



**Committee on Anti-Dumping Practices**  
**Committee on Subsidies and Countervailing Measures**  
**Committee on Safeguards**

Original: English

## **TRADE REMEDIES**

### **NOTIFICATION OF KENYA ON TRADE REMEDY ACT 2017**

#### **KENYA**

The following notification, dated 1 May 2019 is being circulated at the request of the delegation of Kenya.

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### **NO. 32 OF 2017 KENYA TRADE REMEDIES ACT ARRANGEMENT OF SECTIONS**

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**No. 32 of 2017**

**KENYA TRADE REMEDIES ACT**

**[Date of assent: 21<sup>st</sup> July, 2017.]**

**[Date of commencement: 16<sup>th</sup> August, 2017.]**

**AN ACT of Parliament to provide for the establishment of the Kenya Trade Remedies Agency; for the investigation and imposition of anti-dumping, countervailing and trade safeguard measures and for connected purposes**

**[Act No. 32 of 2017.]**

**PART I—PRELIMINARY**

**1. Short title**

This Act may be cited as the Kenya Trade Remedies Act, 2017.

**2. Interpretation**

In this Act, unless the context otherwise requires:

**"Agency"** means the Kenya Trade Remedies Agency established under section 3;

**"Board"** means the Board of the Agency as constituted under section 6;

**"Cabinet Secretary"** means the Cabinet Secretary for the time being responsible for matters relating to trade;

**"confidential information"** means any information which is:

- a) by nature confidential; or
- b) provided on a confidential basis in terms of this Act;

**"countervailing measures"** means a special duty levied for the purpose of offsetting any subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise;

**"domestic industry"** means domestic producers as a whole of the product or like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, and are not related to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries;

**"domestic like product"** means the domestically produced product which is a like product to the investigated product;

**"domestic market"** means the market within the country including the EAC as a single customs territory;

**"dumping"** means the introduction of a product into the commerce of the country at an export price that is less than its normal value;

**"dumping margin"** means the difference between the export price and the normal value as it results from the comparison of the two in accordance with the provisions of this Act;

**"EAC"** means the East African Community as a single customs territory;

**"Executive Director"** means the Executive Director of the Kenya Trade Remedies Agency appointed under section 13;

**"GATT 1994"** means the General Agreement on Tariffs and Trade that was adopted at Marrakech on the 15th day of April 1994 and established the World Trade Organization (WTO);

**"independent buyer"** means an individual or company that has no relationship with either the importer or the exporter of the product under investigation;

**"injury"** means material injury or threat of material injury to a domestic industry, or material retardation of the establishment of such an industry;

**"interested parties"** means:

- an exporter or producer in the exporting country, or the importer of a product subject to investigation, or a trade or business association a majority of the members of whom are producers, manufacturers, exporters or importers of the investigated product; or
- the governments of both the importing and exporting country; or
- a producer of the like product or a trade or business association, a majority of the members of whom, produce the like product in Kenya;

**"investigated product"** means the product subject to an unfair trade practice investigation;

**"like product"** means a product, which is identical or otherwise alike in all respects to the investigated product or in the absence of such a product, another product, which although not alike in all respects, has characteristics closely resembling those of the investigated product;

**"Prior-Stage Cumulative Indirect Taxes"** means multi-staged taxes levied on goods or services used directly or indirectly in making a product, where there is no mechanism for subsequent crediting of the tax if the goods or services subject to the tax at one stage of production of the product are used in a succeeding stage of production thereof;

**"rate of subsidization"** means the *ad valorem* subsidization of the investigated product;

**"safeguard measures"** means the temporary imposition of a tariff or quantitative restrictions or other necessary permissible measures to prevent or remedy serious injury and to facilitate adjustments of the concerned industry;

**"serious injury"** means material injury or threat of material injury to a domestic industry or material retardation of the establishment of an industry;

**"specific subsidies"** means subsidies available only to a defined enterprise or industry, or a group of enterprises or industries, within the jurisdiction of a granting agency;

**"subsidized goods"** means goods in respect of the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export, or import of which a

specific subsidy has been or will be paid, granted, authorized, or otherwise provided, directly or indirectly, by a foreign government;

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

**"threat of serious injury"** means serious injury that is imminent and of whose determination of its existence is based on facts and not on allegation, conjecture or remote possibility;

**"total subsidy amount"** means the absolute monetary value of benefit received by a recipient from an investigated countervailable subsidy programme, net of offsets or deductions otherwise permitted by this Act;

**"WTO"** means the World Trade Organization;

**"WTO Anti-Dumping Agreement"** means the World Trade Organization Agreement on the Implementation of Article VI of the GATT 1994; and

**"WTO SCM Agreement"** means the World Trade Organization Agreement on Subsidies and Countervailing Measures.

## **PART II—ESTABLISHMENT AND FUNCTIONS OF THE TRADE REMEDIES AGENCY**

### **3. Establishment of Agency**

- (1) There is established an Agency to be known as the Kenya Trade Remedies Agency.
- (2) The Agency is a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of:
  - a. suing and being sued;
  - b. purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property;
  - c. borrowing and lending money; and
  - d. doing or performing all other things or acts necessary for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.

### **4. Headquarters of the Agency**

The headquarters of the Agency shall be in Nairobi.

### **5. Functions of the Agency**

The Agency shall:

- a. investigate and evaluate allegations of dumping and subsidization of imported products in Kenya;
- b. investigate and evaluate requests for application of safeguard measures on any product imported in Kenya;

- c. advise the Cabinet Secretary on the results and recommendations of its investigations;
- d. initiate and conduct public awareness and the training of stakeholders on its functions and on trade remedies;
- e. publish and disseminate manuals, codes, guidelines, and decisions relating to its functions; and
- f. perform such other functions as the Cabinet Secretary may assign to it.

## **6. Management of the Agency**

- (1) The management of the Agency shall vest in the Board which shall consist of:
  - a. chairperson appointed by the President upon the recommendation of the Public Service Commission through a competitive process;
  - b. the Principal Secretary in the Ministry for the time being responsible for matters relating to finance or a representative of the Principal Secretary;
  - c. the Principal Secretary in the Ministry for the time being responsible for matters relating to trade or a representative of the Principal Secretary;
  - d. the Principal Secretary in the Ministry for the time being responsible for matters relating to industrialization or a representative of the Principal Secretary;
  - e. the Attorney-General or a representative of the Attorney General;
  - f. three other members appointed competitively by the Cabinet Secretary; and
  - g. the Executive Director of the Agency who shall be the Secretary.
- (2) The Board shall ensure that all its appointments conform to the values and principles of the Constitution under Articles 27 and 32 and other relevant provisions of the Constitution.

## **7. Qualification for appointment**

- (1) A person is qualified to be appointed as the chairperson of the Board if such person:
  - a. holds a master's degree in a relevant discipline from a university recognized in Kenya;
  - b. has had a distinguished career in a senior management position in the private or public sector;
  - c. has at least ten years' relevant professional experience; and
  - d. satisfies the requirements of Chapter Six of the Constitution.
- (2) person is qualified to be appointed a member of the Board under section 6 (f) if such person:
  - a. holds a degree in a relevant discipline from a university recognized in Kenya;
  - b. has had a distinguished career in his or her respective field;
  - c. has at least seven years' relevant professional experience; and
  - d. satisfies the requirements of Chapter Six of the Constitution.
- (3) The members shall elect the vice-chairperson from among the members appointed under section 6 (f).

## **8. Disqualification from appointment**

A person shall not be qualified to be appointed as the chairperson or member of the Board under section 6 (a) or (f) if that person:

- a. is a member of Parliament or a County Assembly;
- b. is a member of the governing body of a political party;
- c. is a member of a Commission established under the Constitution;
- d. is an undischarged bankrupt;
- e. has been removed from public office for contravening the Constitution or any other law; or
- f. has, in the conduct of his or her affairs, not met any statutory obligations.

## **9. Tenure and vacation of office**

(1) The Chairperson and members of the Board under section 6 (a) and (f) shall be appointed for a term of three years on such terms and conditions as may be specified in the instrument of appointment and shall be eligible for re-appointment for one further term of three years.

(2) A person ceases to be a member of the Board if:

- a. the Board recommends to the Cabinet Secretary the removal of the member on the ground of misconduct or poor performance;
- b. the member violates the provisions of the Public Officer Ethics Act, (No. 4 of 2003);
- c. the member is absent from three consecutive sittings of the Board without the written approval of the chairperson;
- d. the member resigns in writing to the Cabinet Secretary;
- e. the member dies; or
- f. the member is declared bankrupt.

## **10. Powers of the Board**

The Board shall have all the powers necessary for the proper performance of its functions under this Act and in particular, but without prejudice to the generality of the foregoing, the Board shall have power to:

- a. supervise and offer guidance and strategic direction to the Agency;
- b. control and supervise the use of the assets of the Agency in such manner as best promote the purposes for which the Agency is established;
- c. determine the provisions to be made for capital and recurrent expenditure and for reserves of the Agency;
- d. receive any grants, gifts, donations or endowments and make legitimate disbursements therefrom;
- e. collaborate with other bodies or organizations in furtherance of the purpose for which the Agency is established;
- f. open such bank accounts for the funds of the Agency as may be necessary; and

- g. invest any funds of the Agency not immediately required for the purposes of this Act subject to the approval of the Cabinet Secretary for the time being responsible for matters relating to finance.

### **11. Conduct of business and affairs of the Board**

The Board shall conduct its affairs in accordance with the provisions of the First Schedule, but subject thereto, the Board may regulate its own procedure.

### **12. Delegation by the Board**

The Board may, by resolution in writing, either generally or in any particular case, delegate to any committee of the Agency or to any member, officer, employee or agent of the Agency, the exercise of any of the powers or the performance of any of the functions of the Board under this Act.

### **13. Executive Director of the Agency**

(1) There shall be an Executive Director of the Agency who shall be the Chief Executive Officer of the Agency.

(2) The Board shall, subject to subsection (3), appoint the Executive Director after a competitive recruitment process on such terms and conditions as may be specified in the instrument of appointment.

(3) A person is qualified for appointment as the Executive Director of the Agency if the person:

- a. possesses a post-graduate degree in economics, international trade, trade law, customs or equivalent qualifications and has at least five years' professional experience; or
- b. possesses a basic degree in a relevant field and has at least ten years' professional experience in matters relating to trade and industry; and
- c. satisfies the requirements of Chapter Six of the Constitution.

(4) The Executive Director shall be:

- a. responsible to the Board generally for the functions of the Agency;
- b. an ex officio member of the Board who has no right to vote at any meeting of the Board;
- c. the secretary to the Board;
- d. subject to the directions of the Board, responsible for the day to day management of the affairs of the Agency; and
- e. responsible to the Board generally for supervision of staff.

### **14. Removal of the Executive Director**

(1) The Executive Director may be removed from office by the Board on the following grounds:

- a. inability to perform the functions of the office due to physical or mental incapacity;
- b. gross misconduct or misbehaviour;
- c. incompetence or neglect of duty;
- d. violation of the Constitution or any other law; or
- e. any other ground that would justify removal from office under the terms and conditions of service.



(2) Where the Board decides to remove the Executive Director from office, the Board shall give the Executive Director:

- a. sufficient notice of its decision and the grounds on which the decision is based; and
- b. an opportunity to challenge the grounds of the Board's decision.

### **15. Staff of the Agency**

The Board may appoint such officers or other staff as necessary for the proper discharge of the functions of the Agency, upon such terms and conditions of service as the Board may determine in consultation with the Salaries and Remuneration Commission.

### **16. Common seal of the Agency**

The common seal of the Agency shall be kept in such custody as the Board may direct and shall not be used except on the order of the Board.

### **17. Protection from personal liability**

An officer, employee or agent of the Agency or any person acting on such officer's, employee's or agent's directions is not personally liable to any action, claim or demand whatsoever for an act or omission by a member of the Agency or any officer, employee or agent of the Agency if the act or omission is done without malice for purposes of executing the functions, powers or duties of the Agency.

### **18. Liability of the Agency for damages**

Despite section 17, the Agency is liable to pay compensation or damages to any person for any injury to that person, that person's property or any of that person's interests where such injury, loss or damage is occasioned by the Agency, its agents or officers in the course of carrying out the lawful functions of the Agency.

## **PART III—FINANCIAL PROVISIONS**

### **19. Funds of the Agency**

(1) The funds of the Agency shall consist of:

- a. funds appropriated by the National Assembly for purposes of the Agency;
- b. moneys or assets as may accrue to or vest in the Agency in the course of the exercise of its powers or the performance of its functions under this Act or any other written law;
- c. sums as may be payable to the Agency pursuant to this Act or any other written law, or pursuant to any trust;
- d. any grants, gifts, donations or endowments received by the Board on behalf of the Agency;
- e. any other funds that may be received by the Agency from any other source; and
- f. fees from consultancy and other services by the Agency.

(2) The Agency shall disclose details of the sources of its funds in its annual report.

### **20. Financial year**

The financial year of the Agency shall be the period of twelve months ending on the thirtieth June in each year.

## **21. Annual estimates**

- (1) The Board shall, not less than three months before the commencement of each financial year cause to be prepared estimates of the revenue and expenditure of the Agency for that financial year.
- (2) The annual estimates shall make provision for all estimated expenditure of the Agency for the financial year and in particular, the estimates shall provide for:
- a. the payment of the salaries, allowances and other charges in respect of the members, staff and agents of the Agency;
  - b. the payment of the pensions, gratuities and other charges in respect of retirement benefits to staff of the Agency;
  - c. acquisition and the proper maintenance of the buildings and grounds of the Agency;
  - d. the proper maintenance, repair and replacement of the equipment and other movable property of the Agency;
  - e. the creation of such reserve funds to meet future or contingent liabilities in respect of retirement benefits, insurance or replacement of buildings or equipment or in respect of such other matters as the Agency may deem fit; and
  - f. any other expenditure necessary for the performance of the functions of the Agency.
- (3) The annual estimates shall be approved by the Board and be submitted to the Cabinet Secretary for approval before the commencement of the financial year to which they relate.
- (4) An expenditure shall not be incurred for purposes of the Agency except in accordance with the annual estimates approved under subsection (3) or in accordance with the authorization of the Board and prior written approval of the Cabinet Secretary.

## **22. Accounts and audit**

- (1) The Board shall cause to be kept proper books and records of accounts of the income, expenditure, assets and liabilities of the Agency.
- (2) Within a period of three months after the end of each financial year, the Board shall submit to the Auditor-General the accounts of the Agency in respect of that year together with:
- a. a statement of income and expenditure of the Agency during that financial year; and
  - b. a statement of the assets and liabilities of the Agency on the last day of that financial year.
- (3) The accounts of the Agency shall be audited and reported upon by the Auditor-General in accordance with the provisions of the Public Audit Act, (No. 34 of 2015).

## **PART IV—POWER TO IMPOSE AN ANTI-DUMPING, COUNTERVAILING AND SAFEGUARD MEASURES, INVESTIGATION, EVALUATION AND ADJUDICATION PROCEDURES**

## **23. Anti-dumping and countervailing measures**

- (1) The Cabinet Secretary may impose:
- a. in the case of goods dumped in Kenya, an anti-dumping duty in an amount equal to or less than the margin of dumping of the imported goods; and
  - b. in the case of subsidized goods imported in Kenya, a countervailing duty in an amount equal to or less than the amount of subsidy on the imported goods.
- (2) Where a product is being imported in Kenya in such increased quantities and under such conditions as to cause or threaten to cause serious injury to a domestic industry that produces a like

or a directly competitive product, the Cabinet Secretary may request the Cabinet Secretary responsible for finance to impose a safeguard measure.

(3) The imposition of a safeguard measure under subsection (2) shall be done in accordance with provisions of this Act and the Schedules to this Act.

(4) Where the Cabinet Secretary is required to act on the recommendation of the Agency to impose an anti-dumping, countervailing or a safeguard measure, the Cabinet Secretary shall take action on the recommendation within sixty days of receiving the recommendation.

(5) Where the Cabinet Secretary fails to act on the Agency's recommendation in the prescribed period, he or she shall inform the Agency of the reason of the failure to act in writing.

#### **24. Investigation and evaluation of alleged dumping and subsidized exports in Kenya**

(1) An application for or the conduct of the investigation or evaluations of alleged dumping or subsidized exports in Kenya shall be carried out in accordance with the procedure set out in the Second Schedule.

(2) An application for the investigation or evaluation of alleged dumping or import of subsidized goods in Kenya may be made by the manufacturer of a like product or an authorized person.

#### **25. Investigation and evaluation of alleged increase in imports in Kenya**

(1) An application for investigation, the conduct of investigation or evaluation of imports that have caused or threaten to cause serious injury to an industry in Kenya shall be conducted in accordance with the procedure set out in the Third Schedule.

(2) An application for the investigation or evaluation of imports that have caused or threaten to cause serious injury in Kenya may be made by a manufacturer of a like product, the official of an association of manufacturers in that industry or an authorized person.

#### **26. Power to obtain information**

The Agency may in writing and within a specified period direct any person to provide the Agency with any information relating to an investigation or evaluation in a form as may be prescribed by the Agency.

#### **27. Right to claim confidentiality.**

(1) A person who has been directed to provide information to the Agency may identify all or any part of the information that the person provides to the Agency as confidential.

(2) Where a person makes a claim for confidentiality under this section, such person shall do so in writing and set out the grounds for treating the information as confidential information.

(3) The Agency shall take all measures to protect any person who gives information to it.

#### **28. Non-disclosure of confidential information**

(1) The Agency shall not disclose to any unauthorized person information that is confidential under this Act until the Agency determines the extent to which confidentiality shall be extended regarding the information.

(2) Where the Agency finally determines the extent of the confidentiality of information, it may only disclose to unauthorized persons such information that has not been determined confidential under this section.

#### **29. Restricted use of information**

(1) Any decision of the Agency shall be in writing and shall state the reasons for the decision.

(2) If the reasons for a decision of the Agency reveal the use of confidential information, the Agency shall notify the person who provided the confidential information of the decision in writing and such notice shall include a copy of the decision.

(3) The Agency shall give the notice in subsection (2) at least fourteen days before it publishes its decision.

(4) A person notified by the Agency of a decision to disclose confidential information under this section, may apply to the High Court within fourteen days after receiving the notice for an order to protect the confidentiality of the information.

(5) The Agency may not publish its decision until the High Court determines the application made under subsection (4).

### **30. Appointment of investigating officers**

(1) The Board may appoint any person as an investigating officer and the appointment shall be published in the Kenya Gazette.

(2) In the performance of their duties, the investigating officers appointed under subsection (1) shall possess and display upon request by any person official identification documents that identify them as investigating officers of the Agency.

(3) During an investigation, the Agency may enlist the support of police officers where necessary.

### **31. Investigation**

(1) An investigating officer may question any person under oath or affirmation during the course of an investigation.

(2) A person questioned by an investigating officer may be accompanied by a legal representative.

(3) An investigating officer may summon any person to provide information on the subject of the investigation at any point during an investigation or to deliver to the investigating officer or to produce any book, document or any other object or information referred to in the summons at a time and place as may be specified in the summons.

(4) The investigating officer may:

- a. accept any relevant information either in oral or written form from any person;
- b. accept any relevant information, document or other thing whether or not:
  - i. it is given or proven under oath or affirmation; or
  - ii. would be admissible as evidence in a court of law; or
- c. refuse to accept any information, document or other thing that is unduly repetitious.

(5) Where the investigating officer receives oral information under subsection (4), the investigating officer shall set down the information in writing as soon as is practicable and may require the person who provided the information to sign the written statement or affix his or her mark to the written statement.

### **32. Response to investigation**

(1) A person shall be required to respond to an investigating officer honestly.

(2) Despite subsection (1), a person shall not be required to respond if such response would be an admission of the commission of an offence by that person.

**33. Power to enter and search under warrant**

- (1) A court may issue a warrant to an investigating officer to enter and search any premises that are within the jurisdiction of that court if the investigating officer swears or affirms that there are reasonable grounds to believe that anything connected with an investigation in terms of this Act is in the possession of or under the control of a person who is on or in those premises and such warrant may be issued in the absence of the person whose premises the investigating officer wishes to enter and search.
- (2) A warrant to enter and search may be issued at any time and shall:
- specifically identify the premises that may be entered and searched; and
  - authorize the named investigating officer to enter and search the premises and to do any other thing authorized to be done in the warrant.
- (3) A warrant to enter and search is valid until the:
- warrant is executed;
  - warrant is cancelled by the court;
  - purpose for issuing the warrant lapses; or
  - expiry of one month after the date that the warrant was issued.
- (4) A warrant may be executed only during the day unless the court authorizes that it may be executed at night or at a time that is reasonable in the circumstances.
- (5) Before executing a warrant, the investigating officer executing the warrant shall:
- identify himself or herself to the person named in the warrant if present or the person in charge of the premises at the time of execution of the warrant and explain to that person the purpose of the warrant;
  - hand a copy of the warrant to the person named in the warrant if present or the person in charge of the premises at the time of the execution of the warrant; or
  - where no one is present in the premises, affix a copy of the warrant to the premises in a prominent and visible place.

**34. Power to enter and search**

An investigating officer executing a warrant under section 33 may:

- enter the premises mentioned in the warrant;
- search such premises;
- search any person found in those premises if there are reasonable grounds to believe that such person is in possession of a relevant article or document that has a bearing on the investigation;
- examine any relevant article or document that is found in such premises;
- request for information about an article or document from the owner of, or person in charge of, the premises or from any person who may have such information;
- take an extract from, or make copies of any relevant book or document that is on or in the premises;

- g. use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to:
  - i. access any data in that computer or available in that computer system; and
  - ii. reproduce any record from that data;
- h. attach and where necessary, remove from the premises for examination and safe custody, any relevant thing; or
- i. have powers to close and seal off the premises for further investigation for a period not exceeding fourteen days.

### **35. Review**

Any person affected by a determination, recommendation or decision of the Agency or of the Cabinet Secretary may appeal to the High Court within thirty days of the determination, recommendation or decision being made for a review.

### **36. Variation or setting aside of determination, recommendation or decision**

The Agency or the Cabinet Secretary may vary or set aside a determination, recommendation or decision on the Agency's or the Cabinet Secretary's own volition or upon application by a person affected by the determination, recommendation or decision:

- a. where there is an ambiguity, obvious error or an omission in the determination, recommendation or decision. In such cases, the variation or setting aside shall only be to the extent of correcting the ambiguity, error or omission; or
- b. where the determination, recommendation or decision was made by a common mistake and it affects all relevant parties.

### **37. Standard of proof**

In any proceedings under this Act, other than criminal proceedings, the standard of proof is on a balance of probabilities.

## **PART V—OFFENCES**

### **38. Breach of confidence**

(1) A person commits an offence if that person discloses any information that has been declared confidential concerning the affairs of any person obtained by an authorized person:

- a. in carrying out any function or exercising any power under this Act; or
- b. as a result of initiating a complaint or participating in any proceedings under this Act.

(2) Despite subsection (1), it is not an offence if a person discloses any information:

- a. for the purpose of the proper administration or enforcement of this Act;
- b. for the purpose of the administration of justice;
- c. at the request of the Executive Director or an investigating officer entitled to receive the information; or
- d. that shall be disclosed under this Act.

**39. Hindering administration of Act**

A person commits an offence if that person hinders, obstructs or unduly influences any person in the exercise of a power or the performance of a duty under this Act.

**40. Failure to attend when summoned**

A person commits an offence if that person, when summoned, under this Act:

- a. fails, without sufficient cause, to appear at the time and place specified or to remain in attendance until excused; or
- b. attends as required, but refuses to be sworn in or to make an affirmation or fails to produce a book, document or any other item as required, if it is in the possession of, or under the control of, that person.

**41. Penalty**

Any person convicted of an offence under this Act, where no penalty is provided for, is liable to a fine not exceeding five million shillings or to imprisonment for a period not exceeding five years, or to both.

**PART VI—MISCELLANEOUS****42. Regulations**

(1) The Cabinet Secretary may in consultation with the Agency, make regulations for the better carrying into effect the provisions of this Act.

(2) For the purpose of Article 94(6) of the Constitution:

- a. the purpose and objective of the delegation under this section is to enable the Cabinet Secretary to make regulations to provide for the better carrying into effect the provisions of this Act;
- b. the authority of the Cabinet Secretary to make regulations under this Act will be limited to bringing into effect the provisions of this Act and the fulfilment of the objectives specified under this section;
- c. the principles and standards applicable to the regulations made under this section are those set out in the Interpretation and General Provisions Act (Cap. 2) and the Statutory Instruments Act, (No. 23 of 2013).

**43. Repeal provisions**

Sections 125, 125A and 126 of the Customs and Excise Act (Cap. 472) are repealed.

## **FIRST SCHEDULE**

### **[Section 11.]**

#### **CONDUCT OF BUSINESS AND AFFAIRS OF THE BOARD**

##### **1. Meetings**

- (1) The Board shall meet not less than four times in every financial year and not more than two months shall elapse between the date of one meeting and the date of the next meeting.
- (2) A meeting of the Board shall be held on such date and at such time as the Chairperson shall appoint.
- (3) Unless the majority of the membership of the Board otherwise agree, at least fourteen days' notice of every meeting shall be given to every member.
- (4) The Chairperson shall on the written application of at least one-third of the members, convene a special meeting of the Board.
- (5) The quorum for the conduct of the business of the Board shall be one half of all the members.
- (6) The Chairperson shall when present, preside at every meeting of the Board but the members present shall elect one member to preside whenever the Chairperson is absent, and the person so elected shall have all the powers of the Chairperson with respect to that meeting and the business transacted thereat.
- (7) Unless a unanimous decision is reached, a decision on any matter before the Board shall be by a majority of the votes of the members present and voting, and in case of an equality of votes, the Chairperson or the person presiding shall have a casting vote.
- (8) Subject to subparagraph (5), no proceedings of the Board shall be invalid by reason only of a vacancy among the members thereof.

##### **2. Disclosure of interest by Board members**

- (1) A member who has an interest in any contract, or other matter present at a meeting shall at the meeting and as soon as reasonably practicable after the commencement, disclose the fact thereof and shall not take part in the consideration or discussion of, or vote on, any questions with respect to the contract or other matter, or be counted in the quorum of the meeting during consideration of the matter.
- (2) A disclosure of interest made under subparagraph (1) shall be recorded in the minutes of the meeting at which it is made.
- (3) A member of the Board who contravenes subparagraph (1) commits an offence and is liable on conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding one hundred thousand shillings, or both.

##### **3. Execution of instruments**

Any contract or instrument which, if entered into or executed by a person not being a body corporate, would not require to be under seal, may be entered into or executed on behalf of the Board by any person generally or specially authorized by the Board.

##### **4. Minutes**

The Board shall cause minutes of all resolutions and proceedings of meetings of the Board to be entered in books kept for that purpose.



**SECOND SCHEDULE****[Section 24.]****INVESTIGATION AND EVALUATION OF APPLICATIONS FOR IMPOSING ANTI-DUMPING OR COUNTERVAILING MEASURES****PART I—PRELIMINARY****1. Customs clearance**

An anti-dumping or subsidization investigation does not hinder the procedure of customs clearance.

**PART II—DETERMINATION OF DUMPING, INJURY AND CAUSAL LINK****2. Identification of dumping**

An imported good is considered to be dumped if it is introduced into the commerce of Kenya at a price which is less than its normal value.

**3. Determination of the normal value**

(1) Except as provided in paragraphs 3 and 4 of this Schedule, the Agency shall establish the normal value of the imported good under investigation by determining the comparable price paid or payable in the ordinary course of trade for sales of a like product in the exporting country.

(2) Despite paragraph 1, the Agency may establish the normal value of an imported good by comparing the price of the imported good with the price paid or payable in the ordinary course of trade for a like product when the like product is destined for consumption in the exporting country.

(3) When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined on the basis of either:

- a. comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative; or
- b. with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

(4) Sales of a like product destined for consumption in the domestic market of the exporting country, or sales to an appropriate third country, shall normally be considered a sufficient quantity for the determination of the normal value where such sales constitute 5% or more of the sales of the investigated product into the Republic of Kenya, provided that a lower ratio shall be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

(5) Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit, that is, fixed and variable, costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the Agency determines that such sales are made:

- a. within an extended period of time, normally one year, but in no case less than six months;
- b. in substantial quantities; and
- c. at prices which do not provide for the recovery of all costs within a reasonable period of time,

If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

(6) For the purposes of subparagraph (5)(b), sales below per unit costs are made in substantial quantities when the Agency establishes that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20% of the volume sold in transactions under consideration for the determination of the normal value.

(7) For the purpose of subparagraphs (3), (4), and (5), costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under investigation.

(8) For the purposes of subparagraphs (3), (4), and (5), the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

- a. the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
- b. the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin; or
- c. any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin of the like product.

(9) The Agency shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer.

(10) Unless already reflected in the cost allocations under this Schedule, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and current production, or for circumstances in which costs during the period of investigation are affected by start-up operations. The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, where that period extends beyond the period of investigation, the most relevant costs which can reasonably be taken into account by the Agency during the investigation.

(11) Where the country exporting the investigated product is a non-market economy country, the Agency may, to the extent it considers the methodology for determining normal value set forth in this Schedule to be inappropriate, determine the normal value on the basis of:

- a. the comparable price paid or payable, in the ordinary course of trade, for sales of the like product when destined for consumption in an appropriate market economy country;
- b. the comparable price paid or payable, in the ordinary course of trade, for exports of the like product from an appropriate market economy country to other countries, including the Republic of Kenya;
- c. the price actually paid or payable in the Republic of Kenya for the domestic like product, duly adjusted if necessary to include a profit margin corresponding to the margin to be expected under the existing economic circumstances for the sector concerned; or
- d. any other basis deemed reasonable by the Agency.

(12) The provisions of subparagraph (11) shall be applied to imports from World Trade Organisation member states only to the extent that such application is consistent with the second Supplementary Provision to paragraph 1 of Article VI of GATT 1994, and other World Trade Organisation obligations of Kenya.

#### **4. Determination of the Export Price**

(1) Except as provided for in subparagraphs (2) and (3), the export price is the price paid or payable for the investigated product when sold for export from the exporting country in Kenya.

(2) If there is no export price or where it appears to the Agency that the export price may not be ascertained because of an association or a compensatory arrangement between the exporter and the importer or a third party the export price may be ascertained:

- a. on the basis of the price at which the imported product is first resold to an independent buyer; or
- b. on such reasonable basis as the Agency may determine.

(3) Where the Agency ascertains the normal value on the basis of the country of origin, the export price shall be the price paid or payable for the product when sold for export in the country of origin.

(4) If the product is not imported directly from the country of origin to Kenya the price at which the product is sold from the country of export into Kenya shall be compared with the comparable price in the country of export.

(5) Despite subparagraph (4), a comparison may be made with the price in the country of origin if the product is trans-shipped through the country of export, or such product is not produced in the country of export, or there is no comparable price for the product in the country of export.

#### **5. Comparison between the Normal Value and the Export Price**

(1) A fair comparison between the export price and the normal value shall be made at the same level of trade and in respect of sales made as nearly as possible at the same time.

(2) An allowance may be made for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities or physical characteristics.

(3) Where the export price has been ascertained under this Act, allowances for costs, including duties, and taxes, incurred between importation and resale, and for profits accruing, may also be made and if in these cases, price comparability has been affected, the Agency shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this subparagraph indicating to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

(4) The existence of dumping margins shall be established by comparing the weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.

(5) Normal value established on a weighted average basis may be compared to prices of individual export transactions if the Agency finds a pattern of export prices which differs significantly among different purchasers, regions or time periods and the Agency shall explain why such differences cannot be taken into account by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

(6) When a fair comparison under this regulation requires a conversion of currencies, such conversion shall be made using the exchange rate on the date of sale but when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used.

(7) The Agency shall allow exporters at least sixty days to adjust export prices to reflect sustained fluctuation in exchange rates during the period of investigation.

## **6. Determination of Injury**

(1) The determination of injury shall be based on positive evidence and involve an objective examination of:

- a. the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products; and
- b. the impact of dumped imports on domestic producers of like products.

(2) The Agency shall consider whether there has been a significant increase in dumped imports in absolute terms or relative to production or consumption of like products in Kenya.

(3) The Agency shall consider whether:

- a. there has been significant price undercutting by the dumped imports as compared with the price of a like product manufactured in Kenya; or
- b. whether the effect of dumped imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred to a significant degree.

(4) Where imports of a like product from more than one country are subject to simultaneous anti-dumping investigations, the Agency may cumulatively assess the effects of such imports only if it determines that:

- a. the margin of dumping established in relation to the imports from each country is more than *de minimis* and the volume of imports from each country is not *de minimis*; and
- b. a cumulative assessment of the effects of the imports is necessary because of the competition between the imported products and the conditions of competition between the imported products and the like domestic product.

(5) The examination of the impact of the dumped imports on the domestic industry in Kenya shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry including:

- a. actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity;
- b. factors affecting domestic prices;
- c. the magnitude of the margin of dumping; and
- d. actual and potential negative effects on cash-flow, inventories, employment, wages, growth, ability to raise capital or investments.

(6) The effect of dumped imports shall be assessed in relation to the domestic production of the like product when available data permits the separate identification of that production based on production process, producers' sales and profits but where such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group of products including the like product for which information can be provided.

## **7. Threat of injury**

(1) The Agency shall not determine a threat of material injury on the basis of an allegation, conjecture or remote possibility but only on the basis of fact and where the threat of material injury is foreseeable and imminent.

(2) The Agency shall include the following factors when determining the existence of a threat of material injury:

- a. a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
- b. sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports into the Republic of Kenya, taking into account the availability of other export markets to absorb any additional exports;
- c. whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- d. inventories of the product being investigated.

## **8. Causality**

(1) Causality shall be based on the examination of all the relevant evidence in the Agency's possession that demonstrate that dumped imports are causing injury as provided in this Schedule.

(2) Despite sub-paragraph (1), the Agency shall also examine other known factors not attributed to the dumped imports that are causing injury including:

- a. the volume and prices of imports not sold at dumped prices;
- b. contraction in demand or changes in the patterns of consumption;
- c. trade restrictive practices and competition between the foreign and domestic producers;
- d. developments in technology; and
- e. the export performance and productivity of the domestic industry.

## **PART III—INITIATION, CONDUCT AND CONCLUSION OF A DUMPING INVESTIGATION**

### **9. Initiation of an investigation**

(1) An investigation to determine the existence, degree or effect of alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

(2) An application shall include details of:

- a. the dumping;
- b. the injury; and
- c. the causal link between the dumped imports and the alleged injury.

(3) An application shall contain such information as is reasonably available to the applicant, including:

- a. the name and contact information of the applicant;
- b. the domestic industry by or on behalf of which the application is being made, including the names and contact information of all known producers in the domestic industry;
- c. the volume and value of the domestic production of the like product;
- d. a description of the volume and value of domestic production of the like product accounted for by the applicant and each domestic producer identified;

- e. a complete description of the investigated product, including technical characteristics, its uses and its Harmonized Tariff Classification Number;
  - f. the name of the country or countries in which the investigated product is manufactured or produced or if the investigated product is imported from a country other than the country of manufacture or production, the intermediate country from which the product is imported;
  - g. the identity of each known exporter or foreign producer of the investigated product and a list of known persons importing the investigated product in Kenya;
  - h. information on prices at which the investigated product is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the investigated product) and information on export prices in Kenya; and
  - i. information on the changes in the volume of imports of the investigated product, the effect of the imports on prices of the like product in Kenya, and the impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry.
- (4) The Agency shall determine whether there is sufficient evidence to justify the initiation of an investigation and may seek additional information from the applicant before deciding whether to initiate an investigation.
- (5) The Agency shall simultaneously consider the evidence of dumping, injury, and causal link when determining whether to initiate an investigation, starting on a date not later than the earliest date on which, in accordance with the provisions of paragraph 17, provisional measures may be applied.
- (6) The Agency shall not initiate an investigation unless it determines whether the application has been made by or on behalf of the domestic industry after an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product.
- (7) For the purposes of this paragraph, an application is made by or on behalf of the domestic industry if it is supported by domestic producers whose collective output is more than 50% of the total production of the like product produced by the portion of the domestic industry that supports or opposes the application.
- (8) The Agency shall not initiate an investigation if the domestic producers who support the application account for less than 25% of the total production of the like product produced by the domestic industry.
- (9) The Agency may determine the scale of support for the initiation of an investigation by using statistically valid sampling techniques where the domestic industry is fragmented and involves an exceptionally large number of producers.
- (10) The Agency shall make a decision whether to initiate an investigation within forty-five days but if the application involves complex issues or if the Agency has sought additional information from the applicant, the Agency shall make a decision within sixty days.
- (11) Where the Agency does not initiate an investigation it shall notify the applicant or applicants in writing of the decision and the reasons for not initiating the investigation.
- (12) The Agency may initiate an investigation on its own motion, without having received a written complaint from the affected industry.
- (13) Where the Agency initiates an investigation on its own motion, it shall proceed only if it has sufficient evidence of injury or threat of injury and a causal link to justify the initiation of an investigation.

## 10. Public notice of an investigation

- (1) The Agency shall notify the government of an exporting country of the initiation of an investigation.
- (2) Where the Agency initiates an investigation, it shall:
  - a. notify exporters, importers and representative associations of importers or exporters as well as the government of the exporting country or countries, the applicant or applicants and any other interested party of the initiation of the investigation; and
  - b. notify the public by notice in the Gazette and by advertisement in at least two newspapers of national circulation of the initiation of the investigation.
- (3) The notice of the initiation of an investigation shall state:
  - a. the name of the country or countries of export, and where different, the country or countries of origin, of the investigated product;
  - b. a complete description of the investigated product, including a description of the technical characteristics and uses of the product and its Harmonized Tariff Classification Number;
  - c. a description of the alleged dumping, including the basis for the allegation;
  - d. a summary of the factors on which an assessment of injury and causal link is based;
  - e. an address where information and comments may be submitted;
  - f. the date of the initiation of the investigation; and
  - g. a proposed schedule for the investigation.
- (4) The effective date of the commencement of an investigation is the date when the notice of the investigation is published in the Gazette.

## 11. Termination of an investigation

- (1) The Agency may terminate an investigation:
  - a. at any time if it determines that there is insufficient evidence to support the allegation of dumping or injury to a domestic industry; or
  - b. in any case where the Agency determines that the margin of dumping is *de minimis*, or that the volume of imports of the investigated product or the threat of injury to a domestic industry is *de minimis*.
- (2) For the purposes of this paragraph:
  - a. the margin of dumping is *de minimis* if the export price is less than 2% of the export price; and
  - b. the volume of imports is *de minimis* if the volume of the investigated product from a particular country is found to account for less than 3% of imports of the like product in Kenya but it is not *de minimis* if the countries which individually account for less than 3% of the imports of the like product in Kenya collectively account for more than 7% of imports of the like product in Kenya.
- (3) Where the Agency terminates an investigation under this paragraph it shall publish its reasons in sufficient detail as may be practicable in the circumstances in the Gazette and in at least two newspapers of national circulation while taking care to protect confidential information.

## **12. Procedural requirements of an investigation**

- (1) Except in special circumstances, the Agency shall conclude an anti-dumping investigation within twelve months of the initiation of the investigation and in any case not more than eighteen months after the initiation of the investigation.
- (2) Taking care to protect confidential information, the Agency shall provide the written text of the application as soon as an anti-dumping investigation is initiated to the known exporters of the investigated product and to the government of the export country or countries as the case may be, to interested parties upon their request and where the number of exporters of the investigated product is particularly high, to the trade association of the industry where the investigated product or a like product is manufactured or traded and to the government of the exporting country or countries.
- (3) An interested party in an anti-dumping investigation shall be given notice of the information which the Agency requires and reasonable opportunity to present to the Agency any evidence which that party considers relevant to the anti-dumping investigation.
- (4) After the initiation of an investigation, the Agency may send questionnaires to any person it believes has relevant information and shall give such persons thirty days to respond to the questionnaires and where a person who has received a questionnaire and after showing cause requests for an extension of time to respond to the questionnaire, the Agency shall grant such an extension of time.
- (5) During an investigation the Agency may request further information from interested parties and shall do so using supplementary questionnaires or written requests for clarifications or additional information and shall grant sufficient time for meaningful answers to be provided.
- (6) In order to verify information provided and, where necessary, to obtain further information, the Agency may conduct investigations outside Kenya but the Agency shall only do so after being permitted by the firms concerned, and notifying and being permitted by the country or countries where the investigation will take place and, taking care to protect confidential information, shall inform the firms concerned and the applicant or applicants of the results of the investigation.
- (7) The Agency may make a preliminary or final determination on the basis of the information available if during an investigation an interested party refuses to grant access to the Agency or otherwise does not provide the Agency with any information required by the Agency for the purposes of the investigation.
- (8) Despite sub-paragraph (7), the Agency may take due account of any difficulties experienced by an interested party, in particular any small company, in supplying information requested and may provide any assistance practicable or may extend any time period prescribed for the submission of given information as the case may be.
- (9) The Agency shall provide industrial users of the investigated product and representative consumer organizations if the product is commonly sold at the retail level an opportunity to provide relevant information on dumping, injury or causality during the course of the investigation.
- (10) This paragraph does not prevent the Agency from proceeding expeditiously when initiating an investigation, making a final determination, or applying provisional or final measures.

## **13. Period of data collection for investigations**

- (1) The Agency:
  - a. shall collect data during an anti-dumping investigation for at least six months of the period under investigation but for not more than twelve months and such period shall start as close to the date of the initiation of the investigation as is practicable;
  - b. may collect data in an anti-dumping investigation at the same time as it is collecting data regarding sales below cost of the investigated product in Kenya; and



- c. shall set, and inform any interested party of, the periods of the data collection, and also the dates for completing collection or submission of data and where such dates are set, inform any interested party in advance.

(2) In the specific case of injury to a domestic industry, the Agency shall collect data for at least three years of the period under investigation, unless a party from whom data is being gathered has operated for a lesser period, and shall also include the period of data collection for the investigation into dumping.

(3) When establishing the period during which data will be collected during an investigation the Agency may consider financial reporting practices of firms from whom such data will be sought that import the investigated product, the characteristics of the investigated product, including seasonality and cyclicity, and the existence of special orders or customized sales.

#### **14. Hearings**

(1) The Agency shall, upon the request of interested parties, schedule a date when the interested parties may be heard regarding any preliminary determination by the Agency and such hearing shall be held within thirty days of the making of the preliminary determination but in any case not more than sixty days before the making of a final determination.

(2) The Agency may schedule a hearing by considering the convenience of an interested party but where an interested party fails to attend a hearing such failure shall not prejudice the interests of such a party.

(3) Where an interested party wishes to attend a hearing scheduled by the Agency, such a party shall inform the Agency in writing at least seven days before the hearing of the person who shall represent it at the hearing and any witness who may testify on its behalf.

(4) The Agency shall appoint one of its officers to preside over a hearing and such officer shall be responsible for ensuring the confidentiality of the proceedings, that any interested party is afforded reasonable opportunity to participate in the hearing, and that a record of the proceedings is made and, taking care to protect confidential information, promptly made public.

(5) An interested party may be represented by a legal representative during the hearing and may, where justified, present any other relevant information orally during meetings with the Agency and the Agency shall keep a detailed record of the meetings and, taking care to protect confidential information, make this record available to the public.

#### **15. Confidential information**

(1) A party may request the Agency to classify information that the interested party has supplied as confidential and shall provide reasons for such a request and the Agency shall consider and determine the request and shall inform the interested party of its decision if it rejects the request.

(2) The Agency may request a party to provide a non-confidential summary of confidential information that the party has provided and the non-confidential summary shall provide sufficient detail to permit a reasonable understanding of the confidential information.

(3) In exceptional circumstances, a party may indicate that confidential information is not susceptible to summarisation and shall provide a statement of the reasons why summarisation is not possible.

(4) If the Agency concludes that a non-confidential summary of confidential information provided by a party does not provide sufficient detail to permit a reasonable understanding of the confidential information, the Agency may determine that the request to classify the information as confidential is not warranted.

(5) If the Agency finds that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the Agency may disregard such information unless it can be demonstrated to its satisfaction from appropriate sources that the information is correct.

## **16. Preliminary determination**

- (1) The Agency shall inform interested parties of the date when the Agency shall make a preliminary determination of dumping, injury and causal link and such interested parties may make written submissions at least fifteen days before the Agency makes the preliminary determination.
- (2) The Agency shall make a preliminary determination of dumping, injury, and causal link no earlier than sixty days and no later than one hundred and eighty days after the initiation of an investigation.
- (3) The Agency shall publish a notice of preliminary determination of dumping, injury and causal link and the notice shall set forth the findings and conclusions of the Agency and shall include:
  - a. the identities of the known exporters and producers of the investigated product;
  - b. a description of the investigated product including its Harmonized Tariff Classification Number;
  - c. the amount of the dumping margin and the basis for making such a determination, including the methodology used to determine normal value, export price and any adjustments made when comparing the two;
  - d. the factors that have led to the determinations of injury and causal link including information on factors other than dumped imports that have been taken into account; and
  - e. the provisional measures to be applied and the reasons why such provisional measures are necessary to prevent injury.
- (4) The Agency shall publish the notice in the Gazette and by advertisement in at least two newspapers of national circulation in Kenya and deliver the notice to the government of the export country and to the known interested party or parties.
- (5) Within fifteen days of the making of a preliminary determination and upon the request of exporters and producers, the Agency shall hold separate meetings with the exporters and producers to disclose and explain the dumping calculation methodology used to make the preliminary determination.

## **17. Provisional measures**

- (1) Provisional measures may be applied by the Cabinet Secretary only if:
  - a. the Agency has initiated an investigation in accordance with this Schedule, it has published a notice of such an investigation and any interested party has been given a reasonable opportunity to make submissions regarding the investigation;
  - b. the Agency has made a preliminary determination that proves dumping, injury and causal link affecting a domestic industry; and
  - c. the Agency has advised the Cabinet Secretary that the measures are necessary to prevent injury to the domestic industry during the investigation.
- (2) Provisional measures may take the form of provisional anti-dumping duties or a security that is not greater than the estimated margin of dumping and security shall be either a cash deposit or a bond.
- (3) Provisional measures shall not be applied sooner than sixty days from the date of the initiation of the investigation.
- (4) Provisional measures shall be applied for a period not exceeding six months.

(5) The Cabinet Secretary may extend the application of provisional measures by a period not exceeding nine months upon the request of exporters representing a significant percentage of the trade in the investigated product.

(6) The provisions on the imposition and collection of anti-dumping duties, with the necessary modifications, apply to this paragraph.

(7) Taking care to protect confidential information, the Cabinet Secretary shall publish in the Gazette the details of the provisional measures imposed and such notice shall state:

- a. the names of the exporters, or where this is impracticable, the exporting countries;
- b. a description of the investigated product including its Harmonized Tariff Classification Number;
- c. the margin of dumping established and the methodology used in the establishment and comparison of the export price and the normal value;
- d. any grounds relied on for the determination of injury to the domestic industry; and
- e. the main grounds for the preliminary determination.

### **18. Voluntary Price Undertakings**

(1) Proceedings may be suspended or terminated without the imposition of provisional measures or anti-dumping duties if the Agency is satisfied that the injurious effect of the dumping has been eliminated after the exporter of the investigated product gives a voluntary undertaking to revise its prices or ceases to export the investigated product to Kenya.

(2) The price increase may not be higher than required to eliminate the margin of dumping but it may be less than the margin of dumping if such increase is adequate to remove the injury to the domestic industry.

(3) The Agency may only seek or accept a price undertaking in the form of a revision in the export price of the commodity to eliminate the margin of dumping from an exporter of an investigated product if the Agency has made a preliminary determination of dumping, injury and causal link.

(4) The Agency may refuse to accept a price undertaking if it considers the acceptance as impractical, for example, if the number of actual or potential exporters is too great or for other reasons including general policy, and where the Agency refuses to accept a price undertaking it shall give an exporter reasons for such refusal and give the exporter an opportunity to comment on the refusal.

(5) Where the Agency has accepted a price undertaking from an exporter, the Agency may still complete the investigation if it so decides or upon the request of the exporter and if the Agency determines that:

- a. there is no dumping or injury, the price undertaking shall lapse; or
- b. there is no dumping or injury, and this is because of the price undertaking, the price undertaking shall be maintained for a reasonable period;
- c. the margin of dumping established and the methodology used in the establishment and comparison of the export price and the normal value;
- d. any grounds relied on for the determination of injury to the domestic industry; and
- e. the main grounds for the preliminary determination.

(6) An exporter may suggest a price undertaking to the Agency but an exporter shall not be compelled to give a price undertaking and the Agency shall not be prejudiced towards an exporter

who does not offer a price undertaking or accept an offer to make a price undertaking during an investigation.

(7) The Agency may require any exporter from whom a price undertaking has been accepted to periodically provide information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. exporter may suggest a price undertaking to the Agency but an exporter shall not be compelled to give a price undertaking and the Agency shall not be prejudiced towards an exporter who does not offer a price undertaking or accept an offer to make a price undertaking during an investigation.

(8) If an exporter breaches any of the terms of a price undertaking, the Agency may recommend to the Cabinet Secretary for the prompt application of provisional measures and the levying of duties may be on products exported to Kenya not more than ninety days before the application of such provisional measures, except that any such retroactive assessment shall not apply to products imported before the violation of the undertaking.

(9) Where the Agency accepts an undertaking, it shall publish the details of the undertaking in the Gazette and by advertisement in at least two newspapers of national circulation including the non-confidential details of the undertaking and the material grounds for accepting the price undertaking.

## **19. Final determination and calculation of dumping margin**

(1) Taking care to protect confidential information, the Agency shall make a final determination of dumping, injury, and causal link within one hundred and eighty days after making the preliminary determination based on the information obtained by the Agency during the course of the investigation.

(2) The Agency shall determine the margin of dumping for each known exporter or producer of the investigated product.

(3) Where the number of exporters, producers, importers, or types of products involved is so large as to make a determination impracticable, the Agency may limit its examination to a reasonable number of exporters, producers or importers, or products by using statistically valid samples, or to the largest percentage of the volume of the exports from the exporting country which can reasonably be investigated.

(4) Any selection of exporters, producers, importers or types of products may be chosen in consultation with the exporters, producers or importers concerned.

(5) In addition to sub-paragraphs (3) and (4), the Agency shall determine the individual margin of dumping for an exporter or producer not initially selected who submits the required information in time for the information to be considered during an investigation, but if the number of exporters or producers is so large that individual examinations will be unduly burdensome and prevent the timely completion of the investigation, the Agency shall not make such individual determinations of dumping margin.

(6) The Agency may decline to determine an individual dumping margin on the basis of a voluntary response and limit its examination to the exporters and producers in the sample.

## **20. Notification of final determination**

(1) The Agency shall inform all interested parties of its final determination and the main grounds for the decision to apply anti-dumping measures at least thirty days before the final determination to impose an anti-dumping measure is made.

(2) Taking care to protect confidential information, the Agency shall publish a notice of the final determination and the notice shall contain all relevant information including:

- a. the names of the known exporters and producers of the investigated product;

- b. a description of the investigated product including the Harmonized Tariff Classification Number of the investigated product;
  - c. the amount of the dumping margin, if any, and the basis for such determination, including the methodology used in determining normal value, export price, and any adjustments made in comparing the two;
  - d. the method of comparison between the export price and normal price and the explanation for the use of that method;
  - e. the grounds for not determining any individual margin of dumping where the Agency has declined to make such a determination;
  - f. the grounds relied on to determine injury and causal link, including grounds other than dumped imports;
  - g. any other grounds for the final determination;
  - h. the grounds for accepting or rejecting the relevant arguments or claims of exporters or importers;
  - i. the amount of anti-dumping duty to be imposed, including whether a duty less than the dumping margin would be adequate to remove the injury to the domestic industry; and
  - j. where final anti-dumping duties are to be collected with regard to the imports, which provisional measures were applied and the grounds for the decision.
- (3) The Agency shall publish the notice in the Gazette and by advertisement in at least two daily newspapers of national circulation.
- (4) The notice shall be forwarded to each government of a country whose products are subject to the determination and to other known interested parties.

## **21. Imposition and collection of Anti- Dumping Duties**

- (1) Where all the requirements for the imposition of an anti-dumping duty have been met, the Cabinet Secretary when deciding whether or not to impose an anti-dumping duty shall:
- a. examine whether the imposition of an anti-dumping measure is in the national interest; and
  - b. upon the recommendation of the Agency, consider whether a duty less than the full dumping margin is adequate to remove the injury to the domestic industry.
- (2) When determining what the national interest is, the Cabinet Secretary shall consider, in addition to the interests of the domestic industry, the domestic competition for the investigated product, the needs of industrial users of the investigated product and the interest of final consumers where applicable.
- (3) An anti-dumping duty shall be an *ad valorem* duty or any other specific duty and shall be collected on a non-discriminatory basis from all sources found to be responsible for dumping and causing injury in Kenya but not from those sources from whom the Agency has accepted price undertakings.
- (4) Where the Cabinet Secretary imposes an anti-dumping duty, the Agency shall name the supplier of the investigated product.
- (5) Despite sub-paragraph (4), where it is impracticable to name all the exporters of the investigated product, the Agency may name the exporting country concerned and if several exporters from more than one country are involved, the Agency may name either all the exporters involved, or where this is impracticable, all the exporting countries involved.

(6) An anti-dumping duty shall not exceed the margin of dumping as established under this Schedule.

(7) When the Agency has limited its examination in accordance with paragraph 19, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

- a. the weighed average margin of dumping established with respect to the selected exporters or producers; or
- b. where an anti-dumping duty is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually but the Agency shall disregard any zero and *de minimis* margins determined under this Schedule.

(8) Where the amount of the anti-dumping duty is assessed retroactively under paragraph 22:

- a. the determination of the final liability for payment of the anti-dumping duty shall take place as soon as possible, within twelve months, and in any case shall not exceed eighteen months after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made;
- b. any refund shall be made within ninety days of the determination of final liability; and
- c. where a refund is not made within ninety days, the Kenya Revenue Authority shall provide an explanation if so requested.

(9) Where the amount of the anti-dumping duty is assessed prospectively:

- a. provision shall be made for a prompt refund under the Act, upon request of any duty paid in excess of the margin of dumping;
- b. a refund of any duty paid in excess of the actual margin of dumping shall be made within one year, and in any case not later than eighteen months, after the date on which a request for a refund has been made by an importer of the product subject to the anti-dumping duty; and
- c. the refund authorized shall be made by the Kenya Revenue Authority within ninety days of the decision made by the Agency.

(10) In determining the amount of the reimbursement to be made under the Act, and on the recommendation of the Agency, where the export price is determined under paragraph 4, the Agency shall take into account any change in normal value, costs incurred between importation and resale, and any change in the resale price, and shall calculate the export price without deducting the amount of anti-dumping duty paid.

## **22. Retroactivity**

(1) Any provisional measure or anti-dumping duty imposed by the Cabinet Secretary may only be imposed against products imported after the publication of the notice of final determination of an investigation or review.

(2) The Cabinet Secretary may levy a retroactive anti-dumping duty upon the recommendation of the Agency where there has been a final determination of injury or threat of injury and if the determination of the injury or threat of injury would have led to the imposition of provisional measures for the period when the product was imported.

(3) If the final anti-dumping duty levied is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected if the Agency so recommends, but if the final anti-dumping duty is lower than the provisional duty paid or payable or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

(4) Where a determination of threat of injury or material retardation is made, but no injury has yet occurred, a final anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of any provisional measures shall be refunded and any bonds released promptly upon the recommendation of the Agency.

(5) Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released promptly upon the recommendation of the Agency.

(6) A final anti-dumping duty may be levied upon the recommendation of the Agency on products which were imported for consumption not more than ninety days prior to the date of the application of the provisional measures, when the Agency determines with respect to the investigated product that:

- a. there is a history of dumping which has caused injury or that the importer is, or should be, aware that the exporter practices dumping and that such dumping may cause injury; and
- b. taking into account the timing and the volume of the dumped imports and other circumstances including the rapid build-up of inventories of the dumped product, the injury is caused by massive dumped imports of a product in a relatively short time which is likely to seriously undermine the remedial effect of the final anti-dumping duty to be applied, but the final anti-dumping duty shall not be applied unless the importers concerned have been given an opportunity to comment.

(7) Anti-dumping duties shall not be levied retroactively upon the direction from the Cabinet Secretary on products imported for consumption prior to the date of initiation of an anti-dumping investigation.

(8) The Kenya Revenue Authority, upon the recommendation of the Agency, may, after the initiation of an anti-dumping investigation, take such measures such as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively once the Agency has sufficient evidence that the conditions set forth in sub-paragraph (6) have been satisfied.

#### **PART IV—DURATION AND REVIEW OF ANTI-DUMPING DUTIES AND VOLUNTARY PRICE UNDERTAKINGS**

##### **23. General requirements**

(1) An anti-dumping duty shall be levied until such time the injury caused by any dumping of a product has been counteracted.

(2) Any review shall be carried out expeditiously and shall be concluded within twelve months of the date of initiation of the review.

(3) The provisions of this paragraph shall apply to any voluntary price undertaking accepted under paragraph 18.

(4) The Agency shall publish a notice of impending expiry of any anti-dumping measures in the Gazette and by advertisement in at least two newspapers of national circulation no less than ninety days before the date of expiry of an anti-dumping measure.

(5) The Agency shall publish a public notice in the Gazette and by advertisement in at least two newspapers of national circulation of the initiation of any review carried out by the Agency.

##### **24. Review for change of circumstances**

(1) The Agency shall review the need for the continued imposition of an anti-dumping duty on its own initiative where necessary or upon request by any interested party who submits information substantiating the need for a review.



(2) An interested party may request the Agency to examine whether the continued imposition of an anti-dumping duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty was removed or varied, or both.

(3) If after a review under this paragraph, the Agency determines that the anti-dumping duty is no longer necessary, it shall request the Kenya Revenue Authority to cease its collection.

## **25. Sunset reviews**

(1) Despite the provisions of paragraphs 24 or 26, the Agency may request the Kenya Revenue Authority to cease the collection of a final anti-dumping duty not later than five years from the date of the imposition of the anti-dumping duty or from the date of the latest review under paragraph 26.

(2) If the Agency initiates a review before the period provided for under sub-paragraph (1) on its own motion or upon the request made by or on behalf of the domestic industry and the review is initiated within a reasonable time and the Agency determines that the cessation of the collection of the anti-dumping duty would lead to continuation or recurrence of dumping and injury, it shall not request the Kenya Revenue Authority to cease collecting the anti-dumping duty.

(3) The Kenya Revenue Authority shall continue to collect an anti-dumping duty while a review is being conducted by the Agency.

## **26. New shipper reviews**

(1) If a product is subject to anti-dumping duties, the Agency shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers from an exporting country who have not exported the product into Kenya during the period of the investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties imposed on a product.

(2) Such a review shall be initiated within thirty days following receipt of the application by the producer or exporter concerned and shall be carried expeditiously.

(3) Anti-dumping duties shall not be levied on imports from such exporters or producers while the review is being carried out but the Agency may recommend that the Kenya Revenue Authority obtain guarantees in the amount of the residual anti-dumping duty rate determined under 22 to ensure that where such a review results in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

## **PART V—DETERMINATION OF SUBSIDIZATION, INJURY AND CAUSAL LINK**

### **27. Subsidies**

(1) For the purpose of this paragraph, a subsidy is deemed to exist if there is a financial contribution by a government or any public body within the territory of a foreign country, including:

- a. a government practice that involves a direct transfer of funds, for example, grants, loans, or equity infusion and potential direct transfers of funds or liabilities, for example, loan guarantees;
- b. where government revenue that is otherwise due is foregone or not collected, for example, fiscal incentives such as tax credits;
- c. where a government provides goods or services other than general infrastructure, or purchases goods; and
- d. where a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in this paragraph



which would normally be vested in the government and the practice does not materially differ from practices normally followed by that government.

(2) subsidy is also deemed to exist when there is any form of price support which increases exports of any product from or reduces imports of any product into the territory of the country offering such support and a benefit is thereby conferred as defined in Article XVI of GATT 1994.

(3) A subsidy is also deemed to exist when there is any form of income support which increases exports of any product from or reduces imports of any product into the territory of the country offering such support and a benefit is thereby conferred as defined in Article XVI of GATT 1994.

(4) In accordance with the provisions of Article XVI of GATT 1994, the WTO SCM Agreement and this Schedule, the exemption of an exported product from duties or taxes levied on the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

(5) A subsidy shall be subject to the provisions of this Schedule only if such a subsidy is specific in accordance with paragraph 28.

## **28. Subsidy should be specific**

(1) For the purposes of this paragraph "certain enterprises" means an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority.

(2) A subsidy is specific to certain enterprises if the following principles apply:

- a. the granting authority, or the legislation under which the granting authority operates, explicitly limits access to a subsidy to certain enterprises;
- b. specificity does not exist if the granting authority, or the legislation under which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. "Objective criteria or conditions" means criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as the number of employees or the size of an enterprise; and
- c. despite the appearance of non-specificity there are factors to believe that the subsidy is specific including the use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. Information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall also be considered. Account shall also be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

(3) Any subsidy that is limited to certain enterprises located within a designated geographical region, including an export processing zone or free trade zone, within the jurisdiction of the granting authority, shall be deemed specific. In the case of products originating in an export processing or free trade zone located within the jurisdiction of a Least Developed Country, these shall not be deemed to be a specific subsidy that is actionable so long as the relevant WTO waiver remains in force.

(4) The setting or review of generally applicable tax rates set by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Schedule.

(5) Any subsidy falling under the provisions of paragraph 29 shall be deemed to be specific.

(6) Any determination of specificity under the provisions of this paragraph shall be established by positive evidence.

## 29. Prohibited subsidies

(1) Except as may be expressly permitted by the WTO Agreement on Agriculture, the following subsidies are prohibited:

- a. subsidies contingent upon export performance and this standard is met when it is shown that the granting of a subsidy is tied to actual or anticipated exportation or export earnings but the mere grant of a subsidy to enterprises which export is not for that reason alone to be considered an export subsidy within the meaning of this provision; and
- b. subsidies contingent upon the use of domestic goods instead of imported goods.

(2) The subsidy described in sub-paragraph (1)(a) may be permitted in the case of products originating in a country designated by the United Nations as a Least Developed Country.

## 30. Calculation of the amount of a subsidy in terms of the benefit to the recipient

(1) The amount of the countervailable subsidy received by the recipient shall be calculated in terms of the benefit conferred on the recipient.

(2) Where the recipient of a countervailable subsidy is a state-owned enterprise which is subsequently privatized, it is presumed that the privatization extinguishes the benefit if the privatization is at arm's length and for fair market value.

(3) In calculating the total rate of subsidization of the investigated product for a given foreign producer or exporter, a rate of subsidization of that product for the producer or exporter shall be calculated for each investigated subsidy or subsidy programme, and the sum of the resulting per-subsidy or per-programme rates shall be the total rate of subsidization of the product for that producer or exporter.

(4) Any calculation of the total *ad valorem* subsidization of a product exceeding the relevant *de minimis* percentage shall be calculated in accordance with sub-paragraph (11) in cases where serious prejudice arises as a result of the following:

- a. the effect of the subsidy is to displace or impede the importation of a like product originating in Kenya into the market of the subsidizing foreign country;
- b. the effect of the subsidy is to displace or impede the exports of a like product originating in Kenya into the market of a foreign country;
- c. the effect of the subsidy is a significant price undercutting by the subsidized product in Kenya as compared with the price of a like product made in Kenya, or significant price suppression, price depression or lost sales in Kenya; effect of the subsidy is to displace or impede the exports of a like product originating in Kenya into the market of a foreign country;
- d. the effect of the subsidy is an increase in the world market share of the subsidizing country in a particular subsidized primary product or commodity unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when the subsidies have been granted.

(5) To calculate the rate of subsidization of an investigated product for a foreign producer or exporter from a given investigated subsidy or subsidy programme, the Agency shall:

- a. determine the total subsidy amount received by that producer or exporter from the subsidy or programme in question, and the date or dates of receipt thereof;
- b. determine the portion of the total subsidy amount that is attributable to the subsidy period of investigation;

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- c. determine the total value during the subsidy period of investigation of the relevant sales of the foreign producer or exporter to which the subsidy period of investigation amount can be attributed; and
  - d. calculate the *ad valorem* rate of subsidization from the subsidy or programme by dividing the subsidy period of investigation amount by the relevant sales value identified in the third step, and multiplying the result by one hundred.
- (6) The Agency shall determine an individual amount of subsidization for each known foreign producer or exporter of the investigated product.
- (7) Where the number of exporters, producers, importers or types of products involved is so large as to make it impracticable to determine an individual subsidization amount for each known foreign producer or exporter concerned of the investigated product, the Agency may limit its examination to a reasonable number of interested parties or investigated products by using statistically valid samples based on the data available to the Agency at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.
- (8) Any selection of exporters, producers, importers or types of products made under this paragraph shall be made after consultation with the exporters, producers or importers concerned.
- (9) Where the Agency has limited its examination as provided for in sub-paragraph (5), the Agency shall determine an individual subsidization amount for any foreign producer or exporter who voluntarily submits the necessary information in time for that information to be considered during the course of the investigation.
- (10) Where the number of exporters or producers is so large that individual examinations would be unduly burdensome and prevent the timely completion of an investigation, the Agency may decline to determine individual subsidization amounts on the basis of such voluntary responses and limit their examination to the exporters and producers in the sample. The number of exporters, producers, importers or types of products involved is so large as to make it impracticable to determine an individual subsidization amount for each known foreign producer or exporter concerned of the investigated product, the Agency may limit its examination to a reasonable number of interested parties or investigated products by using statistically valid samples based on the data available to the Agency at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.
- (11) The total subsidy amount, calculated in terms of the benefit to the recipient, shall be determined by the Agency on the basis of an appropriate methodology corresponding to the form of subsidy involved.
- (12) In determining the total subsidy amount received by a foreign producer or exporter or the total *ad valorem* subsidization rate of the product under investigation the Agency shall deduct the following items where appropriate:
- a. any application fee or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy; and
  - b. export taxes, duties or other charges levied on the export of the product to Kenya specifically intended to offset the subsidy or subsidies.
- (13) Any method used by the Agency to calculate the benefit conferred to the recipient shall be transparent and adequately explained and shall be consistent with the following guidelines:
- a. a government's provision of equity capital shall not be considered as conferring a benefit unless the investment decision can be regarded as inconsistent with the usual investment practice of private investors in the territory of that country;
  - b. a loan by a government shall not be considered as conferring a benefit unless there is a difference between the amount that the firm receiving the loan pays on the government loan in interest and any other charges and costs and the amount the firm would pay on a

comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

- c. a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan without the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees; and
- d. the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration and adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision including price, quality, availability, marketability, transportation and other condition of purchase or sale.

(14) A calculation of the amount of subsidy shall be done by determining the cost of the subsidy to the granting government.

(15) Except as provided in subparagraphs (16), (17) and (18), in determining if the overall rate of subsidization exceeds 5% of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's sales in the period of twelve months preceding the date that the subsidy was granted and for which the sales data is available. total subsidy amount, calculated in terms of the benefit to the recipient, shall be determined by the Agency on the basis of an appropriate methodology corresponding to the form of subsidy involved.

(16) If a recipient firm is a start-up firm, serious prejudice is deemed to exist if the overall rate of subsidization exceeds 15% of the total funds invested in the start-up firm and the start-up period does not exceed the first twelve months of production and includes situations where financial commitments for product development or construction of facilities have been made even though production has not yet begun.

(17) If a recipient firm is located in a country with an inflationary economy, the value of the product shall be calculated as the recipient firm's total sales or if the subsidy is tied, the sales of the related product for the period of twelve months preceding the date that the subsidy was granted.

(18) The subsidies given under different programmes and by different authorities in the territory of a foreign country shall be aggregated to determine the overall rate of subsidization in a given year.

### **31. Determination of the subsidy amount attributable to the period of investigation**

(1) The subsidy amount attributable to the subsidy period of investigation from an investigated subsidy or subsidy programme is the total subsidy amount received by the recipient from that subsidy or subsidy programme during that period.

(2) Where the total subsidy amounts are allocated over a multi-year period, the subsidy period of investigation amount shall be the portion of the total subsidy amount of benefits allocated to that period.

(3) Where the Agency finds that a particular subsidy has one or more of the characteristics of an "allocable subsidy", the subsidy amount may be allocated over the average useful life of the recipient's operational assets.

(4) Subsidies to be so allocated under subparagraph (3), include subsidies that:

- a. have been provided for the purpose of purchasing fixed assets;
- b. are non-recurring;
- c. are oriented toward future production; and

d. are transferred forward in the recipient's accounting records.

(5) In the case of small value grants not exceeding 0.5% of the recipient firm's relevant sales, the subsidy period of investigation shall be attributed in full to the year of receipt.

(6) The Agency shall determine the subsidy amount to be attributed to the subsidy period of investigation from an allocable subsidy by dividing the total subsidy amount by the number of years of average useful life of the recipient's operational assets, that is, the allocation period" and where the number of years between the date of receipt of the subsidy and the subsidy period of investigation is greater than the average useful life of the assets, no subsidy amount shall be attributed to the subsidy period of investigation.

(7) The allocation prescribed in sub-paragraphs (3), (4), (5), and (6) above shall be performed by dividing the subsidy amount over the number of years in the allocation period and attributing the resulting amount to the subsidy period of investigation.

(8) In the case of subsidies provided through long-term loans, that is, with maturity of longer than one year, the allocation period shall be the life of the loan.

(9) Except as otherwise provided in this Schedule, the date on which the subsidy period of investigation amount from an allocable subsidy shall be deemed to have been received shall be the anniversary date of the original date of receipt of the subsidy.

(10) For purposes of determining the allocation period for a given foreign producer or exporter, the Agency shall normally calculate the average useful life of that producer's or exporter's assets as the ratio of the total average book value of its physical, depreciable assets to its average annual depreciation expense over the most recent relevant multi-year period. In selecting a data source for the calculation of the average useful life of assets, accounting data shall be preferred to tax depreciation data.

(11) Where the Agency is satisfied on the basis of positive evidence that a subsidy is tied to the purchase of a particular asset, the Agency may use the average useful life of the asset to which the subsidy is tied as the allocation period of that subsidy.

### **32. Determination of the sales to which the subsidy Period of Investigation (POI) amount is attributable**

(1) The sales to which the period of investigation subsidy amount shall be attributed are the recipient's total sales during that period, unless the Agency proves that a subsidy amount received by a foreign producer or exporter is tied to or designated to benefit a particular portion of the recipient's products or sales, for example, production or sales of a particular product for a particular market.

(2) Where the Agency proves that a subsidy amount received by a foreign producer or exporter is tied to or designated to benefit a particular portion of the recipient's production or sales, the Agency shall attribute the subsidy amount to the value of the relevant corresponding sales of the recipient during the subsidy period of investigation. In identifying such relevant corresponding sales the Agency shall apply the following guidelines:

- a. in the case of subsidies tied to the recipient's overall exports or export efforts, the relevant sales for attribution of the subsidy amount shall be the recipient's total export sales value during the subsidy period of investigation;
- b. in the case of subsidies tied to production or sale of a particular product, the relevant sales for attribution of the subsidy amount shall be the recipient's total sales value of that product during the subsidy period of investigation;
- c. in the case of subsidies tied to a particular market the relevant sales for attribution of the subsidy amount shall be the recipient's total sales value to that market during the subsidy period of investigation; and

- d. in the case of subsidies tied exclusively to production or sale of products, or for markets, other than exports of the investigated product to Kenya, no subsidy amount shall be attributed to those exports, that is, no amount of such subsidies shall be countervailed.

### 33. Determination of the Total Rate of Subsidization of the Investigated Product

(1) The Agency shall calculate the *ad valorem* rate of subsidization for a foreign producer or exporter of the investigated product from a given subsidy or subsidy programme by dividing the subsidy period of investigation amount determined by the appropriate value of sales determined under paragraph 30 and multiplying the result by one hundred.

2) The Agency shall calculate the total *ad valorem* subsidy rate for a foreign producer or exporter of the investigated product by summing the *ad valorem* subsidy rates calculated for that producer or exporter for each of the subsidies or subsidy programmes investigated.

(3) In the case of allocable subsidies in high-inflation countries, the Agency may adjust the *ad valorem* subsidy rate for inflation and if such an adjustment is made it shall be performed by converting both the total subsidy amount and the value of sales for the period of investigation into the same non-inflationary currency using the following exchange rates:

- a. for the total subsidy amount, the exchange rate shall be the rate prevailing on the date when the subsidy is deemed to have been received;
- b. for the value of sales for the period of investigation, the exchange rate shall be the average rate for the subsidy period of investigation; and
- c. in cases where there are substantial variations in sales volume over the period of investigation this average rate may be weighted by the sales volume in appropriate sub-periods of the period of investigation.

### 34. Calculation methodology and guidelines for certain firms of subsidies

(1) In the case of a grant, no portion of the value of which is repaid to the government, the total subsidy amount shall be the amount of the grant, determined under paragraph 30 but the Agency shall normally consider the date of receipt of the subsidy to be the date of receipt of the grant and the Agency shall determine the amount of a grant that is attributable to the subsidy period of investigation under paragraph 31.

(2) In the case of an assumption or forgiveness by the government of a firm's debt obligation, a benefit exists equal to the amount of principal or interest that the government has assumed or forgiven, but if the government receives shares in a firm in return for eliminating or reducing the firm's debt obligations, the Agency shall determine the existence of a benefit in accordance with the provisions in paragraph 30 and the Agency shall normally consider the date of receipt of the subsidy to be the date on which the debt or interest was assumed or forgiven.

(3) The exemption, remission or forgiveness of direct taxes constitutes a subsidy in the amount of the difference between the amount of taxes exempted, remitted or not collected and the amount that the company otherwise would have paid without the exemption, remission or forgiveness but the Agency shall consider the date of receipt of the subsidy to be the date on which the taxes exempted, rebated or forgiven otherwise would have been due and the Agency shall expend the amount of the subsidy in accordance with the provisions of paragraph 31.

(4) In the case of a deferral of taxes (direct taxes, indirect taxes, import duties and charges, and similar fiscal charges) the Agency shall consider such tax deferral as a government loan in the amount of the taxes deferred, and shall calculate the amount of any resulting subsidy in accordance with the provisions of paragraph 30, depending on whether the deferral is for less than one year or for one year or more but tax deferral shall not be treated as conferring a subsidy if the government collects an appropriate commercial rate of interest on the deferred amount.

(5) In the case of a full or partial exemption from indirect taxes or import charges, the Agency shall determine the amount of any resulting subsidy as the difference between the amount of indirect taxes or import charges paid by a firm and the amount that would otherwise have been paid by the

firm without the exemption but the Agency shall consider the date of receipt of the subsidy to be the date that the firm would have had to pay the exempted tax or charge and the Agency shall expense the amount of the subsidy in accordance with the provisions of paragraph 31.

(6) In the case of government assistance to workers, a benefit shall be deemed to exist to the extent that the assistance relieves the employing firm of an obligation that it otherwise would incur but the Agency shall consider the date of receipt of the subsidy to be the date on which the government payment is made that relieves the firm of the relevant obligation and the Agency shall expend the amount of the subsidy in accordance with the provisions of paragraph 31.

(7) In the case of the exemption or remission of indirect taxes, other than prior-stage cumulative indirect taxes, in respect of the production and distribution of an exported product, the Agency shall consider that a subsidy exists only to the extent that it determines that the amount of the exemption or remission exceeds the amount levied with respect to the production and distribution of the like product when sold for domestic consumption but the Agency shall consider the date of receipt of the subsidy to be the date on which the excessive amount was remitted or the exempted taxes were otherwise due and the Agency shall expend the amount of the subsidy in accordance with the provisions of paragraph 31.

(8) In the case of the exemption or remission of prior-stage cumulative indirect taxes in respect of an exported product, the Agency shall consider that a subsidy exists only to the extent that it determines that the amount of the exemption or remission exceeds the amount of such taxes levied on inputs consumed in the production process, making normal allowance for waste following the provisions of Part IV to this Schedule, but the Agency shall consider the date of receipt of the subsidy to be the date on which the excessive amount was remitted or the exempted taxes were otherwise due and the Agency shall dispense with the amount of the subsidy in accordance with the provisions of paragraph 31.

(9) In the case of the remission or drawback of import charges in respect of an exported product, the Agency shall consider that a subsidy exists only to the extent that it determines that the amount of the remission or drawback exceeds the amount of import charges on imported inputs that are consumed in the production process, making normal allowance for waste and in determining the amount of the subsidy in the case of remission or drawback of import charges in respect of inputs consumed in the production of an exported product, the Agency shall take into account the provisions in Part IV to this Schedule.

(10) In the case of remission or drawback of import charges under subparagraph (9) in respect of inputs consumed in the production of an exported product, the Agency shall consider the date of receipt of the subsidy to be the date on which the excessive amount was remitted or drawn back and the Agency shall expense the amount of the subsidy in accordance with the provisions of paragraph 31.

(11) The provisions of sub-paragraph (9) shall apply to cases of substitution drawback, where a firm uses a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them and in such a case the Agency shall only deem that a subsidy exists when:

- a. the import and the corresponding export operations did not both take place within a reasonable time period, of not more than two years; or
- b. the amount drawn back exceeds the amount of the import charges levied initially on the imported inputs for which drawback is claimed.

### **35. Determination of Injury**

(1) A determination of injury shall be based on positive evidence and involve an objective examination of:

- a. the volume of the subsidized imports;
- b. the effect of the subsidized imports on prices in the domestic market for like products; and



- c. the consequent impact of these imports on the domestic producers of such products.
- (2) With regard to the volume of the subsidized imports, the Agency shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in Kenya.
- (3) With regard to the effect of the subsidized import on prices, the Agency shall consider whether:
- a. there has been a significant price undercutting by the subsidized imports as compared to the price of a like product in Kenya; or
  - b. the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree.
- (4) Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the Agency may cumulatively assess the effects of such imports only if it determines that:
- a. the amount of subsidization established in relation to the imports from each country is more than *de minimis* and the volume of imports from each country is not *de minimis*; and
  - b. a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.
- (5) The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including:
- a. actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity;
  - b. factors affecting domestic prices;
  - c. actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments; and
  - d. in the case of agriculture, whether there has been an increased burden on government support programmes.
- (6) The Agency shall assess the effect of the subsidized imports in relation to the domestic production of the domestic like product when available data permits the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits but if such separate identification of that production is not possible, the Investigations Authority shall assess the effects of the subsidized imports by the examination of the production of the narrowest group or range of products, which includes the domestic like product, for which the necessary information can be provided.

### **36. Threat of Injury**

- (1) A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility and the change in circumstances which would create a situation in which the subsidy would cause injury shall be clearly foreseen and imminent.
- (2) In making a determination regarding the existence of a threat of material injury, the factors the Agency should consider include:
- a. the nature of the subsidy in question and the trade effects likely to arise as a result;
  - b. a significant rate of increase of subsidized imports into Kenya indicating the likelihood of substantially increased importation;



- c. sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports into the market within the customs territory of Kenya, taking into account the availability of other export markets to absorb any additional exports;
- d. whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- e. inventories of the product being investigated.

(3) With respect to cases where injury is threatened by subsidized imports, the application of countervailing measures shall be considered and decided with extra caution.

### **37. Causality**

(1) It shall be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Schedule and the demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the Agency.

(2) The Agency shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors shall not be attributed to the subsidized imports including the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry.

## **PART VI—INITIATION, CONDUCT, AND CONCLUSION OF A SUBSIDIZATION INVESTMENT**

### **38. Initiation of an Investigation**

(1) Except as provided in sub-paragraph (11), an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated when a written application by or on behalf of the domestic industry is made to the Agency.

(2) An application shall include sufficient evidence of the existence of:

- a. a subsidy and, where possible, the amount of the subsidy;
- b. injury; and
- c. a causal link between the subsidized imports and the alleged injury.

(3) An investigation shall not be initiated if the written application consists only of a simple assertion that is not substantiated by relevant evidence.

(4) The application shall contain such information as is reasonably available to the applicant on:

- a. the identity of the applicant and contact information;
- b. the domestic industry by or on behalf of which the application is being made, including the names and contact information of all other known producers in Kenya;
- c. the degree of domestic industry support for the application, including the total volume and value of the domestic like-product, and the volume and value of domestic production of the like-product accounted by the applicant and by each producer in Kenya;
- d. a complete description of the subsidized product, the name of the country of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product;

- e. a complete description of the investigated product, including its technical characteristics and uses of the product and its current tariff classification number;
- f. the country in which the allegedly subsidized product is manufactured or produced and if it is imported from a country other than the country of manufacture or production, the intermediate country from which the product is imported;
- g. the name and address of each person the applicant believes sells the allegedly subsidized product and the proportion of total exports to Kenya that person accounted for during the most recent twelve-month period; and
- h. evidence that the alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies including information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry.

(6) An investigation shall not be initiated unless the Agency has determined that the application has been made by or on behalf of the domestic industry.

Provided that the application is made by or on behalf of the domestic industry if it is supported by domestic producers whose collective output constitutes more than 50% of the total production of the like product.

(7) An investigation shall not be initiated when domestic producers expressly supporting the application account for less than 25% of total production of the like product produced by the domestic industry.

(8) The evidence of both subsidy and injury shall be considered simultaneously:

- a. in the decision whether or not to initiate an investigation; and
- b. thereafter, during the course of the investigation starting on a date not later than the earliest date on which provisional measures may be applied.

(9) In cases where products are not imported directly from the country of origin but are exported to Kenya from an intermediate country, the provisions of this paragraph shall be fully applicable and the transaction shall, for the purposes of this paragraph, be regarded as having taken place between the country of origin and Kenya.

(10) The Agency shall decide whether to initiate a countervailing-measure investigation within forty-five days of the date of receipt of the written application, but where the application involves complex issues, or if the Agency has sought additional information from the applicant, a decision to initiate a countervailing-measure investigation may be made within sixty days.

(11) Where, under special circumstances, the Agency decides to initiate an investigation on its own motion it shall proceed only if it has sufficient evidence of the existence of a subsidy, injury and causal link, to justify the initiation of an investigation.

### **39. Public notice of the initiation of an investigation**

(1) Once the Agency has made a decision to initiate an investigation, it may publish a notice of its decision by publication in the Gazette and by advertisement in at least two newspapers of national circulation.

(2) The Agency shall notify the exporters, importers and representative associations of importers or exporters known to the Agency as well as the government of any country where the investigated product is exported from, the complainants, and other interested parties known to the Agency of its decision to initiate an investigation.

(3) The notification and public notice of the initiation of an investigation shall contain adequate information on the following:

- a. the name of the country of export, and if different, the country of origin, of the investigated product;
- b. a full description of the investigated product, including the technical characteristics and uses of the product and its Harmonized Tariff Classification Number;
- c. a description of the subsidy practice to be investigated;
- d. a summary of the factors on which the allegations of injury and causal link are based;
- e. the address where information and comments may be submitted;
- f. the date of initiation of the investigation; and
- g. the proposed schedule for the investigation.

(4) An initiation of an investigation shall take effect only on or after the date that the public notice is published as may be provided in the notice.

#### 40. Termination of an investigation

(1) An application shall be rejected and an investigation terminated as soon as the Agency is satisfied there is insufficient evidence of either subsidization or of injury to justify proceeding with the case.

(2) Any countervailing duty investigation shall be terminated as soon as the Agency determines that the amount of a subsidy is *de minimis*, or where the volume of subsidized imports or the injury, is negligible.

(3) The amount of the subsidy shall be considered *de minimis* if the subsidy is less than 1% *ad valorem*.

(4) In the case of subsidies provided by a developing country, a subsidy shall be considered *de minimis* if it does not exceed 2% *ad valorem*.

(5) Where the investigated product is being imported from one or more developed countries, imports are considered to be negligible if the volume of the investigated product from a developed country represents less than 4% of the total imports of the like product into Kenya.

(6) Where the investigated product is being imported from one or more WTO member developing states, imports are considered to be *de minimis* if the volume of the imports from a developing country represents less than 4% of the total imports of the like product into Kenya, unless imports from developing countries whose individual shares of total imports represent less than 4% collectively account for more than 9% of the total imports of the like product into Kenya.

(7) Taking into account the protection of confidential information and where it does not impose any measures, the Agency shall issue a public notice of the conclusion of an investigation which shall set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the Agency including those matters which have led to arguments being accepted or rejected.

#### 41. Consultations

(1) Promptly after an application to initiate an investigation is accepted by the Agency and in any event before the initiation of any investigation, the Agency shall invite the government of the country where the investigated product is exported for consultations regarding the application to find a mutually agreed upon solution.

(2) During an investigation, the government of a country from where the investigated product is exported shall be afforded a reasonable opportunity to provide additional information to find a mutually beneficial solution.

(3) The Cabinet Secretary, on the recommendation of the Agency, may impose provisional or final measures during an investigation despite any ongoing consultations with a country from which the investigated product is exported.

(4) The Agency may give access to non-confidential evidence or the non-confidential summary of confidential information to representatives of a country from which the investigated product is imported upon a written request by the representatives.

#### **42. Procedural requirements of an investigation**

(1) An investigation shall be concluded within twelve months and in any case not more than eighteen months after its initiation.

(2) Save where the protection of confidential information is required, the Agency shall provide a copy of the application to initiate an investigation to any known exporter or producer of an investigated product, or any interested party upon request, or to the representatives of any government of a country from which the investigated product is exported and where the number of exporters or producers of the investigated product is large, the Agency may provide a copy of the application to the relevant trade association or to the representatives of the country from which the investigated product is exported.

(3) On the initiation of an investigation, the Agency shall send questionnaires to any person it believes to have information relevant to the investigation, including known domestic producers, importers, exporters, foreign producers and the government of any country from which the investigated product is exported and a party that receives a questionnaire shall respond to it within thirty days of receipt but a questionnaire will be deemed to have been received on the seventh day from when the Agency sends it to a party.

(4) The Agency may extend the deadline for responding to the questionnaire where it is necessary or practicable upon request by a party.

(5) The Agency may send supplementary questionnaires to the known domestic producers, importers, exporters, foreign producers and the governments of any country from which the investigated product is exported for additional information. Where the Agency asks for additional information, it shall give the parties reasonable time to respond to the supplementary questionnaires.

(6) The Agency shall base its assessments of subsidization, injury and causal link on data relating to defined periods, which shall be the periods for which information is requested in its questionnaires:

- a. the investigation period for the determination of subsidization, that is, the "subsidy Period of Investigation", shall be the most recently completed calendar or fiscal year, as relevant, preceding the initiation of the investigation;
- b. the investigation period for injury, that is, the "injury Period of Investigation", shall cover a period of three years, but the Agency may select a shorter or longer period if it is deemed appropriate in light of available information regarding the domestic industry and the investigated product; or
- c. where different periods from those specified as the norms in sub-paragraphs (6a.) and (6b.) above are used, the Agency shall include in its published report on the investigation, as provided for in this Schedule, an explanation of the reasons therefore.

(7) Where any foreign government or interested party refuses access to, or otherwise does not provide required information within a reasonable period or significantly impedes the investigation, preliminary and final determinations may be made without such information.

(8) The Agency shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance where practicable.

(9) Except as provided in sub-paragraph (8), the Agency shall satisfy itself as to the accuracy of information provided by interested parties during the investigation or obtain further details by conducting investigations outside Kenya but only if it obtains the agreement of the firms concerned and if it notifies the government of the country in question and if that government does not object.

(10) The Agency shall give a reasonable opportunity to industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation.

#### **43. Hearings**

(1) An interested party may request the Agency to hold a hearing after the publication of a preliminary determination not more than thirty days after the publication of the determination and the hearing may only be held not later than sixty days before the proposed date of the publication of a final determination by the Agency.

(2) An interested party may attend a hearing but the failure of an interested party to attend the hearing shall not be prejudicial to that interested party's interests and the Agency shall take into account the convenience of interested parties when organising hearings.

(3) An interested party intending to appear at the hearing shall notify the Agency of the names of representatives and witnesses who will appear at the hearing at least seven days before the date of the hearing.

(4) A hearing shall be presided over by an official of the Agency, who shall ensure that confidentiality is observed and who shall organize the hearing in a manner to ensure that all parties participating have an adequate opportunity to present their views.

(5) Taking into account the need to protect confidential information, the Agency shall maintain a record of the hearing, which shall be provided to any person upon request, with the exception of any confidential information.

(6) An interested party may apply to the Agency to provide additional information by way of an oral presentation at a hearing and such additional information shall be recorded by the Agency.

#### **44. Preliminary determination**

(1) An interested party may submit written submissions on any relevant matter to the Agency not later than fifteen days before the Agency publishes a preliminary determination.

(2) The Agency shall make a preliminary determination in respect of subsidization, injury, and causal link no earlier than sixty days, and no later than one hundred and eighty days, after initiation based on all information available to the Agency at that time.

(3) The Agency shall issue a public notice of the preliminary determination setting forth the findings and conclusions reached on all issues of fact and law considered material, while protecting confidential information and the notice shall contain:

- a. the names of the known exporters and producers of the investigated product;
- b. description of the investigated product that is sufficient for customs purposes, including the Harmonized Tariff Classification Number;
- c. the amount of subsidy established and the basis on which the existence of a subsidy has been determined;
- d. the factors that have led to the determination of injury and causal link, including information on factors other than subsidized imports that have been taken into account; and
- e. the amount of any provisional measures to be applied and the reasons why such provisional measures are necessary to prevent injury caused during the investigation.

(4) The Agency shall publish the notice in the Gazette and in at least two daily newspapers of national circulation and forward the notice to the government of the country exporting the investigated product and to other known interested parties.

(5) The Agency shall, on request made within fifteen days of the Agency's publication of a preliminary determination by exporters and producers, hold separate disclosure meetings with exporters and producers to explain the subsidy calculation methodology applied for that foreign exporter or producer.

#### **45. Provisional Measures**

(1) Provisional measures may be applied by the Cabinet Secretary at the request of the Agency only if:

- a. an investigation has been initiated under paragraph 38 and any interested government and party has been given adequate opportunity to submit information and to make comments;
- b. a preliminary determination has been made under paragraph 44 that a subsidy exists and that there is injury to a domestic industry and that the causal link is the investigated product; and
- c. the Agency deems such measures necessary to prevent injury being caused during the investigation.

(2) Provisional measures may include a security guaranteed by a cash deposit or a bond not greater than the estimated amount of the provisionally calculated subsidy set forth in the notice of preliminary determination.

(3) Provisional measures shall not be applied sooner than sixty days from the date of initiation of the investigation.

(4) Provisional measures shall apply for a maximum period of four months.

(5) A public notice issued by the Agency with respect to provisional measures shall set forth an explanation for the preliminary determination on the existence of a subsidy and injury and shall, taking into account the protection of confidential information, contain in particular:

- a. the names of the suppliers or, when this is impracticable, the countries from which the product is supplied;
- b. a description of the product, including its Harmonized Tariff Classification Number;
- c. the amount of subsidy established and the basis on which it has been determined;
- d. considerations relevant to the determination of injury or threat of injury as provided in paragraphs 35 and 36; and
- e. the main reasons for the determination by the Agency.

#### **46. Voluntary price undertakings**

(1) Proceedings may be suspended or terminated without the imposition of provisional measures or countervailing duties by the Cabinet Secretary if the Agency is satisfied with voluntary undertakings where:

- a. the government of the exporting country agrees to eliminate or limit the subsidy or take other measures concerning its effects; or
- b. the exporter agrees to revise its prices so that the Agency is satisfied that the injurious effect of the subsidy is eliminated.

(2) Any price increase under such an undertaking may not be higher than necessary to eliminate the amount of the subsidy, and shall be less than the amount of the subsidy if such increase is adequate to remove the injury to the domestic industry.

(3) An undertaking shall neither be sought by the Agency nor accepted by the Agency unless it has made a preliminary determination under paragraph 44 of subsidization, injury and causal link but if an undertaking is made by an exporter, the Agency shall first obtain the consent of the government of the exporting country.

(4) An undertaking may not be accepted if the Agency considers its acceptance impractical and the Agency shall provide reasons for the refusal and provide the exporter an opportunity to be heard regarding the refusal of an undertaking.

(5) If the Agency accepts an undertaking:

- a. the investigation of subsidization and injury shall nevertheless be completed if the government of the exporting country so desires or the Agency so decides;
- b. the undertaking shall lapse if it is determined that there is no subsidization or injury, but not if such a determination is due in large part to the existence of an undertaking and in such a case the undertaking shall be maintained for a reasonable period consistent with the provisions of this Schedule; or
- c. the undertaking shall continue to apply if it is determined that there is subsidization and injury.

(6) The Agency may propose a price undertaking but an exporter may refuse to give such an undertaking and the Agency's proposal or the exporter's refusal shall not prejudice the consideration of the case, but the Agency is free to determine that a threat of injury is more likely to be realized if the subsidized imports continue.

(7) The Agency may require a government or exporter from whom an undertaking has been accepted to periodically provide information relevant to the fulfilment of such an undertaking, and to permit verification of the information.

(8) If there is a violation of an undertaking by an exporter or a government, the Agency may take such action which may constitute immediate application of provisional measures using the best information available.

(9) Where an undertaking is accepted, the Agency shall publish a notice in the Gazette and in at least two daily newspapers of national circulation which shall include the non-confidential part of the undertaking and shall set forth the findings and conclusions on all issues of fact and law considered material by the Agency and notice shall be forwarded to the government of the country whose products are subject to such determination and to other known interested parties.

(10) Where the Agency continues an investigation under sub-paragraph (5) above, the department responsible for matters relating to international trade shall publish a notice of the continuation of the investigation, setting out the proposed date for the final determination, and any other modifications to the proposed schedule of the investigation and a final determination shall be made within one hundred and eighty days from the date of publication of the notice.

#### **47. Final determination**

Taking care to protect confidential information, the Agency shall make a final determination of subsidization, injury, and causal link within one hundred and twenty days of the preliminary determination based on the information obtained by the Agency during the course of the investigation.



#### 48. Notification of final determination

(1) Before the Agency makes a final determination, it shall inform all interested governments and parties of the essential facts which form the basis for the determination and such disclosure should take place at least thirty days before the proposed date for issuance of the final determination.

(2) Taking care to protect confidential information, the Agency shall issue a public notice of the final determination, which shall include all relevant information and grounds for the determination, including:

- a. the names of the known exporters and producers of the investigated product;
- b. a description of the investigated product including its Harmonized Tariff Classification Number;
- c. if applicable, an explanation of the subsidy or injury Period of Investigation used;
- d. the amount of subsidy established and the basis of the determination;
- e. the grounds for the final determination;
- f. the reasons for accepting or rejecting any argument or claim made by an exporter or importer;
- g. the amount of any countervailing duties to be imposed at the request of the Agency, including whether a duty less than the amount of the subsidy would be adequate to remove the injury to the domestic industry; and
- h. if final countervailing duties are to be collected at the request of the Agency with regard to the imports to which provisional measures were applied, the reasons for the decision to do so.

(3) The Agency shall publish the notice in the Gazette and in at least two daily newspapers of national circulation and forward it to the country whose products are subject to such determination and to other known interested parties.

(4) After the final determination has been issued, the Agency shall, on request made by exporters or producers within fifteen days of the publication of the final determination, hold separate disclosure meetings with such exporters or producers, to explain the subsidy amount calculation methodology applied for each foreign producer or exporter.

#### 49. Imposition and collection of countervailing duties

(1) The Agency may recommend to the Cabinet Secretary the imposition of a countervailing duty after it determines that sufficient consultations have been held and it has issued a final determination of the existence of a subsidy and injury to the domestic industry because of the subsidy but it shall recommend that no countervailing duty be imposed if the subsidy is withdrawn.

(2) The decision to impose a countervailing duty where all the requirements for its imposition have been fulfilled and the amount of the countervailing duty to be imposed shall be within the sole discretion of the Agency.

(3) In making its decision whether or not to impose a countervailing duty, the Agency shall take into account the representations made by domestic interested parties including the needs of industrial users and the interest of the final consumers whose interests might be adversely affected by the imposition of a countervailing measure.

(4) Countervailing measures shall take the form of *ad valorem* or specific duties.

(5) When a countervailing duty is imposed in respect of any product, it shall be levied in the appropriate amounts in each case, on a non-discriminatory basis on imports of such products from



all sources found to be subsidized and causing injury, except as to imports from those sources who have renounced any subsidies in question or where a voluntary price undertaking has been accepted.

(6) Any exporter whose exports are subject to a countervailing duty but who was not actually investigated for reasons other than a refusal to co-operate shall be entitled to an expedited review in order that the Agency may promptly establish an individual countervailing duty for that exporter.

(7) A countervailing duty shall not be levied by the Kenya Revenue Authority on any imported product in excess of the amount of subsidy found to exist and which has been calculated in terms of subsidization per unit of the subsidized exported product.

## **50. Retroactivity**

(1) Provisional measures and countervailing duties shall only be applied to products which enter Kenya on or after the date of publication of a preliminary or final determination in an investigation or review, subject to the exceptions set out in this paragraph.

(2) Where a final determination of injury is made or, in the final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be retroactively imposed for the period for which provisional measures, if any, have been applied.

(3) Where the countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference should not be collected. Where the duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released promptly by the Kenya Revenue Authority.

(4) Except as provided in sub-paragraph (2), where a threat of injury or material retardation is made, a countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released promptly.

(5) Where the Agency determines that there is no injury or threat of injury or where it terminates an investigation without the imposition of countervailing duties, any cash deposit made during the period of the application of the provisional measures shall be refunded and any bonds released promptly.

(6) Despite sub-paragraph (1) and in critical circumstances where the Agency finds that the injury caused by a subsidy will be difficult to repair because of a massive surge of imports within a relatively short time, and where in order to avoid a recurrence of the injury, it is necessary to assess countervailing duties retroactively, the Agency may assess countervailing duties on imports which have been imported for consumption for a period of ninety days prior to the date of the application of provisional measures.

(7) Countervailing duties shall not be levied retroactively pursuant to sub-paragraph (6) on goods imported before the date of initiation of the investigation.

## **PART VII—DURATION AND REVIEW OF COUNTERVAILING MEASURES AND VOLUNTARY PRICE UNDERTAKINGS**

### **51. General requirements**

(1) A countervailing measure shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

(2) The provisions of paragraph 42 regarding evidence and procedure shall apply to any review carried out under this paragraph. Any such review shall be carried out expeditiously but in any case it shall be concluded within twelve months of the date of initiation of the review.

(3) The provisions of this Schedule shall apply with the necessary changes to voluntary price undertakings accepted under paragraph 46.

(4) The Agency shall, no earlier than ninety days before the date of expiry of a countervailing measure publish a notice of impending expiry of countervailing duties in the Gazette and by advertisement in at least two daily newspapers of national circulation.

(5) The Agency shall, upon initiation of a review by the Agency, publish a notice in the Gazette and by advertisement in at least two daily newspapers of national circulation.

## **52. Review for change of circumstances**

(1) The Agency shall review the continued imposition of a countervailing duty on its own initiative or upon the request by any interested party which submits positive information substantiating the need for a review but only after a reasonable amount of time has elapsed.

(2) An interested party may request the Agency to examine whether the continued imposition of a countervailing duty is necessary to offset the subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both, and after the review, the Agency may recommend the continued imposition of the countervailing duty or its withdrawal.

## **53. Sunset reviews**

Despite paragraphs 54 and 55, any definitive measure shall be terminated within five years from its imposition or of the date of the most recent review under paragraph 55, if that review has covered both subsidization and injury, but if the Agency determines, in a review initiated on its own initiative or upon a duly substantiated request made by or on behalf of the domestic industry, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury, the duty may remain in force pending the outcome of such a review.

## **54. New shipper reviews**

(1) If a product is subject to a countervailing measure, the Agency shall promptly carry out a review for the purpose of determining the individual countervailing duty rate for any exporter or producer in the exporting country concerned who did not export the product to Kenya during the period of investigation provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the countervailing measures on the imported investigated product and such a review shall be initiated within thirty days after receiving the application by the producer or exporter concerned.

(2) The review shall be completed within six months from its initiation and, in any case, not later than twelve months.

(3) A countervailing duty shall not be levied on imports from such exporters or producers while the review is being carried out.

(4) The Agency may obtain guarantees equal to the residual countervailing duty rate to ensure that if the review results in a determination of subsidization, countervailing duties may be levied retroactively from the date of the initiation of the review.

## **55. Judicial Review**

Any interested party who participated in the administrative proceedings conducted by the Agency relating to final determinations and reviews of determinations regarding the imposition of an anti-dumping duty or countervailing measure pursuant to this Schedule may appeal to the High Court.

**THIRD SCHEDULE****[Section 25.]****INVESTIGATION AND EVALUATION OF APPLICATIONS FOR  
IMPOSING SAFEGUARD MEASURES****1. Purpose and application**

This Schedule governs the investigation of any product imported into Kenya that has caused or threatens to cause serious injury to a domestic industry and the application of safeguard measures.

**2. Conditions for application of a safeguard measure**

(1) A safeguard measure may be applied to a product only if:

- a. the Agency has conducted an investigation in accordance with this Schedule; and
- b. the Agency has determined that as a result of unforeseen developments, such product is being imported into Kenya in such increased quantities, absolute or relative to domestic production and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like products or directly competitive products; and

(2) A safeguard measure shall be applied to a product irrespective of where it originates.

**3. Request for the initiation of an investigation**

(1) An investigation to determine whether increased imports of a product has caused or threatens to cause serious injury to a domestic industry may be initiated upon a written request addressed to the Agency by or on behalf of a domestic industry.

(2) The Agency may initiate a general safeguard investigation on its own motion if it determines that there is sufficient evidence that meets the conditions set out in this paragraph.

(3) A written request for the initiation of an investigation shall include such information as is reasonably available to the applicant on:

- a. the complete description of the imported product, including its technical characteristics, uses, Harmonized Tariff Classification Number and the duties applicable;
- b. the complete description of the domestic like or directly competitive product, including its technical characteristics and uses;
- c. the names and addresses of the enterprises or entities represented in the application, and of all other known producers of the domestic like or directly competitive product;
- d. the percentage of domestic production of the like or directly competitive product represented by the requesting enterprises;
- e. information on the volume and value of the imported product for each of the three calendar years preceding the request, and any more recent partial-year data, by country of origin;
- f. a description of the increase in imports alleged to exist, in particular, whether such increase is absolute or relative to domestic production, or both;
- g. information relevant to the existence of serious injury or threat thereof to the domestic industry, for each of the three calendar years preceding the request, and any more recent partial-year data, including but not limited those found in paragraph 12(1) of this Schedule with respect to serious injury, or those found in paragraph 13(1) of this Schedule with respect to threat of serious injury;

- h. an explanation, in light of the data provided in the request and the requirements of these provisions, of the reasons why it is believed that serious injury or threat thereof exists and is caused by increased imports;
- i. information on relevant unforeseen developments;
- j. a statement giving specific reasons for seeking application of a safeguard measure, for example, to facilitate the orderly transfer of resources to more productive uses, to improve competitiveness or to adapt to new conditions of competition, together with the type and level of the measure considered necessary to ensure the achievement of the objectives pursued;
- k. an explanation of why the application of a safeguard measure would be in the public interest;
- l. a plan for adjusting the domestic industry to competition from imports, in accordance with the objectives described in the sub-subparagraph (j); and
- m. if a provisional measure is sought, information regarding critical circumstances where delay in taking action would cause damage to the industry which it would be difficult to repair, and a statement indicating the level of tariff increase requested as a provisional measure.

#### **4. Decision to initiate an investigation**

- (1) Where the Agency has received a written request to initiate an investigation, the Agency may seek such additional information as it deems necessary, including from the person making the request, before deciding whether to initiate an investigation.
- (2) Where the Agency has received a written request to initiate an investigation and the Agency decides not to initiate an investigation, it shall notify the person making the request of the reasons for not initiating the investigation.
- (3) The Agency shall make a decision whether or not to initiate an investigation within sixty days after receiving the written request to initiate.
- (4) When a written request for an investigation involves complex issues, or if the Agency has sought additional information, the Agency shall make a decision whether or not to initiate an investigation within ninety days of receiving the request.

#### **5. Public notice of the initiation of an investigation**

- (1) When the Agency makes a decision regarding a request for an investigation, it shall notify in writing the government of the exporting country and it shall notify interested parties of its decision in the Gazette and by advertisement in at least two daily newspapers of national circulation, but if the Agency decides to initiate an investigation, the effective date of the investigation is the date of the publication of the notice in the Gazette.
- (2) The notice of initiation of a safeguard investigation shall include the following information:
  - a. a complete description of the investigated product, including its technical characteristics, uses, Harmonized Tariff Classification Number and the duties applicable;
  - b. a complete description of the domestic like or directly competitive product, including its technical characteristics and uses;
  - c. the names of the requesting enterprises, if any, and of all other known producers of the domestic like or directly competitive product;
  - d. the country of origin of the investigated product;
  - e. a summary of the information on which the allegations of increased imports and serious injury or threat thereof caused by increased imports are based, including a summary of

the unforeseen developments that led to the alleged increase in imports of the investigated product, or to the change in the conditions under which such imports occur;

- f. the name, address and telephone number of the contact person at the Agency;
- g. a statement that the date of initiation is the date of publication in the Kenya Gazette of the notice regarding the initiation of a safeguard investigation;
- h. whether an application of a provisional measure will be considered or not including a schedule for and deadlines pertaining to the preliminary phase of the investigation;
- i. the proposed schedule for the investigation, including the date by which interested parties desiring to participate in the investigation shall so inform the Agency in writing;
- j. the date by which a hearing, if desired, must be requested; and
- k. the proposed dates for the determination for any decision regarding the application of a safeguard measure.

(3) An interested party that is desirous of participating in the investigation may inform the Agency in writing within thirty days of the publication of the notice but the Agency may entertain an application made by an interested party outside the thirty day period for good cause.

## **6. Confidential information**

(1) For the purposes of this paragraph, confidential information includes information whose disclosure would give a competitor a significant advantage over the party to whom the information relates or whose disclosure would have a significant adverse effect on the person to whom it relates.

(2) A party to an investigation may request the Agency to classify any information that the party gives to the agency as confidential and if the Agency classifies the information as such, it shall not disclose that information save with the permission of that party.

(3) The Agency may request a party that has given it confidential information to provide a non-confidential summary of that information and such a non-confidential summary shall be sufficiently detailed to enable a reasonable understanding of the confidential information but if the party alleges that the confidential information cannot be summarised, it shall provide an explanation to the Agency as to why it cannot be summarised.

(4) If the Agency finds that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in summary form, the Agency may disregard such information unless it can be demonstrated to its satisfaction from appropriate sources that the information is accurate.

## **7. Timetable for completing an investigation**

(1) The Agency shall complete an investigation within six months from the date of initiation.

(2) The Agency may extend this period once only by a period of two months.

(3) Where the Agency considers the imposition of provisional measures during the investigation, it shall make a decision in accordance with this Schedule no sooner than thirty days after the initiation of the investigation but no later than forty-five days after the initiation of the investigation.

(4) During the investigation the Agency shall establish, and shall promptly notify all participating interested parties of such deadlines as are necessary for the effective conduct of the investigation.

## **8. Submission of evidence**

(1) All interested parties participating in an investigation shall present evidence and submissions in writing, including responses to the written and oral presentations of other interested parties and views as to whether or not the application of safeguard measures would be in the public interest.

(2) In an investigation in which the application of a provisional safeguard measure will be considered, any interested party may submit written submissions concerning any matter it considers relevant to the preliminary phase of the investigation no later than fifteen days before the proposed date of the determination regarding the application of a provisional safeguard measure.

(3) In an investigation in which no hearing is requested, any interested party may submit written submissions concerning any matter it considers relevant to the investigation no later than forty five days before the proposed date of the determination regarding serious injury or threat thereof and causation. Participating interested parties shall have a further ten days after the deadline for initial written submissions to submit any written responses to the written submissions of other participating interested parties.

## **9. Public hearings**

(1) If a hearing is held during an investigation, an interested party may submit written submissions and information concerning any matter relevant to the investigation not more than ten days before the hearing, but interested parties may also submit written submissions and information in response to any matter that is raised during the hearing within ten days of the hearing.

(2) The Agency shall hold a hearing at the request of interested parties within fifteen days of the publication of a determination regarding the application of a provisional measure or within forty five days of the initiation of an investigation if the Agency will not be considering the application of a provisional measure at which the interested parties may present oral or written arguments and any hearing shall be held no less than sixty days before the date proposed for the determination regarding serious injury or threat thereof and causation.

(3) There shall be no obligation on any participating interested party to appear at a hearing, and failure to do so shall not be prejudicial to that participating interested party's case, but the Agency shall, to the extent possible, organize hearings taking into account the convenience of the participating interested parties.

(4) Taking care to protect confidential information, hearings shall be presided over by officers from the Agency who shall organize hearings ensuring that all interested parties have adequate opportunity to present their views.

(5) Taking care to protect confidential information, the Agency shall maintain a record of any hearing which shall promptly be made part of the public record.

## **10. Serious injury and causation**

(1) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry, the Agency shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation and level of development of that industry, and in particular:

- a. the rate and amount of the increase in imports of the investigated product, in absolute terms and relative to domestic production of like or directly competitive products;
- b. the prices of the investigated product, especially for the purposes of determining whether prices lower than those of the domestic like or directly competitive products have been recorded;
- c. the impact of increased imports of the investigated product on the domestic industry, as evidenced by relevant indicators including production, capacity utilization, inventories, sales, market share, prices, that is, domestic price declines or failure of domestic prices to increase as they otherwise would have in the absence of increased imports, productivity, profits and losses, return on investments, cash flow, and employment; and
- d. factors other than increased imports of the investigated product which at the same time are causing or threatening to cause serious injury to the domestic industry.

(2) The determination shall not be made unless an investigation objectively demonstrates the existence of a causal link between increased imports of the product concerned and the actual or threatened serious injury to the domestic industry.

(3) The demonstration of a causal relationship between the increased volume of imports and the injury to the domestic industry shall be based on an examination of all relevant evidence by the Agency and where appropriate, the Agency shall also examine any known factors other than the increased imports of the product concerned caused by these other factors not attributed to the increased volume of imports.

### **11. Threat of serious injury**

(1) A determination of a threat of serious injury caused by increased imports shall be based on facts and not merely on allegation, conjecture or remote possibility.

(2) In considering whether increased imports threaten to cause serious injury, the Agency shall evaluate, in addition to the factors provided under paragraph 10(1), the following:

- a. the actual and potential export capacity of the country of production or origin;
- b. any build-up of inventories in Kenya and in the country of exportation;
- c. the probability that exports of the investigated product will enter Kenya in increasing quantities; and
- d. any other factor deemed relevant by the Agency.

### **12. Provisional safeguard measures**

(1) In critical circumstances where delay would cause damage which would be difficult to repair, the Cabinet Secretary may impose a provisional safeguard measure after a preliminary determination that because of unanticipated circumstances there is proof that increased imports have caused or are threatening to cause serious injury to the domestic industry producing a like product or a directly competing product.

(2) Preliminary measures shall take the form of tariff increases which shall be promptly refunded if the investigation does not determine that increased imports have caused or threaten to cause serious injury to a domestic industry.

(3) The Agency shall publish a notice regarding the application of a provisional safeguard measure in the Gazette and by advertisement in at least two daily newspapers of national circulation immediately after making the decision regarding the application of such a provisional safeguard measure.

(4) The notice shall include the following information:

- a. a complete description of the investigated product, including its technical characteristics, uses, Harmonized Tariff Classification Number and the duties applicable;
- b. the volume and value of the imported product for each of the three calendar years preceding the request, and any more recent partial-year data, by country of origin;
- c. a complete description of the domestic like or directly competitive product, including its technical characteristics and uses;
- d. the names of all known producers of the domestic like or directly competitive product;
- e. the basis for the determination of critical circumstances, where delay would cause damage that would be difficult to repair, and the basis for the determination of the existence of clear evidence that, as a result of unforeseen developments, the investigated product is being imported in such increased quantities and under such conditions as to cause or



threaten to cause serious injury to the domestic industry producing like or directly competitive products;

f. the amount of tariff increase proposed as the provisional safeguard measure; and

g. the intended duration of the provisional safeguard measure.

(5) The period during which the provisional measure shall be applicable shall not exceed two hundred days and the Agency may suspend the application of the provisional safeguard measure before the expiration of the authorized period.

(6) The duration of any such provisional measure shall be counted as a part of the initial period and any extension of the period that may be made by the Agency.

(7) Any amount collected as a provisional safeguard measure shall be promptly refunded and any bond or deposit shall be promptly released if the investigation demonstrates that increased imports have not caused or threaten to cause serious injury to the domestic industry.

### **13. Application of final safeguard measures**

(1) The Agency shall determine, whether increased imports of the investigated product have caused or threaten to cause serious injury to the domestic industry and the determination shall be published in a report that contains a detailed analysis of the information obtained during the investigation, the Agency's findings, and conclusions on all relevant issues of fact and law and also including a demonstration of the relevance of the factors examined by the Agency.

(2) The Cabinet Secretary shall apply a safeguard measure only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment and a final safeguard measure shall be applied either as a tariff increase or a quantitative restriction on imports.

(3) If a quantitative restriction is used, it shall not reduce the quantity of imports of the investigated product below the average level calculated for the previous three years for which statistics are available unless reasonable justification is given by the Agency that a different level is necessary to remedy or prevent serious injury or threat of serious injury.

(4) If more than one country is exporting an investigated product on which a quantitative restriction has been imposed, any such quota shall be allocated among the supplying countries and in such a case, the Agency may seek agreement with respect to an allocation of shares in the quota with the governments of all the other countries that have a substantial interest in supplying the product concerned.

(5) In cases in which the method in sub-paragraph (4) is not reasonably practicable, the Agency shall allot to all those countries a quota that is based proportionally on the total quantity or value of imports of the investigated product that these countries have supplied in the previous three years and the Agency shall consider any special factors which may have affected or may be affecting the trade in the product.

(6) Despite sub-paragraph (3) in a case in which serious injury to a domestic industry has been found provided that the Agency shall provide justification indicating that:

a. imports from certain countries have increased in disproportionate percentage in relation to the total increase of imports of the product concerned during the representative period;

b. the reasons for the departure are justified; and

c. the conditions of such departure are equitable to all suppliers of the product concerned;

the duration of any such measure shall not be extended beyond the initial period under paragraph 18(2), that is, for a maximum of six years.

(7) Final safeguard measures may not be applied on any product originating in a developing country:



- a. if its share of imports do not exceed 3% of the total imports of that product; and
- b. provided that the developing countries below the 3% threshold on an individual basis do not collectively account for more than 9% of imports into Kenya of the investigated product.

#### **14. Notification of a final determination**

(1) Once it makes a determination regarding serious injury, threat of serious injury and causation the Agency shall promptly publish a notice in the Gazette and by advertisement in at least two daily newspapers of national circulation which shall include the following details:

- a. a complete description of the investigated product, including its technical characteristics, uses, an identification of its tariff classification and the duties applicable;
- b. a complete description of the domestic like or directly competitive product, including its technical characteristics and uses;
- c. the names of all known producers of the domestic like or directly competitive product;
- d. the country of origin of the investigated product; and
- e. a summary of the information obtained in the investigation, the factors considered and the relevance thereof, and the findings and conclusions reached on the issues of fact and law considered, and the reasons therefor.

(2) If the Agency decides to impose a definitive safeguard measure, the notice shall also include the following details:

- a. the volume and value of the imported product for each of the three calendar years preceding the request, and any more recent partial-year data, by country of origin;
- b. a summary of the unforeseen developments that led to the increase in imports of the investigated product, or to the change in the conditions under which such imports occur;
- c. a summary of the affirmative injury determination, including the injury factors considered and the relevance thereof, as well as of the findings and conclusions, and the reasons therefor, on the issues of fact and law considered in respect of injury;
- d. the reasons for which the Agency has concluded that application of a definitive safeguard measure is in the public interest;
- e. details concerning the domestic industry's adjustment plan;
- f. the form, level and duration of the proposed definitive safeguard measure, and an explanation of the domestic industry's adjustment plan;
- g. the proposed date of application of the definitive safeguard measure;
- h. if a quantitative restriction is proposed, the allocation of the quota among the supplier countries, and an explanation and the relevant information regarding the basis on which this allocation has been made; and
- i. if the proposed duration of the measure, including the period of application of any provisional safeguard measure, is more than one year, a timetable for the progressive liberalization of the measure.

#### **15. Consultations**

(1) Before the Agency recommends the application or extension of a safeguard measure it shall provide adequate opportunity for consultations with each government of a country having a substantial interest as exporters of the investigated product, with a view to review all the information considered by the Agency to support its determination of serious injury or threat thereof caused by

increased imports, exchange views on the proposed measure, and reach an understanding that best serves the public interest, among others issues.

(2) Consultations shall be initiated promptly after a provisional safeguard measure is applied.

#### **16. Concessions, etc**

If Kenya applies a safeguard measure or seeks to extend a safeguard measure, it shall endeavour to maintain a substantially equivalent level of concessions to the exporting country that would be affected by such a measure and the Cabinet Secretary may reach an agreement with the government of an interested country, as the case may be, on any adequate means of trade compensation for the adverse effects of the measure on their trade.

#### **17. Duration and review of a safeguard measure**

(1) A safeguard measure shall remain in force only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment and in any case shall not exceed six years, unless it is extended by the Agency as may be provided.

(2) The period a safeguard measure is in force may be extended if that the Agency has determined that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting. The relevant private sector firm, in consultation with the Cabinet Secretary shall agree on the sequence of actions that it will take to adjust to the situation.

(3) The total period of application of a safeguard measure, including the period of application of any provisional measure, the period of initial application and any extension of the application of the safeguard measure, shall not exceed ten years.

(4) To facilitate adjustment where the expected duration of a safeguard measure is longer than one year, the Cabinet Secretary shall progressively liberalize it at regular intervals during the period it is in force.

(5) If the duration of a final safeguard measure exceeds three years, including the period of application of any provisional measure, the Agency shall review the situation not later than the mid-term of when the measure has been in place and, if appropriate, advise the Cabinet Secretary to withdraw it or increase the pace of liberalization but a safeguard measure that has been extended shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized.

(6) The Agency shall publish the results of a review in the form of a report and shall notify the public by notice in the Gazette and by advertisement in at least two daily newspapers of national circulation and the Agency shall decide to maintain or withdraw the definitive safeguard measure or to increase the pace of its liberalization.

#### **18. Extension of safeguard measures**

(1) When a domestic industry considers that there is a continuing need to apply a definitive safeguard measure beyond the initial period of application, it shall submit a written request for extension of the measure, including evidence that the industry is carrying out the adjustment plan, to the Agency, not less than six months before the end of the initial period and the Agency shall investigate and determine whether an extension is necessary.

(2) A safeguard measure may be extended once only for a period that does not exceed six years except as provided under sub-paragraph (3).

(3) The Agency may recommend the extension of a definitive safeguard measure only if it determines that the measure continues to be necessary to prevent or remedy serious injury and that the domestic industry is adjusting.

(4) An extended definitive safeguard measure shall not be more restrictive than at the end of the initial period of application but during the extension period, the measure shall continue to be

progressively liberalized and the Agency shall notify the public of the extension of the duration of the safeguard measure by notice in the Gazette and by advertisement in at least two daily newspapers of national circulation.

(5) In extending a definitive safeguard measure, Kenya shall take all reasonable steps to maintain a substantially equivalent level of concessions and other obligations to each country exporting the investigated product.

#### **19. Reapplication of a safeguard measure**

(1) A safeguard measure shall not be applied again to the import of a product which has been subject to such a measure for a period of time equal to that during which such measure had been previously applied, but only if the period of non-application is at least two years.

(2) Despite sub-paragraph (1), a safeguard measure with a duration of one hundred and eighty days or less may be applied to the imports of an investigated product which was the subject of an earlier safeguard measure if:

- a. at least one year has elapsed since the date of imposition of the earlier safeguard measure on the imports of the investigated product; and
  - b. a safeguard measure has not been applied on imports of the investigated product more than twice in the five-year period immediately preceding the date on which the new safeguard measure is to take effect.
-