



8 October 2019

(19-6486)

Page: 1/3

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

Original: English

**NOTIFICATION OF LAWS AND REGULATIONS UNDER
ARTICLES 18.5, 32.6 AND 12.6 OF THE AGREEMENTS**

QUESTIONS POSED BY THE UNITED STATES
REGARDING THE NOTIFICATION OF KENYA¹

The following communication dated 4 October 2019, is being circulated at the request of the delegation of the United States.

The United States thanks Kenya for its notification concerning its trade remedy laws (i.e., Kenya Trade Remedies Act), and poses the following questions:

Question 1

In Part I, Article 2, Kenya defines the domestic market as "the market within the country including the East African Community (EAC) as a single customs territory." (emphasis added) On page 4 of the same section, Kenya defines interested parties, in part, as a producer of the like product in Kenya. Additionally, various other articles in the Kenya Trade Remedies Act, in both the antidumping and injury sections refer to domestic market and like product as the product produced in Kenya, as opposed to the entire EAC. The injury sections of the Kenya Trade Remedies Act also appear to limit the analysis of injury to the domestic industry in Kenya.

- Will the Kenya Trade Remedies Agency ("Agency") conduct trade remedy investigations (i.e., antidumping (AD), countervailing duty (CVD), safeguard (SG)) on a national level (i.e., only on behalf of the producers/exporters in Kenya) or on behalf of the entire EAC? If the former, please clarify the definition of "domestic market," which presently includes the EAC in its entirety.
- Will AD/CVD/SG duties applied by Kenya be applicable only to imports of the investigated product into Kenya or imports into the entire EAC?

Question 2

Part II, Article 5 states that the Agency will conduct trade remedy investigations and advise the Cabinet Secretary on the results of these investigations. The role of the Cabinet Secretary is further explained in Part IV, Article 23, as well as Article 21 of the Second Schedule.

- Please provide additional clarification regarding the process by which the Agency's recommendation is passed to the Cabinet Secretary.
- What role does the Cabinet Secretary have in the imposition of trade remedy measures? Specifically, does the Cabinet Secretary have the ability to modify the duty recommended by the Agency, or only to approve or reject the recommendation from the Agency? If the Cabinet Secretary may modify the duty, explain any limitations on such modifications, such as changing the form or amount of duty.

¹ G/ADP/N/1/KEN/3 - G/SCM/N/1/KEN/3 - G/SG/N/1/KEN/2 (dated 21 May 2019).

- What factors does the Cabinet Secretary take into consideration in determining whether to impose a trade remedy measure or modify the amount?

Question 3

Will interested parties need to register with the Agency to participate in a trade remedy investigation and to gain access to case files? If so, what are the registration requirements?

Question 4

Will Kenya's trade remedy case files be accessible by the general public, or will case files only be accessible by the interested parties to the proceeding? How will Kenya's trade remedy case files be maintained (e.g., hard-copy files, electronic files)? Please describe the process by which interested parties will be able to access the case file to review submissions made by other parties or documents put on the case file by the Agency? Will the case file ever be closed to further review or will it be accessible even after the case has been closed?

Question 5

In Article 10 of the Second Schedule, Kenya states that the Agency will notify the government of an exporting country of the initiation of an investigation. Will the Government of Kenya also notify the government of an exporting country of the existence of a properly documented petition/application prior to initiation, as provided for in Article 5.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement)?

Question 6

In various articles throughout the Kenya Trade Remedies Act (e.g., Part IV, Articles 29 and 35) Kenya states that decisions of the Agency may be appealed to the "High Court."

- Please describe in further detail Kenya's judicial system, the High Court, and role the High Court plays in trade remedy proceedings.

Article 35, Part IV, indicates that persons may appeal to "the High Court within thirty days of the determination, recommendation or decision being made for a review." Does the 30-day period begin upon publication in the Kenya Gazette or at an earlier date? For applications under Article 36, Part IV to the Agency or Cabinet Secretary, is there a timeframe within which appeals need to be lodged? Also, under Article 36, Part IV, what is the difference between an "obvious error" and a "common mistake", and who are the "relevant parties" who must be affected by a common mistake?

Question 7

In Part IV, Articles 27 to 29, Kenya describes how it will handle confidential information in its trade remedy proceedings. Please provide further information regarding how the Government of Kenya will ensure the confidentiality of information provided by parties involved in its trade remedy proceedings. For example, will there be penalties if confidential data is accidentally or internationally disclosed? Will Kenya require that parties file public versions of confidential documents? How will Kenya ensure that the public versions of case documents provide sufficient detail to be meaningful?

Question 8

In Part IV, Article 37, Kenya states that in any proceedings conducted under the Kenya Trade Remedies Act (other than criminal proceedings) the standard of proof is on "a balance of probabilities." Please describe this standard of proof in further detail.

Question 9

In Article 11, paragraph 1(b) of the Second Schedule, Kenya states that the Agency may terminate an investigation if it determines that the margin of dumping is *de minimis*.

- Does this finding apply to the preliminary determination or only to a final determination? In other words, if the dumping margin is *de minimis* at the time of the preliminary

determination, will Kenya terminate the investigation at that time or continue the investigation?

- What if the preliminary injury determination is negative? Will the case be terminated, or will it continue until the final determination?

Question 10

In Article 17, paragraph 4 of the Second Schedule, Kenya states that provisional measures shall be applied for a period not exceeding 6 months and, if requested by exporters, the period can be extended to nine months. Article 7.4 of the Antidumping Agreement states that provisional measures can be applied in lengths ranging from six to nine months only in circumstances where a duty lower than the dumping margin that is sufficient enough to remove injury (i.e., application of a lesser duty). Since Kenya's regulations state that provisional measures may be applied for a period up to 9 months, does this mean that Kenya intends to examine whether the application of lesser duty is appropriate in all of its AD/CVD investigations? Or will Kenya only examine whether lesser duty is appropriate upon request?
