers, and does not require proof of injury to the local producers as it is for the general regime. However, countries must have reserved their right to use it by designating the specific products concerned[55].

Safeguards are the least-used remedy within the WTO. Between 1995 and 2010, only 216 safeguard investigations were reported to the WTO Committee on Safeguards, of which only 101 ended up in applied safeguard measures (WTO 2010). This is probably due to their stringent legal regime and the obligation to provide compensation, which makes them less attractive. In addition, the obligation to apply them indiscriminately makes safeguards particularly difficult to manage.

After this general overview of trade remedies, we turn in the next section to the experiences of African countries with these measures, both as users and targets.

3. African countries and trade remedy actions

This section reviews the use of trade remedies by African countries. It also explores, conversely, the use of these measures against African exports. The data is mainly drawn from the WTO and covers the period 1995-June 2011[56]. As a consequence, we do not take into account non-WTO African countries (except when they are targets)[57].

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[54] Nonetheless, the Agreement on Safeguards (article 9) provides for a *de minimis* clause for developing countries, which means that their products are excluded from safeguard measures, as long as their individual share of the export of the product concerned does not exceed 3 per cent of the total import for the product in the imposing country. However, this exception is limited in that when these developing countries' collective share exceeds 9 per cent of the imported product, they all become subject to safeguards.

[55] See Article 5 of the Agreement on Agriculture.

[56] Regarding safeguard measures however, the period covered is 1995-2010, due to data availability.

[57] 41 African countries are currently Members of the WTO. The major outsiders include Algeria, Ethiopia, Libya, and Sudan.

3.1. African countries as users of trade remedies

Anti-dumping (AD) is the most preferred trade remedy instrument by states, and Africa is no exception to that. Between 1995 and June 2011, African countries reported some 283 AD investigations to the WTO, of which 181 ended up in applied AD measures (see Tables 1 and 2). This represents 7.21% of global AD investigations and 7.11% of global AD measures respectively.

Weighted on Africa's global trade share (around 3%), one might think that these shares are high. However, we need to bear in mind that trade remedies are used more frequently by countries when they are at their initial stages of development (see the rhetoric in USA after independence and Canada in 1904 mentioned above). This is moreover borne out by the data. Prior to the 1980s, developed countries where the primary users of AD measures, but since the 1990s these countries have been overtaken by developing countries. Today, developing countries represent collectively more than 60% of global anti-dumping investigations, and at the same are the primary targets, targeted by more than 50% of the actions launched since 1995. India and Brazil are now the biggest users of anti-dumping in the world while China has become the biggest target[58].

In Africa, South Africa and Egypt have been the major and traditional players in AD actions. More recently, new countries are joining. Morocco launched its first AD investigation in 2011, while countries including Mauritius, Kenya, and Ghana are in the process of drafting their first anti-dumping legislation and/or setting up investigating authorities.

South Africa, the most advanced and diversified economy on the continent, accounted for the vast majority of AD actions reported by African countries under the period of review (1995-2011). It accounted for 75% of AD initiations under the period and more than 70% of the applied measures. Egypt accounted for almost 25% of the investigations and 30% of the applied measures. However, in terms of implementation rate, Egypt shares the highest rate, as 53 out of it 69 investigations ended up in actual AD measures, which represents 76% implementation rate, compared to 60% for South Africa (128 out of 213).

[58] See WTO, Document WT/COMTD/W/143/Rev.5, 28 October 2010, p. 26.

The biggest target of South Africa's AD investigations has been the EU (22.53%), followed by China (15.49%), India (9.85%), and South Korea (7.04%). Egypt has mostly targeted its investigations at the EU (26.08%), China (20.28%), India (10.14%), and Indonesia (7.24%). The only AD investigation of Morocco carried out so far has targeted imports from China.

As we may notice, China is the single biggest target of African countries' AD actions. This does not deviate from worldwide figures however, as China has become, according to WTO statistics, the world single biggest target of AD actions (WTO 2010). This may be due to the confusion (intentionally held sometimes for protectionist purposes) that exists between cheap imports (that China is the champion) and dumped imports. Moreover, China has for long time been classified by many countries as non-market economy, which makes dumping easier to find in its case.

African AD actions covered a variety of products but mainly industrial products. South Africa for example has focused its investigations and duties on base metals (27%), plastic and rubber products (17%), and chemicals (14%). Egypt, on the other hand, has focused its actions on plastic and rubber articles (29%), machinery (22%), and base metals (19%). Morocco has targeted its one AD investigation at wood products from China.

Turning to countervailing actions, the second trade remedy, scrutiny of the data shows that, like other countries, African countries use this remedy less frequently than AD actions. Once again, South Africa has been the most active in countervailing actions on the continent, like in AD actions. During 1995-2011, it was responsible for 13 out of the total 17 investigations reported by African countries, and uniquely responsible for the 5 measures applied in that period. Egypt has initiated 4 countervailing investigations, which all ended up with no duty being imposed.

The main targets of African countervailing actions have been India and the EU. Nine of the thirteen South African investigations and four of its five measures have been indeed directed at India, while Egypt has targeted all its four investigations at EU countries. As regard to products, 100% of Egyptian actions have targeted foodstuffs and beverages while South Africa has focused on base metals (39%) and machinery (23%).

With regards to safeguard actions, the third type of trade remedy, the data reveals that this measure has been used less frequently, although, interestingly, they involved more countries than in the cases of anti-dumping and countervailing actions (see Table 9 below). Out of the twelve safeguard actions launched in Africa from 1995 to 2010, seven ended up with safeguard measures being imposed. Morocco has been responsible for five actions, followed by Egypt (four), Tunisia (two) and South Africa (one). All Egyptian investigations ended up with safeguard measures, while only two of Morocco's five investigations had called for actual safeguards. The two investigations by Tunisia ended up without any measure, and South Africa implemented one safeguard measure as the result of the only investigation it carried out during the period covered.

The limited number of safeguard actions is not specific to Africa. As noted above, contrary to AD and countervailing measures, safeguards do not address any unfair trade practice and should be applied to all sources of importation, regardless of who may be the actual responsible for the woes of the domestic industry. This limits the attractiveness of this tool, as it may complicate the country's foreign trade relations.

As a consequence of the non-discriminatory nature of safeguard actions, there is no specific target country when initiating them. Nonetheless, it is usually the biggest exporters of the product being investigated that will actually suffer the pain the most.

African safeguard actions have targeted a diverse range of products. Morocco has focused its actions on plastic and rubber products (2 out of 5). The remainder were targeted at vegetables, textiles, and ceramics. Egypt on the other side has targeted animal products, chemicals, textiles, and machinery (one action each). Tunisia investigated on ceramic products and machinery (one action each), and South Africa focused on chemical products.

3.2. Trade remedy actions against African countries

African exports have suffered from a limited number of trade remedy actions from other countries, including African countries. Not surprisingly again, South Africa, the most industrialised country on the continent, has been the main target. It bore 59 of the 82 AD investigations initiated against African countries during 1995-2011, and 39 of the 50 AD duties imposed. This represents 71% and 78% of all anti-dumping actions launched against African countries during that period. South Africa is followed by Egypt which was targeted by 12 AD investigations and 5 AD final duties. Algeria, Kenya, Libya and Zimbabwe saw each of their exports investigated twice during the same period while Malawi, Mozambique, and Nigeria have been targeted once (see Tables 3 and 4).

The anti-dumping actions against African countries have originated from a variety of countries, and have targeted various products. The US has been the leading source, with 21% of the investigations and 18% of the duties applied. The main target of US actions has been South Africa, which bore 94% the investigations (16 out of 17), and the entire measures applied. The EU is the second biggest source of AD actions against Africa. Indeed, it issued 17% of the AD investigations against Africa from 1995 to 2010 and shares 16% of the final measures against the continent. India, Argentina and South Africa come as the third, fourth and fifth biggest users of AD actions against African exporters, with respectively 12, 10 and 7 investigations, and 8, 6 and 5 measures applied during the period under review (see Tables 3 and 4).

Base metals were the most frequently targeted products of AD actions against African countries (61% of the investigations and 68% of the measures applied). Chemicals make up the second with 21% of the investigations and 22% of the duties imposed. The remainder is shared between textiles (5%), wood products and paper (4%), articles of stone (4%), machinery and foodstuffs (2% each), and plastics and rubber products (1%).

A limited number of countervailing actions (seven) were also launched against African exports, South Africa being the principal target as one might expect. Australia and the EU initiated one investigation each against South Africa, and New Zealand and the US two investigations each (see Table 7). Two thirds of these investigations have targeted base metals and the remaining third at prepared foodstuffs.

The second country to have experienced countervailing action in Africa during the period under review is Côte d'Ivoire, which was targeted once by Brazil on vegetable products.

As we may see, trade remedy activity in Africa is the fact of a very limited number of countries, which use to be some of the most advanced economies of the continent. This gives a hint to the factors that may explain the lower use of trade remedies on this continent. It appears that the more the country is developed and has a certain level of industrialisation the more it is likely to have the capacity and the willingness to use trade remedies. This hypothesis is explored in greater depth in the next section.

4. The main possible explanatory factors of Africa's limited participation in trade remedy actions

The analysis above has explained that trade remedies can be important tools for preserving domestic industries and stimulating economic development, yet it has also shown that African countries make little use of them. How might we explain this apparent paradox?

This section probes the underlying reasons of the limited use of trade remedies by African countries. It draws among others upon extensive interviews with African trade officials and experts conducted between June 2011 and February 2012 in Geneva and South Africa in particular. The findings include the absence of national legal and institutional frameworks, the lack of expertise and high cost, the availability of alternative instruments, the disorganisation of the business community, and political factors.

4.1. Inexistence of national legal and institutional frameworks

National legal and institutional frameworks are the basic requirements for trade remedy actions (or regional, in the case of Regional Economic Community having competence on trade remedies for its members). For domestic producers to be able to file for protection there must be a national regulation prescribing the conditions and the process, and an authority that can handle the case. The great majority of African countries do not have such frameworks. Only five African countries have comprehensive national legislations covering anti-dumping, countervailing and safeguard measures (see Table 11). As regard to institutional bodies in charge of managing the cases, only two countries – South Africa and Egypt – have fully fledged institutions. Morocco and Tunisia, the two other African countries active in trade remedies, use their trade ministries as substitute bodies.

4.2. High cost and lack of expertise

Putting in place national trade remedy legal frameworks and institutions can prove very costly and take time. For instance, it has taken six years and more than 10 million USD for Egypt to build up its trade remedy framework[59]. Mauritius on its part has taken more than ten years to have in place its regulatory framework for anti-dumping and countervailing measures, and technical assistance was sought from the WTO[60]. As the cost of setting up fully fledged permanent investigating authority was prohibitively high, the government decided to simply establish an ad hoc team of investigators only called in when a case is filed[61].

Trade remedy investigations require moreover a high level of expertise consisting of a good team of well-trained specialised lawyers and economists, among others. Having this team in place is fundamental once the regulatory framework is laid out. However, training these people may prove again very expensive and keeping them is another challenge, particularly in the context of the low salaries most governments can afford in Africa. Indeed, and this has already been experienced through training programmes such as WTO technical assistance for poor countries: many of the government officials who receive the training leave soon after they return home, either to join the private sector or international institutions[62].

Another hurdle faced by African countries is the lack of experience and high costs associated with the conduction of the investigations. Trade remedy proceedings involve hearings, field investigations, and sometimes sending teams abroad, which can prove very expensive in the end. As a matter of example, an anti-dumping action in South Africa cost on average 25000 USD to the country's taxpayers[63].

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[59] Interview with Dr. Magdi Farahat, former head of Egyptian Trade Remedy Authority and Principal Advisor on Trade at Geneva Inter-Regional Advisory Services, United Nations Economic Commission for Africa (Geneva, June 2011).
[60] Interview with Mr. Assad Bhuglah, Trade Expert at Mauritian Trade Ministry (October 2011).
[61] Ibid.
[62] Discussion with WTO officials (Geneva, June 2011).
[63] Interview with Mrs Carina Janse van Vuuren, Senior Manager, Trade Remedies Unit, International Trade Administration Commission of South Africa (Pretoria, January 2012).

4.3. The availability of substitute instruments

One major reason of the lower use of trade remedies in Africa might be the availability of substitute instruments, even though the legality of some of these instruments used might be questionable vis-à-vis WTO law. These substitute instruments include, *inter alia*, tariff increases within WTO-bound limits, import prohibitions, and voluntary export restraint (VERs) arrangements.

As regard to tariff increases, it is noticeable that applied tariffs have been reduced dramatically across the world since the inception of the GATT in 1947. However, "binding overhangs" (i.e. the difference between the WTO-bound tariffs and the actually applied duties) remain high in developing countries. A close examination of tariff bindings in a large number of these countries shows that 70 to 90 per cent of their tariffs could be raised by 15 percentage points without violating WTO rules[64]. In Africa in particular, between 75 and 80 per cent of the majority of countries' tariff lines are unbound, which means that most of their tariffs could be raised, at any time, by up to any conceivable rate without any violation of WTO rules (WTO 2009)[65].

Low levels of tariff bindings have provided African countries with a high level of discretionary use of tariffs, and as a result, tariff hikes are very often used in many African countries as an alternative to trade remedy actions. This link has even been made publicly within the WTO by many developing countries, including African countries, who maintain that given the fact of their lack of institutional and technical capacity to use trade remedies, they need to preserve high bound tariffs as a substitute instrument[66].

The second substitute instrument used by many African countries to defend local industries is imports prohibition. Even though this practice has been banned within the WTO, some African countries continue nevertheless to resort to it with varied frequencies. Nigeria is one of the leading countries in this regard, and despite numerous recriminations and

[64] See WTO, *World Trade Report 2009*, p. xix.
[65] However, if the Doha Round were to be concluded in the present terms, the number of bound tariffs in Africa would increase significantly and the binding overhangs reduced sharply (Interview with WTO officials, Geneva, June 2011).
[66] See WTO official document, WT/COMTD/W/143/Rev.5, 28 October 2010, p. 9.

condemnations from the WTO and other multilateral organisations (IMF, World Bank), the country has maintained steadfastly its policy[67].

Finally, voluntary export restraints (VERs), which are also banned within the framework of the WTO, are parts nevertheless of some African countries' trade defence strategy. In 2006, for instance, South African government struck a deal with China to restrict the latter's textile exports to South Africa in order to relieve its beleaguered textile industry[68].

4.4. Weakness, lack of awareness and poor organisation of local producers

The lack of capacity in most African countries is not only confined to the state. The private sector, which is essentially made up of individual and small companies, is also plagued by many technical and organisational constraints, which prevent it in particular from taking full advantage of international trade agreements signed by the government. It is even now recognised within the WTO that as long as the supply-side and technical constraints of African business communities are not well addressed, these countries will hardly derive any benefit from the multilateral trading system as a whole.

As regard to trade remedies, in some countries, the local producers have barely any knowledge of the mere possibility of filing a case, even where the laws exist. This is the case for instance in the West African Economic and Monetary Union (WAEMU) countries[69], where an anti-dumping regulation has existed since 2003[70] but only one case has been brought so far[71]. The legislation has been adopted without any programme to sensitise the business community, and even some WEAMU countries' trade officials are not aware of the mere existence of the law. Indeed, when asked by the WTO Secretariat to submit their national legislations on trade remedies in 2010, all these countries – except Senegal – surprisingly declared "no law", while at

[67] See A. Oyejide, A. Ogunko. and A. Bankole, "Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *Managing the Challenges of WTO Participation: Case Study 32*, 2005.
[68] See http://www.fibre2fashion.com/news/textile-news/newsdetails.aspx?news_id=19068&page=1.
[69] Members of WAEMU include Benin, Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo.
[70] See Regulation No. 9/2003/CM/UEMOA of 23 May 2003 (www.uemoa.int).
[71] The case brought before the WAEMU Commission goes back to 2010 and involved mustard imports from France; the complainant was a Senegalese firm. The case never reached however formal investigation phase as it was resolved through informal means (Interview with Mr. Amadou Dieng, head of Competition Unit at WAEMU Commission, Ouagadougou, December 2010).

the same time WAEMU 2003 AD regulation is meant to serve as the Union members' anti-dumping legislation![72]

If trade officials in the countries are not aware of the mere existence of the law, let alone having a good knowledge of it, one would wonder about even weaker and disorganised business community. It is not surprising therefore that only one case has been brought so far in spite of the existence of the law and many instances where dumping issues could have been be raised (textile sector for example). To avoid similar situations, Mauritius has incorporated a capacity building programme of the private sector in its trade remedy framework setting up agenda, an example that many other countries in Africa should emulate.

4.5. Political economy factors

Finally, political economy factors play in the restraint by African countries to use trade remedies. As it is well-known, many African countries are aid-dependent countries and this may influence their decision to resort to trade remedy actions against their trading partners, particularly if they are their main aid donors or source of investment.

The Egyptian case alone is telling in that regard. Indeed, although this country has been a prolific user of trade remedies for the last decade against a varied number of countries including developed and developing countries, it has never initiated a single investigation against the United States. Part of the reason is that Egypt has been for more than three decades now the second biggest US foreign aid recipient with an average of more than 1.5 billion USD per year from 2001 to 2011 in particular[73]. It is therefore hard to expect such a country to do anything – such as issuing investigations against US firms for alleged dumping or subsidies bestowed on them by the US government – that might affect its relations with the US and put this assistance at risk.

Many Sub-Saharan African states are in the same position vis-à-vis Western countries, their former colonial powers in particular.

[72] See Committee on Anti-dumping Practices, WTO, 2010 (http://www.wto.org/english/tratop_e/adp_e/adp_e.htm).
[73] See Financial Times (http://ftalphaville.ft.com/blog/2011/01/28/473431/us-foreign-aid-to-egypt/).

Moreover, China is of increasing concern as it has become over the past several years a major aid provider and source of investment for many African countries, yet there are signs that its cheap exports are leading to further de-industrialisation of the continent (or impeding any genuine industrialisation process to take place)[74].

This is an acute dilemma that African countries need to find appropriate ways to solve.

After the examination of the main factors that might explain the lower use of trade remedies by African countries, it is useful now to turn to the contentious question of whether or not these countries should engage further in these actions before seeing the eventual challenges choosing so may involve.

5. Should African countries engage further in trade remedy activity?

The question of whether or not African countries should embrace trade remedy activity to a greater extent is a much-debated one. Some contend that Africa is plagued by so many problems and priorities, and that instead of using the scarce resources of the continent to build up trade remedy systems, these countries should rather invest in much more needed sectors such as infrastructure, education, healthcare, etc.

No doubt, there is much truth in this argument. Indeed, how rational would it be to spend huge amount of money to set up even more expensive trade remedy authorities which may end up handling one or two cases per year while urgent investments are needed elsewhere?

Notwithstanding, we think that what often lacks in Africa are strategic and comprehensive development plans, taking due account of everything so of little importance they may seem at first glance. The lack of such strategic and comprehensive plans often leads countries to vicious circles, where their efforts somewhere are being impaired by their negligence elsewhere.

As underscored earlier, development story in this world has always been a story of industrialisation (Reinert 2007), and one may wonder if a genuine industrialisation process can

[74] R. Sandrey and H. Edinger, "China's Manufacturing and Industrialization in Africa", African Development Bank (AfDB), Working Paper No. 128, May 2011.

take place in today's world, with all protections being cut off as a result of WTO and free trade agreements, among others. As noted by two prominent economists, "the more productive debate is not whether Africa has static comparative advantages in industrialisation but *how* to achieve dynamic comparative and competitive advantages especially under the new rules of the game"[75].

Most countries that are currently industrialised used protectionist policies when they were at their early stages of development (Chang 2002). The British industrialisation between 1770 and 1830, the North Atlantic revolution between 1873 and 1914, the South-East Asia miracle between 1950 and 1995 all occurred when tariffs trend was high (Chang 2002). Africa would thus be the only region in history that would have to industrialise without these policies.

As blatant protectionism is no longer permissible or desirable, mastering "smart protection" instruments such as trade remedies is therefore vital for developing world, African countries in particular.

The argument that African countries should grasp trade remedy instruments is further backed by the fact that the traditional protection tools they used to implement are less and less available. Indeed, as noted earlier, if the WTO Doha round were to be concluded in the present terms, the number of the continent's bound tariffs would increase dramatically and it will see its binding overhangs lowered sharply. Moreover, various free trade agreements agendas such as the African-European Economic Partnership Agreements (EPAs) are underway and would cut off the majority of the tariffs and other protection measures across the continent.

In this context, African countries have no choice but to equip themselves with the remaining legal protection instruments available, including trade remedies.

Moreover, there are some reasons to support the building up of trade remedy mechanisms in developing countries, including Africa, even from the most liberal perspective. First, there is evidence that trade remedies, as a tool of flexibility, promote cooperation, and make countries more willing to engage in international trade liberalisation. Indeed, empirical studies have shown that states that possess national trade remedy mechanisms (especially anti-dumping) are more

[75] D. Njinkeu and C. C. Soludo, "Industrialising Africa using WTO Framework", *Preparing for the WTO 2000 Negotiations*, The World Bank Research and Capacity-Building Project, Chap. 5.

likely to (1) join the WTO, (2) agree to more tightly binding tariff commitments, and (3) implement lower tariffs[76]. Helping African countries to equip themselves with trade remedy frameworks would therefore not lead to an increase in protectionism in these countries as some might think. Second, trade remedies are more desirable than other protection measures such as tariff hikes, quotas, import prohibitions, or voluntary export restraint agreements, still in use in many developing countries, including African countries, as substitute instruments (see section 4.3 above). A genuine trade remedy system is more transparent as it follows due process, with all stakeholders allowed to have their say during the investigation. Moreover, by trusting the investigation with professionals, the process brings impartiality and justice to the system. Thus, the decision to grant protection is solely based on the merits of the case, which at the same time keeps politics and special interests away (or at least limits their influence). On the other hand, tariff increases, quotas and import prohibitions are usually discretionary, administered directly by the government, which leaves room for politics, favouritism and rent-seeking behaviours.

To conclude, the academic debate over the usefulness of trade remedies in general and for African countries in particular may continue but in the meantime many African countries have made their choice to set up trade remedy mechanisms. In effect, a kind of trade remedy wind is sweeping across Africa since the last several years and many countries are either operationalizing or drafting their first trade remedy laws. Table 13 sows the countries either in the process of complementing their existing legal apparatus or adopting their first ever trade remedy legislations. Ghana, Mauritius and Kenya are the most advanced in this process, and these countries could be conducting their first investigations in the coming months. However, many challenges lie ahead for these countries to become “good” (in the sense of meeting WTO standards and legal requirements) and effective users of trade remedies, as the next section will explain.

6. Challenges facing African countries in the way toward trade remedies use

The constraints that prospect users of trade remedies in Africa would have to face can be divided into two categories: internal and external.

[76] See J. Kucik, and E. Reinhardt, “Does Flexibility Promote Cooperation? An Application to the Global Trade Regime”, *International Organization*, Summer 2008, pp. 477-505.

6.1. The internal challenges

The internal challenges revolve around the institutional and technical capacity constraints stressed before, both from the government and private sector sides. As noted earlier indeed, trade remedies activity requires highly specialised economic and legal expertise, which availability in many African countries is not obvious. Moreover, the training and maintenance of this expertise is costly as shown, and some countries will have to face difficult choices as whether to devote their scarce resources to such programme or to invest in much urgent-needed sectors like education and healthcare. Resources also need to be allocated to sensitise and train the private sector to these new legislations and their workings if there were to be effective. Ultimately, it is on the private sector that rests the entire trade remedy system as it is the principal responsible for the case initiations through its petitions. Government authorities are usually entitled to initiate cases on their own but the experience has shown that this option is little used by states.

The second internal challenge that most African countries face is related to the implementation and administration of trade remedy measures. As well-known, most African countries have porous borders, which are in many cases fraught with corrupt customs officers. Making sure that a given trade remedy measure is being enforced under these conditions is a daunting challenge. Even in normal times, customs rules are daily circumvented or violated, and one may wonder what can happen if the customs service has to manage in addition trade remedy measures. The Nigerian case is worth recalling here. Indeed, the long-standing import prohibition policy maintained by this country to defend its local industry is said to have been rendered virtually impotent, mainly because of large-scale smuggling and corruption[77].

6.2. The external challenges

The external challenges stem mainly from the WTO, especially the necessity to meet its standards and legal requirements. WTO laws on trade remedies are very complex and demanding to master, and many African countries do not have the economic and legal expertise, and the resources, to fully meet these requirements when they would have to carry out investigations. Moreover, trade remedies are among the most challenged measures before the WTO Dispute

[77] A. Oyejide, A. Ogunko. and A. Bankole, "Import Prohibition as a Trade Policy Instrument: The Nigerian Experience", *Managing the Challenges of WTO Participation: Case Study 32*, 2005.

Settlement Body and many African countries would have to hire international lawyers to defend their cases if they were challenged, adding to the cost of these actions.

Another pressing external challenge is related to regional integration. Most African countries are part of regional economic communities with the aim very often of establishing customs unions or common markets. In this regard, adopting individual trade remedy schemes, as seems to be the case in many parts of Africa so far[78], could be harmful to these customs unions or common markets. In effect, some of the key features of a customs union or common market are free movement of goods between the members and common external tariffs (CET) toward third countries. As a consequence, any border trade measure, such as anti-dumping or countervailing duties, has to be adopted and implemented by all the members at the same time. Otherwise, goods could easily escape the additional duty of the adopting member by transiting through the borders of the others and inundate the entire market, thereby rendering impotent the remedying measure. To avoid that, the adopting member has to erect border controls to collect the relevant duties, a move that would equal technically and practically a suspension of the customs union. Adopting individual trade remedy laws – as is unfortunately the trend on the continent today – is therefore not a good sign for regional integration agendas in Africa.

7. What lessons from South Africa and Egypt?

Before turning to the conclusion of this paper, it is perhaps useful to try to extract some lessons from the experiences of the two major players in trade remedies in Africa, i.e. South Africa and Egypt. Doing so may help enlighten the in-coming and prospect users of these measures on the continent.

South Africa is among the first countries in the world to use trade remedies. Indeed, the country's first anti-dumping law goes back to 1914, and from 1921 to 2001, it is said to have carried out more than 900 anti-dumping actions[79]. The use of trade remedies was however

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[78] Kenya, which is part of the East African Community (a common market between Burundi, Kenya, Rwanda, Tanzania and Uganda), is on the process of adopting its own trade remedy laws, while Ghana, member of the Economic Community of West African States (ECOWAS), has already adopted its own. It is also the case of Mauritius, member of the Common Market of Eastern and Southern Africa (COMESA), which regroups 19 countries of Eastern and Southern Africa.

[79] N. Joubert, "The Reform of South Africa's Anti-Dumping Regime", Managing The Challenges of WTO Participation: Case Study 38.

suspended from 1978 to the beginning of the 1990s following a high tariff policy pursued by the successive governments of that period.

An upsurge in trade remedy actions was seen during the second half of the 1990s, following South Africa's entry to the WTO and the subsequent decline of tariffs. Since 2007, the country's trade remedies activity has been in the decline again (see Figure 6), though it still remains the principal user of such measures on the continent. The recent decline observed from 2007 onward is due, according to some analysts, to the depreciation of the local currency (the Rand), which has given natural protection to the domestic industries, and a Supreme Court ruling in 2007 that tightened in some way the regime of anti-dumping – the most used remedy in the country[80]. Moreover, China, one of the main targets of South African anti-dumping actions, was recently granted the status of market economy by the South African authorities, which reduced the chances of finding dumping from it exporters and subsequently restrained the case filings against it[81].

South African trade remedies mechanism works through a quasi-judicial process, involving government agencies, private sector and the judiciary. The agency responsible for the conduction of the investigations is the International Trade Administration Commission (ITAC) of South Africa which, since 2002, has also had jurisdiction on the other South African Customs Union (SACU) countries (Botswana, Lesotho, Namibia and Swaziland). Indeed, ITAC has been charged by SACU members to act as regional trade remedy investigating authority for the long-standing customs union while awaiting a regional body to be set up[82]. Once ITAC receives a petition from a given domestic industry of a SACU member, its Trade Remedies Unit conducts the investigation and then turns its report to the South African Ministry of Trade and Industry for final decision. Once the report is approved by the trade minister, the decision is transmitted to the Finance Ministry, responsible tariff collection, for implementation (ITAC, 2011). Unhappy parties which find that ITAC has not followed due process during its investigations can lodge an appeal with the judiciary.

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[80] L. Edwards, "South Africa: From Proliferation to Moderation", in C. Bown (ed), *The Great Recession and Import Protection: The Role of Temporary Trade Barriers* (Washington: The World Bank), 2011, p. 443.
[81] Interview with South African trade remedy officials, Pretoria, January 2012.
[82] Interview with South African trade remedy officials, Pretoria, January 2012.

As a consequence of ITAC's new regional role, trade remedies enacted since 2002 in South Africa are equally implemented in all other SACU member states (Botswana, Lesotho, Namibia and Swaziland). This is in line with the customs union principles we alluded to above.

Egypt's experience is more recent as compared to South Africa. However, the country has proven to be somewhat active so far in it trade remedies activity.

Egypt enacted it first trade remedy law in 1998 following its entry to the WTO three years earlier (1995). The then authorities saw in the law a necessary complement to their commitment to trade liberalisation and a way of promoting the country's industrial development under the new WTO rules (Egyptian Ministry of Trade and Industry, 1998). The Central Department of International Trade Policies (CD/ITP) was therefore set up and received the mandate of implementing the law. Since its inception, the CD/ITP has handled more than 77 trade remedy cases.

South African and Egyptian experiences show that maintaining a permanent trade remedy investigating authority can be very costly. South Africa's trade remedy authority employs more than 20 permanent staff with an annual operational budget of 640 000 USD[83]. As regard to Egypt, the CD/ITP employs more than 200 people, which implies even higher functioning costs.

For many small African countries, such costs are prohibitive and so alternative ways need to be devised, if those countries are to have the capacity to use trade remedies to defend their local producers. In that regard, Mauritius' perspective of an ad hoc investigating team needs to be shared among African countries. The cost of such an approach could be made even cheaper by drawing on retired or independent trade experts to serve as investigators. Morocco and Tunisia's experiences could also serve as an alternative way. These countries have trusted trade ministries with the responsibility of managing trade remedies, thereby reducing the cost associated with the establishment of an independent body. The third way of making trade remedies accessible to small African countries could consist of the building up regional trade remedy investigating authorities, through in particular the commissions of the various regional economic communities on the continent. This would have the advantage of sharing the cost

[83] Interview with South African trade remedy officials.

among the member countries, and making the expertise more available by pooling the skills. Furthermore, it would be in line with the regional economic integration agendas on the continent. Finally, financial contribution could be asked from the companies filing for protection, which may help mitigate the cost to the government.

The actual impact of trade remedies in the using African countries is debated. This not an exception however, as trade remedies have always been a controversial instrument from the economic rationale in particular. The only impact study conducted in South Africa so far at the request of the authorities has remained confidential, and some suspect poor evidence of great impact, if not overall negative impact on the national economy, something that may be embarrassing the government for publishing it[84]. However, concluding that trade remedies in South Africa have been ineffective would be too hasty. Firstly, the outcome of an impact study depends on the methodology and models used, and the results may vary from one expert to another. Secondly, the facts speak for themselves, at least according to South African trade remedies officials. Indeed, it has been pointed out the many industries from steel to textiles that have been helped to adjust and survive through this policy, and the thousands of jobs that have been saved accordingly[85]. Whether this assessment is accurate is difficult to ascertain. One thing seems to be certain however. If trade remedies have not served the interests of South Africa in anyway, the system could have hardly remained in place for almost a century. This would be against any common sense.

No impact study as regard to Egyptian practice exists so far to our knowledge; however, the commentaries made by the officials join largely those of the South African's. According to Magdi Farahat, former head of Egyptian trade remedies authority, many Egyptian domestic industries could have not survived Egypt's entry to the WTO in particular, had a trade remedy mechanism not been put in place to assist them[86].

[84] Interview with Professor Colin McCathy, Trade Law Center for Southern Africa (TRALAC), Stellenbosch, South Africa, January 2012.
[85] Interview with South African trade remedy officials.
[86] Interview in Geneva, June 2011.

8. Conclusion

Although there might not be any particular urgency for trade remedy mechanisms in Africa today, the need to start thinking of – if not building – ones is more than desirable. Indeed, as we have shown, tariffs are being reduced – and even suppressed through free trade agreements such as EPAs –, and traditional trade defence tools such as import prohibitions, quotas, and tariff hikes are less and less permissible. In this context, the survival of African domestic industries under the pressures of liberalisation and foreign unfair trade practices will have to rely more and more on international legal trade defence instruments, which trade remedies constitute the heart. Nevertheless, the support for trade remedy mechanisms in Africa should not make us forget the overwhelming challenges associate with it, as we have shown throughout this study. As Kucik and Reinhardt rightly put it, "establishing a politically effective anti-dumping system requires more than passing a simple law"[87]. And many African countries will have that reality in face in the months or years to come as they are busy laying out their first ever trade remedy regulatory and institutional frameworks.

[87] J. Kucik and E. Reinhardt (2008), p. 483.

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Tables and Figures

Table 1: Anti-dumping investigations by African countries (1995-June 2011)

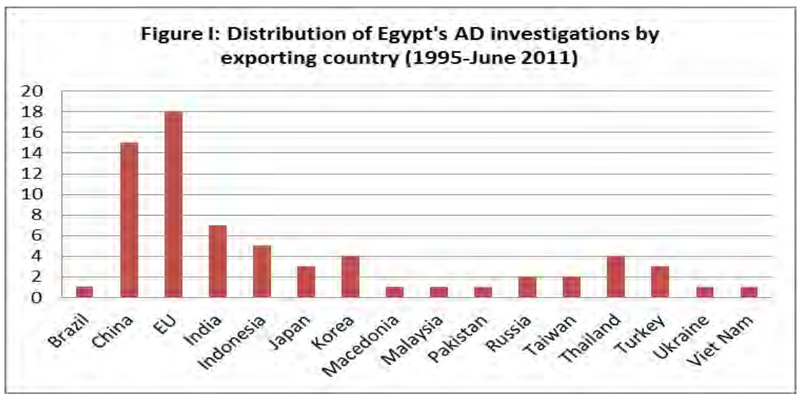
Egypt	69
Morocco	1
South Africa	213
Total	283

Source : WTO

Table 2: Applied AD measures by African countries (1995-June 2011)

Egypt	53
South Africa	128
Total	181

Source : WTO



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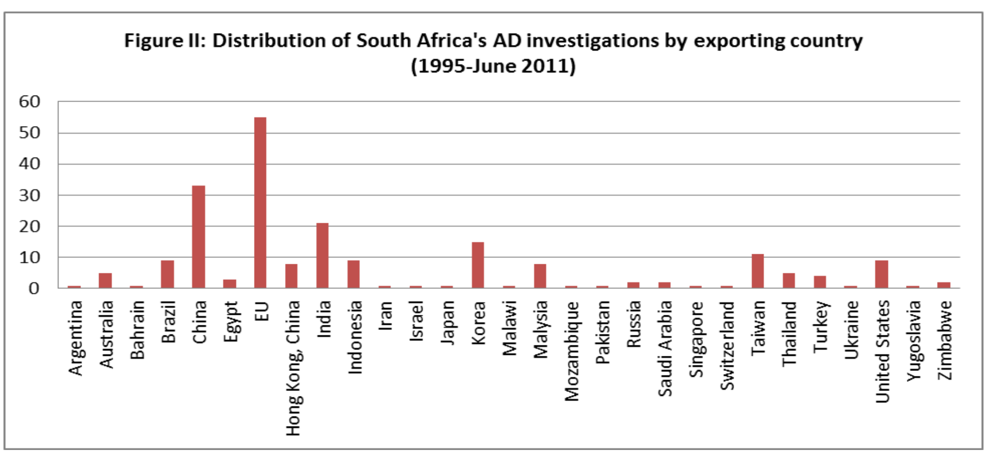

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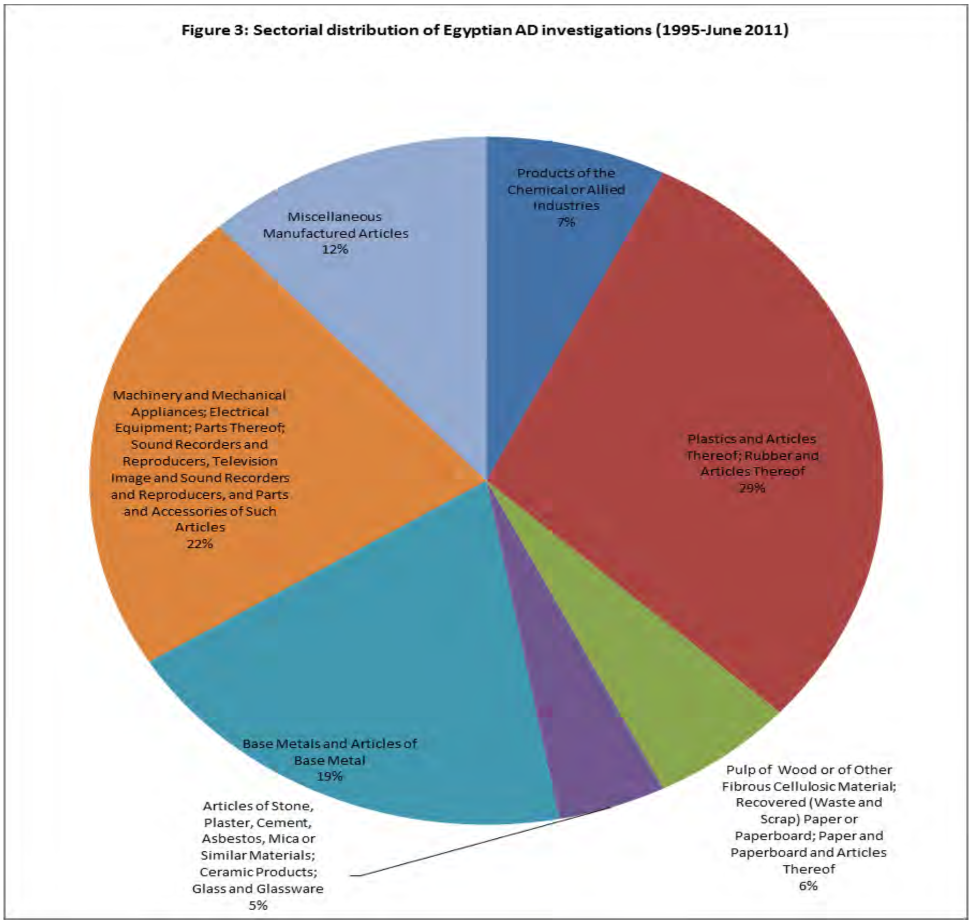
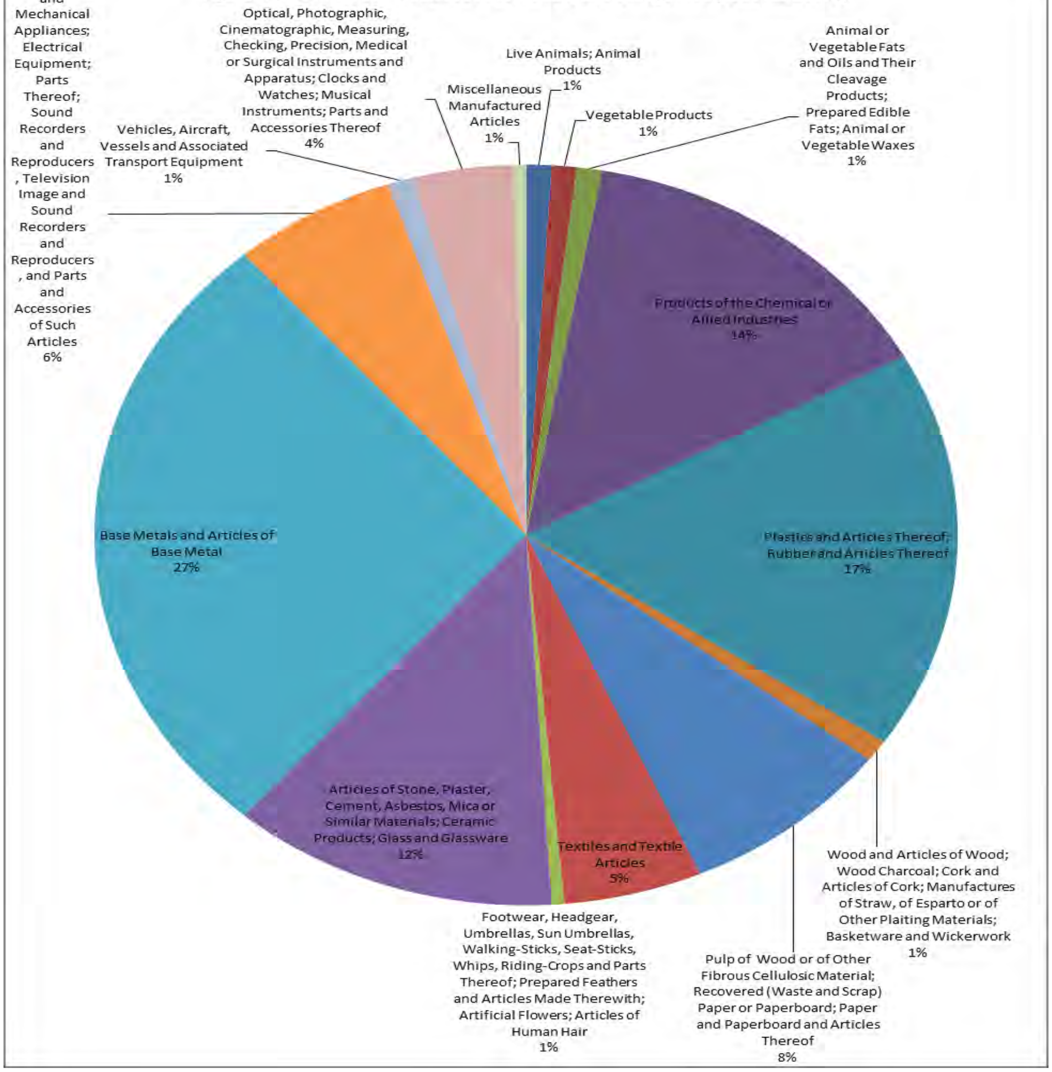


Figure 3: Sectorial distribution of Egyptian AD investigations (1995-June 2011)
Products of the Chemical or Allied Industries 7%
Plastics and Articles Thereof; Rubber and Articles Thereof 29%
Pulp of Wood or of Other Fibrous Cellulosic Material; Recovered (Waste and Scrap) Paper or Paperboard; Paper and Paperboard and Articles Thereof 6%
Articles of Stone, Plaster, Cement, Asbestos, Mica or Similar Materials; Ceramic Products; Glass and Glassware 5%
Base Metals and Articles of Base Metal 19%
Machinery and Mechanical Appliances; Electrical Equipment; Parts Thereof; Sound Recorders and Reproducers, Television Image and Sound Recorders and Reproducers, and Parts and Accessories of Such Articles 22%
Miscellaneous Manufactured Articles 12%

Source : WTO

Figure 4: Sectorial distribution of South Africa's AD investigations (1995-June 2011)



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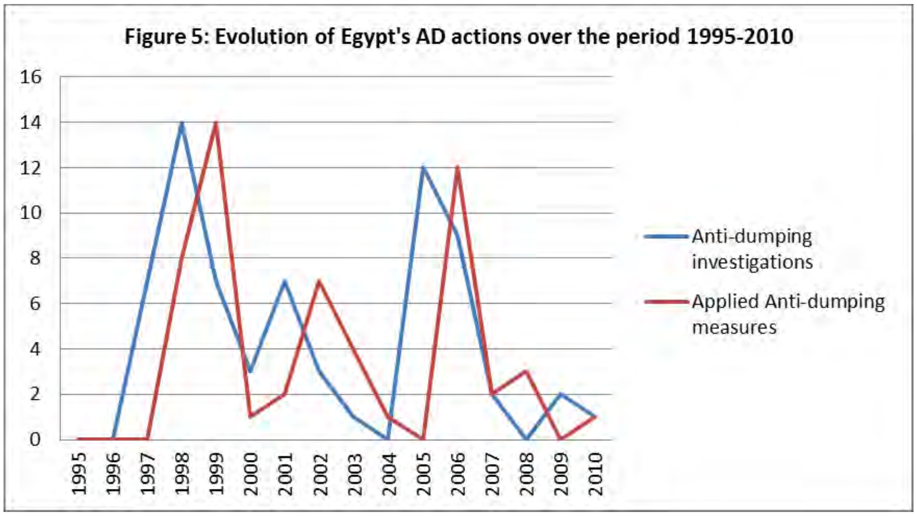
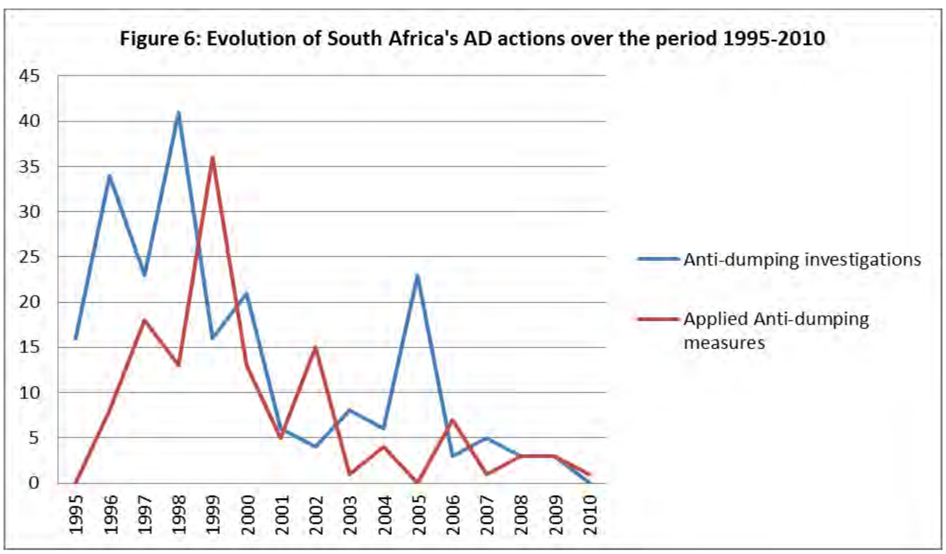


Data source : WTO



Data source : WTO

Table 3: AD investigations against African countries: 1995-June 2011

African Contries \ Investigating countries	Argentina	Australia	Brazil	Canada	China	EU	India	Japan	Jordan	New Zealand	Pakistan	South Africa	Thailand	US	Total
Algeria						1							1		2
Egypt						7			1			3		1	12
Kenya							1				1				2
Libya						2									2
Malawi												1			1
Mozambique												1			1
Nigeria							1								1
South Africa	10	4	3	5	1	4	10	1		3	1		1	16	59
Zimbabwe												2			2
Total	10	4	3	5	1	14	12	1	1	3	1	7	2	17	82

Source : WTO

Table 4: AD applied against African countries: 1995-June 2011

African countries \ Imposing countries	Argentina	Australia	Brazil	Canada	EU	India	Japan	New Zealand	Pakistan	South Africa	Thailand	US	Total
Algeria					1						1		2
Egypt					2					3			5
Libya					1								1
Malawi										1			1
Nigeria						1							1
South Africa	6	2	2	3	4	7	1	3	1		1	9	39
Zimbabwe										1			1
Total	6	2	2	3	8	8	1	3	1	5	2	9	50

Source : WTO

Table 5: Countervailing investigations by African countries (1995-June 2011)

Egypt	4
South Africa	13
Total	17

Source : WTO

Table 6: Distribution of African countervailing investigations by exporting (1995-June 2011)

	China	EU	India	Korea	Malaysia	Pakistan
Egypt		4				
South Africa	1	9		1	1	1

Source : WTO

Table 8: Countervailing measures applied against African countries (1995-June 2011)

	Brazil	US	NZ	Total
South Africa		2	2	4
Cote d'Ivoire	1			1
Total	1	2	2	5

Source : WTO

Table 7: Countervailing investigations against African countries (1995-June 2011)

	Australia	Brazil	EU	New Zealand	US	Total
South Africa	1		1	2	2	6
Cote d'Ivoire		1				1
Total	1	1	1	2	2	7

Source : WTO

Table 9: Safeguard investigations by African countries (1995-2010

Egypt	4
Morocco	5
South Africa	1
Tunisia	2
Total	12

Source : WTO

Table 10: Implemented safeguard measures in Africa (1990-2010)

Egypt	4
Morocco	2
South Africa	1
Total	7

Source : WTO

Table 11: African countries with national trade remedy regulatory and institutional frameworks

1. Egypt

2. Morocco

3. Tunisia

4. South Africa

Source : WTO

Table 12: African countries with partial trade remedy laws

1. Nigeria

2. WAEMU*

3. Zambia

4. Zimbabwe

*WAEMU (West African Economic and Monetary Union) is a regional grouping made up of Benin, Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo. The group has possessed regional AD law since 2003.

Source: WTO and author's personal research

Table 13: African countries considering (or on the process of) adopting trade remedy laws – or complementary trade remedy laws - in the near future

1. Angola

2. Chad

3. Ghana

4. Kenya

5. Mauritius

6. WAEMU Countries

Source : WTO and author's information

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