

EAST AFRICAN COMMUNITY LAW JOURNAL

VOLUME I, NUMBER I, 2020/2021

INSTITUTIONAL MECHANISMS FOR RESOLUTION OF TRADE REMEDIES DISPUTES UNDER THE EAST AFRICAN COMMUNITY CUSTOMS UNION AND BY MEMBER STATES

*Nelly C. Rotich**

Abstract

Trade remedies were introduced by the World Trade Organization to address unfair trade practices caused by dumping and prohibited subsidies and to restrict import surges brought about by international trade. Trade remedies take the form of anti-dumping measures, countervailing measures and safeguard measures. Trade remedies have been regulated by the East African Community and member states in almost similar terms as those of the World Trade Organization's rules on trade remedies. Significant to this paper is how trade remedies disputes are dealt with by the East African Community as a regional economic community established within the realms of the World Trade Organization and by EAC member states, who with the exclusion of South Sudan are members to the World Trade Organization. The East African Community laws and member states' legislations allow for the creation of institutions to resolve trade remedies disputes. While no trade remedy dispute has been instituted under these two regimes, the existing legal framework forms the basis for discussions in this paper. This paper therefore analyses the institutional mechanism for resolution of trade remedies disputes under the East African Community and domestically, by member states.

Key words: East African Community, Trade Remedies, Dispute Settlement, Safeguard Measures, Anti-Dumping Duties, Countervailing Measures

* LL. D Candidate (University of Pretoria), LL.M (University of Pretoria), LL. B (Kabarak University), PGD (Kenya School of Law) & Advocate of the High Court of Kenya.

1. Introduction

The Republics of Kenya, Uganda and Tanzania established the East African Community (EAC) in 1999 pursuant to the Treaty for the Establishment of the East African Community (EAC Treaty).¹ In June 2007, Burundi and Rwanda acceded to the EAC Treaty and in April 2016, South Sudan joined.² EAC membership therefore currently stands at six. With the exclusion of South Sudan, EAC countries are members to the World Trade Organization (WTO).³ In a February 2019 Trade Policy Review Report on EAC by the Trade Policy Review Body of the WTO, it was noted that ‘nearly 90% of EAC trade in goods takes place outside the EAC, with major imports originating mainly from China, India, the European Union and the United Arab Emirates.’⁴ Compared to other African economic communities however, EAC is believed to have attained greater levels of trade liberalisation⁵ and is considered as one of the fastest growing regional economic communities in the world.⁶

To attain a more integrated EAC, the EAC Customs Union was created in 2004.⁷ The EAC Customs Union was specifically termed as “transitional and integral part of the EAC”.⁸ It objectifies intra-regional trade in goods, efficiency in production, domestic and foreign investment and industrial diversity

¹ Signed on 30 November 1999 and entered into force on 7 July 2000, Art 2 available at <https://www.eac.int/index.php?option=com_documentmanager&task=download.document&file=bWFpbI9kb2N1bWVudHNfcGRmX0RpcEV6WXRITVRreWhsRVFicXNmVkrNRUFDFIRSRUFUWQ==&counter=13>.

² East African Community, ‘Overview of EAC’ <<https://www.eac.int/overview-of-eac>> (accessed 22 March 2020). Save for Kenya, all other EAC members are least developed countries, see United Nations Department of Economic and Social Affairs Economic Analysis, ‘Least Developed Countries’ <<https://www.un.org/development/desa/dpad/least-developed-country-category.html>> (accessed 22 March 2020).

³ Working Party on the accession of South Sudan to the World Trade Organization began negotiations on 21 March 2019, see World Trade Organization, ‘South Sudan’ <https://www.wto.org/english/thewto_e/acc_e/a1_south_sudan_e.htm> (accessed 22 March 2020).

⁴ World Trade Organization Trade Policy Review Body, ‘Trade Policy Review Report by the Secretariat: East African Community’ (13 February 2019) WT/TPR/S/384 at 1/417, paragraph 4.

⁵ TRALAC, ‘Optimising the dispute resolution process for trade remedies in the EAC’ available at <<https://www.tralac.org/discussions/article/7222-optimising-the-dispute-resolution-process-for-trade-remedies-in-the-eac.html>> accessed 22 March 2020.

⁶ EAC (n 2).

⁷ See Protocol on the Establishment of the East African Customs Union, signed 2 March 2004, Preamble & Art 2; see also EAC Treaty, Arts 2 (2), 5 (2) & 75 (2). Kenya, Uganda and Tanzania began implementation of the Protocol on 1 January 2005; Burundi and Rwanda in July 2007; and South Sudan in September 2016.

⁸ *ibid.*

and development.⁹ Building on the provisions of the EAC Treaty, the Protocol on the Establishment of the East African Customs Union (EAC Customs Union Protocol) comprehensively addresses trade remedies under the EAC.¹⁰ Like other economic communities in Africa, there has been limited use of trade remedies under EAC. So far only Kenya and Tanzania have national legislations on trade remedies, albeit in paper only. It is important to note that no trade remedy dispute has been instituted or resolved under the EAC framework. There is also no existing literature by other scholars on this area. To fill this gap in literature, this paper proceeds on a general analysis of the legal framework under the EAC that allows for resolution of disputes relating to countervailing measures, anti-dumping measures and safeguard measures.

As you will note throughout the paper, institutional mechanisms for resolution of trade remedies disputes under the EAC Customs Union and by member states are still underdeveloped and therefore not fully utilized. In fact, Most EAC members do not have national legislations on trade remedies. For countries like Kenya and Tanzania that have national legislations, institutions to deal with trade remedies are conspicuously missing or still in their embryonic stage of development a justification for this examination.

To nuance this, the paper introduces the reader to the three types of trade remedies, namely; safeguard measures, countervailing measures and anti-dumping duties in its section 2. Section 3 analyses the mechanisms for resolving trade remedies disputes under the EAC Customs Union. Section 4 analyses the mechanisms for resolving trade remedies disputes by EAC members while Section 5 analyses the framework for resolution of trade remedies disputes under the East African Community Customs Union and by member states. Section 6 concludes the paper.

2. Conceptual Analysis of Trade Remedies under the East African Community

Trade remedies were adopted by the WTO to address unfair trade practices caused by prohibited subsidies and dumped products, and to restrict

⁹ EAC Customs Union Protocol (n 7), Art 3.

¹⁰ See generally EAC Customs Union Protocol (n 7).

import surges of products.¹¹ The WTO sets rules on trade remedies under its Subsidies and Countervailing Measures Agreement, Agreement on Safeguards and Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement) to counteract subsidized exports, import surges and dumped exports respectively.¹² While trade remedies contribute to a large share of disputes before the WTO Dispute Settlement Body, no dispute has been lodged against or by EAC members.¹³ Kenya has however appeared as a third party in EC – Export Subsidies on Sugar¹⁴ whereupon Australia lodged a complaint against the European Communities on the basis of export subsidies imposition beyond export subsidy commitment levels.

WTO rules on safeguards measures, countervailing measures and anti-dumping measures appear in EAC and member states' laws in almost similar terms. Generally, the EAC Customs Union Protocol, call on member states to work together in identifying and investigating subsidies, dumping and import surges of products.¹⁵ Where it is identified and investigated that there is export of subsidised goods, dumping and import surges, the affected member state is permitted to counter the effects resulting therefrom by imposing countervailing duties, anti-dumping measures and safeguard measures accordingly.¹⁶ Kenya is the only EAC member that has a comprehensive legislation on trade remedies. The Kenya Trade Remedies Act¹⁷ allows for the establishment of the Kenya Trade Remedies Agency with the mandate of investigating allegations of dumping, subsidization and requests for imposition of safeguard measures.¹⁸ Tanzania's legislation is limited to anti-dumping and countervailing measures. Notably, the Anti-dumping and Countervailing Measures Act of

¹¹ World Trade Organization, 'Anti-dumping, subsidies, safeguards: contingencies, etc' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm> (accessed 22 March 2020).

¹² All of these Agreements clarify and reinforce disciplines under the General Agreement on Tariffs and Trade, 1994. Specific GATT provisions that informed the formulation of these Agreements are Article VI (Anti-dumping), Article XIX (Safeguards) and Article VI & XVI (Subsidies and Countervailing Measures).

¹³ Chad P Bown, 'Trade Remedies and World Trade Organization Dispute Settlement: Why are so Few Challenged?' (2005) 34(2) *The Journal of Legal Studies* 515-555.

¹⁴ Panel Report, 'European Communities – Export Subsidies on Sugar-Complaints by Australia' WT/DS265/R, adopted 19 May 2005.

¹⁵ EAC Customs Union Protocol (n 7), Art 20 (1).

¹⁶ EAC Customs Union Protocol (n 7), Art 20 (2).

¹⁷ No. 32 of 2017, assented on 21 July 2017 & Commenced 16 August 2017.

¹⁸ *ibid*, Sections 3 & 5.

Tanzania¹⁹ allows for the establishment the Anti-dumping and Countervailing Measures Advisory Committee with the mandate of advising the Minister for Trade on subsidies and dumping matters.²⁰ The subsequent sub-sections of this section therefore explore these trade remedies under the EAC.

2.1 Countervailing Duties

The EAC Treaty defines a countervailing duty as “a specific duty levied for purposes of offsetting a subsidy bestowed directly or indirectly upon the manufacture, production or export of a product”.²¹ The EAC Customs Union Protocol on the other hand defines a countervailing measure as a “measure taken to counteract the effect of injurious subsidies”.²² These definitions appear in similar terms under the Kenya Trade Remedies Act.²³ Under the Anti-dumping and Countervailing Measures Act of Tanzania, countervailing measures are applied to counteract the impacts of ‘injurious subsidies’.²⁴ Simply put, countervailing duties or measures were created to resolve unfair trade practices resulting from imposition of subsidies. What then is a subsidy? A subsidy is a financial contribution, price support or income by a government or public body which result in conferment of a benefit.²⁵ The financial assistance take the form of ‘loans, grants, facilities, guarantees, fiscal incentives or operational or support services’.²⁶ Such financial assistance is channelled towards the manufacture, production or export of specific goods.²⁷ Further, it is given to a specific industry within the territory of a member state.²⁸ Not all

¹⁹ No 1 of 2004, assented on 14 April, 2004.

²⁰ *ibid*, Sections 4 & 6.

²¹ Art 1 (1); see EAC Customs Union Protocol (n 7), Art 18 (1); see also The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 3.

²² Art 1 (1); The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 3.

²³ See section 2.

²⁴ See section 3. A subsidy is Injurious if it is specific to an industry or enterprise, relates to an investigated product and the subsidization is likely to cause injury to locally produced product or industry; see section 22 of the Act.

²⁵ EAC Customs Union Protocol (n 7), Art 1 (1); EAC Treaty, Art 1 (1); The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulations 3 & 7; World Trade Organization General Agreement on Tariffs and Trade of 1995, Art XVI;1; Further see the World Trade Organization Agreement on Subsidies and Countervailing Measures of 1995, Art 1.1.

²⁶ *ibid*; see EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 7 (1).

²⁷ EAC Customs Union Protocol (n 7), Art 1 (1).

²⁸ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 8.

forms of subsidies are however prohibited. Only subsidies contingent in law or fact on export performance and use of domestic over imported products are prohibited (prohibited subsidies).²⁹

An EAC member state is obligated to notify other member states in writing of any subsidy maintained in its territory that favours certain industries or production of certain products. Such notice indicates the nature, extent, effect and circumstances of a subsidy and quantity of products affected by a subsidy.³⁰ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations (Subsidies and Countervailing Measures Regulations) ensures that there is uniformity in applying subsidies and countervailing measures by EAC member states. It necessitates that they be applied in a manner that is transparent, accountable, fair, predictable and is consistent with the law.³¹

If the decision by the EAC Trade Remedies Committee (discussed in detailed later in this paper) or directive by the EAC Council (discussed in detail later in this paper) is not implemented with regards to prohibited subsidies within the stipulated time, the complaining party receives authorisation to take the appropriate countervailing measure.³² A countervailing duty against a subsidy must be equivalent to the value of a subsidy granted.³³ Further, a countervailing measure can only be imposed after investigations by an investigating authority have been conducted.³⁴

At the national level, the Anti-dumping and Countervailing Measures Act of Tanzania calls on the Anti-dumping and Countervailing Measures Advisory Committee to impose countervailing measures where it is established that the exporting countries have applied subsidies.³⁵ In the case of Kenya, the Kenya Trade Remedies Act mandates the Cabinet Secretary for Trade to impose a countervailing measure to counteract subsidized goods imported into Kenya.³⁶

²⁹ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 9; see generally Nelly C Rotich, 'Assessing Kenya's Free Zones Consistency with WTO Agreements on Subsidies and Countervailing Measures and Agriculture' (Mini-dissertation, University of Pretoria 2019) University of Pretoria Repository Chapter 3.

³⁰ EAC Customs Union Protocol (n 7), Art 17.

³¹ Regulation 2.

³² The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 10 (10).

³³ EAC Customs Union Protocol (n 7), Art 18 (1) (b).

³⁴ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 6.

³⁵ See section 10(3) of the Act.

³⁶ See section 23(1)(b).

Such measures are applied in equal amounts or amounts less than the subsidy imposed by the importing country.³⁷

2.2 *Safeguard Measures*

Safeguard measures are measures taken to protect an EAC member state from serious injuries caused to its economy³⁸ by import surges of imported products.³⁹ They are specifically applied in Kenya to allow for the adjustment of a domestic industry that produces a “like or directly competitive product”.⁴⁰ The EAC Customs Union (Safeguard Measures) Regulations (Safeguard Measures Regulations) ensures that there is uniformity in the application of safeguard measures by EAC member states. In so doing, it ensures that there is accountability, fairness, predictability, consistency and transparency.⁴¹

Safeguard measures are applied to all kind of imported products⁴² and in a non-discriminatory manner. Importantly, they are applied only when necessary.⁴³ EAC members are also allowed to take provisional safeguard measures in the form of tariff increases for a maximum of two hundred days where it is evident that an injury that cannot be remedied would result.⁴⁴ In Kenya, safeguard measures take the forms of tariff increase or quantitative restriction on imports.⁴⁵ EAC members are permitted to apply safeguard measures for a period of one year and three years at most.⁴⁶ While this is the case at the regional level, Kenyan law allows it to maintain safeguard measures for a maximum period of ten years consisting of the periods for provisional measures (maximum of two hundred days), initial final measures (maximum of six years) and extended final measures where it is considered necessary.⁴⁷ Paramount to these processes is the role of the investigation authority, which is tasked with

³⁷ *ibid.*

³⁸ EAC Customs Union Protocol (n 7), Art 1 (1); See EAC Customs Union (Safeguard Measures) Regulations, Regulation 3; See also EAC Treaty, Art 78 (1).

³⁹ The EAC Customs Union Protocol (n 7) Art 19 (1); see The EAC Customs Union (Safeguard Measures) Regulations, Regulation 4 (2)

⁴⁰ See sections 2 & 23(2) of the Kenya Trade Remedies Act.

⁴¹ Regulation 2.

⁴² The EAC Customs Union (Safeguard Measures) Regulations, Regulation 4 (1).

⁴³ The EAC Customs Union (Safeguard Measures) Regulations, Regulation 7 (1) & (2).

⁴⁴ The EAC Customs Union (Safeguard Measures) Regulations, Regulation 8.

⁴⁵ Kenya Trade Remedies Act, Third Schedule, paragraph 17(1).

⁴⁶ The EAC Customs Union (Safeguard Measures) Regulations, Regulation 9 (2) & (3).

⁴⁷ Kenya Trade Remedies Act, Third Schedule, paragraph 17(3).

ensuring that there is a link between import surges of a product and the injury caused to a domestic industry.⁴⁸

Notably, in Kenya where imports from a developing country are less than three per cent of the total imports in that product, Kenya does not apply final safeguards measures.⁴⁹ This is however conditional on all such imports from developing countries not accounting for more than nine per cent of products import subject to investigation in Kenya.⁵⁰

2.3 *Anti-dumping Measures*

The EAC Customs Union Protocol defines anti-dumping measures as “measures taken by the investigating authority of the importing member state after conducting an investigation and determining dumping and material injury resulting from the dumping”.⁵¹ The Anti-Dumping and Countervailing Measures Act of Tanzania defines anti-dumping as measures applied to ‘equalize export price and normal value’.⁵² Dumping arise when the export price of imported goods is less than the usual price of like products in the originating country.⁵³ Dumping that causes or threatens to cause injury to an industry in any member state is prohibited. Dumping should also neither affect the setting up of a domestic industry nor ‘frustrate the benefits expected from the removal or absence of duties and quantitative restrictions of trade between EAC members.’⁵⁴

It is a requirement under the EAC Customs Union Protocol that, a domestic industry should be producing like products as a whole or a major proportion of the whole product for it to be successfully considered under the rules on anti-dumping.⁵⁵ Assessment of injury is then based on the volume and effects

⁴⁸ The EAC Customs Union (Safeguard Measures) Regulations, Regulation 6 (3); see Kenya Trade Remedies Act, Third Schedule, paragraph 2.

⁴⁹ Third Schedule, paragraph 13(7).

⁵⁰ *ibid.*

⁵¹ Art 1 (1).

⁵² Section 3.

⁵³ The EAC Customs Union (Anti-dumping Measures) Regulations, Regulation 3; EAC Customs Union Protocol, Art 1 (1); see The Anti-Dumping and Countervailing Measures Act of Tanzania, section 10; see also Kenya Trade Remedies Act, Second Schedule, paragraph 2.

⁵⁴ EAC Customs Union Protocol (n 7), Art 16 (1).

⁵⁵ EAC Customs Union Protocol (n 7), Art 16 (4).; see the EAC Customs Union (Anti-dumping Measures) Regulations, Regulation 9. A product is like if it is identical or similar in all respects, see EAC Customs Union (Anti-dumping Measures) Regulations, Regulation 3 & 7.

on prices and impact of dump goods on domestic industries.⁵⁶ A criteria for determining like products was offered by the WTO Dispute Settlement Body in Japan – Customs, Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages.⁵⁷ The WTO Panel arrived at the decision that, while the likeness of a product should be determined on a case by case analysis, the following would be a general criteria for assessing likeness of a product; first, the physical characteristics of a product should be assessed. Secondly, the end uses of a product should be considered. Thirdly, the preferences of consumers in relation to the product should be assessed. Lastly, the tariff classification of the product should be considered.⁵⁸

The EAC Customs Union (Anti-dumping Measures) Regulations (Anti-dumping Measures Regulations) ensure that there is uniformity in the imposition of anti-dumping measures within EAC.⁵⁹ Anti-dumping measures once imposed can be maintained for as long as necessary to prevent injury caused by dumped products.⁶⁰ Provisional measures can also be imposed for sixty days after commencement of investigation, where it is necessary to prevent injury that may result during investigation. In Kenya, anti-dumping measure can only be applied based on national interest of domestic industries, industrial user's needs, final consumers and general competition of the product under investigation.⁶¹

Unique to anti-dumping measures, in comparison with countervailing measures and safeguard measures, is the requirement under the EAC Customs Union Protocol calling upon the EAC Secretariat to notify the WTO on anti-dumping measures taken by EAC member states.⁶² This according to the EAC Customs Union Protocol, ensures that anti-dumping measures are applied in a predictable, transparent, consistent, fair and accountable manner.⁶³

⁵⁶ The EAC Customs Union (Anti-dumping Measures) Regulations, Regulation 8 (1).

⁵⁷ L/6216-34S/83, 1987 WL 421964, adopted 10 November 1987.

⁵⁸ *ibid.*

⁵⁹ The EAC Customs Union (Anti-dumping Measures) Regulations, Regulation 2.

⁶⁰ The EAC Customs Union (Anti-dumping Measures) Regulations, Regulation 12 (2) & (4); see Kenya Trade Remedies Act, second schedule, paragraph 23; see also The Anti-Dumping and Countervailing Measures Act of Tanzania, section 63.

⁶¹ Kenya Trade Remedies Act, Second Schedule, paragraph 21.

⁶² EAC Customs Union Protocol (n 7), Art 16 (2)

⁶³ *ibid.*

3. Resolution of Trade Remedies Disputes under the East African Community Customs Union

Peaceful settlement of disputes is a principle outlined under the EAC Treaty.⁶⁴ The EAC Customs Union (Dispute Settlement Mechanism) Regulations (EAC Dispute Settlement Mechanism Regulations) ensure that there is uniformity in the settlement of disputes within the EAC. It specifically calls for predictable, fair, consistent, transparent and accountable resolution of disputes.⁶⁵ In conjunction with the Anti-dumping Measures Regulations, Subsidies and Countervailing Measures Regulations and Safeguard Measures Regulations, the EAC Dispute Settlement Mechanism Regulations sets out various ways for resolving trade remedies disputes by EAC members.

As a general rule, if a member state responsible for dumping, import surges or export of subsidised goods fail to act within thirty days of being informed of the effects caused to the economy of the affected member states, the affected member state is mandated to report to a customs union authority.⁶⁶ The affected member state is also entitled to resort to the dispute resolution mechanisms as discussed in the subsequent sub-sections of this section.

3.1 Alternative Dispute Resolution

EAC member states are called upon to give consultations a chance in efforts to resolve any trade remedies dispute that may arise.⁶⁷ Where the subject matter of a trade remedy dispute involves perishable goods, resolution of disputes through consultation is proffered due to their levels of urgency.⁶⁸ Any such request for consultation is notified to the EAC Trade Remedies Committee in writing.⁶⁹ Once resorted to by the parties, EAC Dispute Settlement Mechanism Regulations necessitates that consultations be conducted on a without prejudice basis and confidentially.⁷⁰

Where a prohibited subsidy is granted or maintained by one or more

⁶⁴ Art 6 (c).

⁶⁵ Regulation 2.

⁶⁶ EAC Customs Union Protocol (n 7), Art 20 (3).

⁶⁷ EAC Customs Union Protocol (n 7), Art 41 (1) (b); see the EAC Customs Union (Dispute Settlement Mechanism) Regulations, Regulation 5 (1).

⁶⁸ The EAC Customs Union (Dispute Settlement Mechanism) Regulations, Regulation 6 (7).

⁶⁹ The EAC Customs Union (Dispute Settlement Mechanism) Regulations, Regulation 6 (1).

⁷⁰ The EAC Customs Union (Dispute Settlement Mechanism) Regulations, Regulation 6 (5).

EAC member states, another member state may request for consultations with that member state in efforts to remedy any effects resulting from the granting of that prohibited subsidy.⁷¹ An EAC member may also resort to consultation where a granted or maintained subsidy causes injury to a domestic product, impairs benefits accruing to or seriously prejudice the interest of another member state.⁷² Any such request for consultation indicates the nature and presence of a subsidy, the resulting injury to a domestic industry, benefits impaired and interest seriously prejudiced.⁷³ If resorted to, consultations aim at clarifying issues and arriving at a solution.⁷⁴ Request for consultation is then notified to the EAC Trade Remedies Committee.⁷⁵ If after the expiry of thirty days of requesting for consultation, no solution is arrived at, a party to the consultation is at liberty to refer the dispute to the EAC Trade Remedies Committee.⁷⁶

In so far as anti-dumping measures are concerned, the EAC Anti-dumping Measures Regulations calls on member states to in the first instance resolve disputes through consultation. This similarly entail a formal written request for consultation by a complaining member state and notification of the request to the EAC Committee on Trade Remedies.⁷⁷

Though consultation has been widely referenced by the EAC rules on trade remedies, other alternative methods of resolving disputes such as conciliation, mediation and good office may also be used in the resolution of trade remedies disputes.⁷⁸ Parties to a dispute may also resolve trade remedies disputes through arbitration.⁷⁹

⁷¹ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 10 (1) & (2); see also Regulation 33 (2).

⁷² The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulations 13 (1).

⁷³ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 13 (2)

⁷⁴ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 13 (3).

⁷⁵ *ibid.*

⁷⁶ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulations 10 (4) & 33 (4).

⁷⁷ The EAC Customs Union (Anti-dumping Measures) Regulations, Regulation 19 (2) & (3).

⁷⁸ The EAC Customs Union (Dispute Settlement Mechanism) Regulations, Regulations 5 (1) & 7.

⁷⁹ The EAC Customs Union (Dispute Settlement Mechanism) Regulations, Regulations 5 (8) & 20.

3.2 *The EAC Committee on Trade Remedies*

The Committee on Trade Remedies (EAC Trade Remedies Committee) is a creation of the EAC Customs Union Protocol.⁸⁰ It is however yet to be established. This delay in its establishment is occasioned by non-ratification by EAC members of the Amended Article 24(2)(a) of the Protocol on the Establishment of East African Community Customs Union to provide for establishment of the EAC Trade Remedies Committee.⁸¹ The Amendment introduced in 2009 during the EAC Summit of Heads of State removed the nine-member requirement for the constitution of the EAC Trade Remedies Committee, leaving it ‘open-ended’.⁸² The amendment was made to accommodate Burundi and Rwanda who then became EAC members and to also accommodate countries who decide to join EAC in future. To date, no EAC member has ratified this amendment, hence, a constitution of the EAC Trade Remedies Committee is impossible. In an attempt to mitigate this delay, the EAC East African Legislative Assembly gave a recommendation to the EAC Council of Ministers to recommend sanctions to the Summit of Heads of States against any country that had not ratified the Amendment by 28 February 2020.⁸³ This similarly is yet to materialize.

Once it is established, the EAC Trade Remedies Committee is obligated to entertain on referral by a disputant, disputes relating to anti-dumping measures, subsidies and countervailing measures and safeguard measures that cannot be resolved amicably by the parties.⁸⁴ The EAC Trade Remedies Committee, in collaboration with investigating authorities in member states, is tasked with initiating investigation of disputes relating to anti-dumping meas-

⁸⁰ Art 24.

⁸¹ EAC East African Legislative Assembly, ‘Report of the Committee on Communication, Trade and Investment on the Status of Ratification of the Amended Article 24(2)(a) of the Protocol Establishing the East African Community Customs Union to Provide for the Establishment of the Trade Remedies Committee’ (September 2019), para 2.0.

⁸² *ibid*, paragraph 4.5; see para 7.0 (ii). In its Report on the Status of Ratification of the Amended Article 24(2)(a), the EAC East African Legislative Assembly noted that names of persons to constitute the EAC Trade Remedies Committee were submitted by EAC members between March and July 2013 but it could not be constituted since EAC members were yet to ratify the amended to Article 24(2)(a).

⁸³ *ibid*, paragraph 8.0 (5).

⁸⁴ The EAC Customs Union (Dispute Settlement Mechanism) Regulations, Regulations 5 (2) & 6 (6); EAC Customs Union Protocol (n 7), Art 24 (1); see The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulations 12 (6) & 13 (4) & (5).

ures, subsidies and countervailing measures and safeguard measures.⁸⁵ It is further tasked with recommending provisional measures aimed at preventing injury to a domestic industry, consulting on trade remedies with member states, providing advisory opinions on trade remedies disputes, facilitating consultations between disputants on a trade remedy dispute and foreseeing dispute settlement.⁸⁶

The EAC Trade Remedies Committee will take up the responsibility of reviewing any evidence presented to it in its resolution of disputes referred to it under the Subsidies and Countervailing Measures Regulations.⁸⁷ Specifically, the Committee is tasked with establishing whether a prohibited subsidy causes adverse effects to the interest of other EAC member states, either by injuring a domestic industry, nullifying benefits concessions accruing to other member states or seriously prejudicing⁸⁸ the interest of other states.⁸⁹ In so doing, it permits a state party that is alleged to be maintaining the prohibited subsidy to demonstrate that a subsidy is not prohibited.⁹⁰ Within ninety days of receiving a complaint, the EAC Trade Remedies Committee is required to give a final report to the parties to a dispute as well as other EAC member states.⁹¹ If the finding of the report is that a measure is prohibited, it shall request the member state maintaining the subsidy to, without delay and within a specified period, withdraw the subsidy.⁹²

The EAC Trade Remedies Committee will also take up disputes referred to it relating to dumping of goods that cannot be resolved by the parties

⁸⁵ EAC Customs Union Protocol (n 7), Art 24 (4).

⁸⁶ *ibid.*

⁸⁷ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulations 10 (5) & 34 (4) & (6)

⁸⁸ Serious prejudice results when the total *ad valorem* subsidisation of a product exceeds five percent, where subsidies are used to cover losses or operating losses incurred by an industry or where subsidies are used to cancel debts held by the government or to cover repayment of debts, see *The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 12 (1)*; Serious prejudice may also result in displacement of imports of a like product, results in price undercutting by the subsidized product and result in increase in world market share of the subsidizing country in the subsidised product, see *the EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 12 (3)*.

⁸⁹ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 11.

⁹⁰ *ibid.*

⁹¹ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulations 10 (6) & 33 (8).

⁹² The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 10 (7).

through consultation.⁹³ It in the process would be required to establish a Panel to assist it to settle the dispute.⁹⁴ The EAC Dispute Settlement Mechanism Regulations necessitates the Panel to, after examining the facts and evidence presented, give an interim report to the parties for comments. On incorporation of any comments received from the parties, the Panel is mandated to give a final report to the EAC Trade Remedies Committee.⁹⁵ The decisions of the EAC Trade Remedies Committee will be final⁹⁶ and should be notified to the EAC Council.⁹⁷

Finally, while the Customs Union Protocol vest the EAC Trade Remedies Committee with the power to entertain disputes referred to it in relation to safeguard measures and in conjunction with the Safeguard Measures Regulation, it does not comprehensively address how it is required to deal with such disputes.⁹⁸ The Safeguard Measures Regulation does not also fill this legal gap as it only makes reference to the resolution of disputes in accordance with the Dispute Settlement Mechanism Regulations.⁹⁹ A look into the Dispute Settlement Mechanism Regulations demonstrates that it is similarly not addressed as it only points out that the regulations are applicable to safeguard measures.¹⁰⁰ It is therefore plausible that the EAC Trade Remedies Committee once established will set out its rules for resolving such disputes. An alternative is for EAC Heads of States to formulate comprehensive rules for resolving safeguard disputes.

3.3 The East African Court of Justice

The East African Community Court of Justice (EAC Court of Justice) was established by the EAC Treaty to see to it that there is adherence to the

⁹³ The EAC Customs Union (Anti-dumping Measures) Regulations, Regulation 19 (6-9).

⁹⁴ The EAC Customs Union (Dispute Settlement Mechanism) Regulations, Regulations 8 (1) & 10.

⁹⁵ The EAC Customs Union (Dispute Settlement Mechanism) Regulations, Regulation 5 (2-6).

⁹⁶ EAC Customs Union Protocol, Art 24 (5); the EAC Customs Union (Dispute Settlement Mechanism) Regulations, Regulation 5 (7).

⁹⁷ EAC Customs Union Protocol (n 7), Art 24 (4) (e).

⁹⁸ See generally the EAC Customs Union Protocol (n 7).

⁹⁹ The EAC Customs Union (Safeguard Measures) Regulations, Regulation 12.

¹⁰⁰ The EAC Customs Union (Dispute Settlement Mechanism) Regulations, Regulation 4 (2) (c).

EAC Treaty.¹⁰¹ It has jurisdiction to interpret and apply the EAC Treaty.¹⁰² It also entertains any disputes referred to it by member states on breach of obligations under the EAC Treaty and specifically, legislations, decisions and regulations that are in contravention of the EAC Treaty.¹⁰³ The Secretary General¹⁰⁴ of the EAC and legal and natural persons may also refer cases to the EAC Court of Justice.¹⁰⁵ Key to this paper are disputes that may be referred to it under the Subsidies and Countervailing Measures Regulations¹⁰⁶ and Anti-dumping Measures Regulations.¹⁰⁷ The EAC Court of Justice further has the mandate to hear disputes arising from arbitration.¹⁰⁸ Decisions of the EAC Court of Justice division of first instance can be appealed against to its appellate division.¹⁰⁹

The jurisdiction of the EAC Court of Justice to entertain trade remedies disputes was challenged in the case of East African Law Society versus the Secretary General of the East African Community.¹¹⁰ This case sought to challenge the provisions of Article 24 (1) (e) of the Customs Union Protocol which vests the EAC Trade Remedies Committee with the power to settle trade remedies rules in accordance with the Dispute Settlement Mechanism Regulations.¹¹¹ Concern was raised as to whether EAC Court of Justice has jurisdiction to entertain disputes resulting from the implementation of this provision¹¹² According to Counsel for the Applicant, this provision of the

¹⁰¹ Arts 9 (1), 23 (1). The court is composed of a maximum of fifteen judges (not more than ten in the division of first instance and not more than five in the appeal division) chosen by the EAC Summit consisting of Heads of state or government of member states, EAC Treat, Art 24(2) & (3). See Art 10 of Summit membership.

¹⁰² EAC Treaty, Art 27 (2).

¹⁰³ EAC Treaty, Art 28; The EAC Customs Union (Dispute Settlement Mechanism) Regulations, Regulation 8.

¹⁰⁴ The Secretary General is nominated by heads of states on rotational basis and appointed by the Summit consisting of heads of state and government of member states, see EAC Treaty, Art 67.

¹⁰⁵ EAC Treaty, Arts 29 & 30. Persons referred to under the EAC Treaty are residents in any member state. Such persons can however institute claims before the Court within two months of cause of action provided that the cause of action has not been reserved to the jurisdiction of an institution in that member state, see Art 30 (2) & (3).

¹⁰⁶ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulations 10 (9)(3) & 33 (10)(3).

¹⁰⁷ Regulation 19 (10).

¹⁰⁸ EAC Treaty, Art 32.

¹⁰⁹ See EAC Treaty, Arts 23 (3), 24 & 35 A.

¹¹⁰ See East African Court of Justice case Reference 1 of 2011, delivered on 14 February 2013; see also [2013] eKLR.

¹¹¹ *ibid*, paragraph 2.

¹¹² *ibid*, paragraph 3.1 & 3.2.

Customs Union Protocol was in contravention of Articles 23 and 27 of the EAC Treaty which gives the EAC Court of Justice jurisdiction to interpret the Treaty, which the Customs Union Protocol is part.¹¹³ It was the EAC Court of Justice's finding that both Article 24 (1) and Regulation 6 (7) of Annex IX of the Customs Union Protocol do not take away its interpretative jurisdiction.¹¹⁴ The EAC Court of Justice however acknowledged that it lacks jurisdiction to entertain disputes falling within the mandate of the EAC Trade Remedies Committee save for its power to interpret and apply the Customs Union Protocol.¹¹⁵ Hence, the EAC Court of Justice has jurisdiction to entertain disputes relating to the application and interpretation of the EAC Treaty, the Customs Union Protocol included.

3.4 *The Council*

The Council is a creation of the EAC Treaty.¹¹⁶ Ministers and Attorneys General from each member state constitute the Council.¹¹⁷ It is mandated to ensure that the EAC functions and develops in accordance with the EAC Treaty.¹¹⁸ In so far as dispute settlement under the EAC is concerned, it is entrusted with ensuring resolution of disputes that may be referred to it.¹¹⁹ Any decisions made are binding on member states, their organs and institutions.¹²⁰ It is further tasked with seeking advisory opinion on legal questions from the EAC Court of Justice.¹²¹

Significant to this paper is the mandate of the Council to adopt a report issued by the EAC Trade Remedies Committee within thirty days of issuance to the parties to a dispute and other member states. This mandate is however conditional on the report not been appealed against and the Council not unanimously deciding not to adopt the report.¹²² The Council has the mandate to

¹¹³ *ibid*, paragraph 4.1.

¹¹⁴ *ibid*, paragraph 4.3

¹¹⁵ *ibid*, paragraph 5.3.

¹¹⁶ Arts 9 (1) & 13.

¹¹⁷ *ibid*.

¹¹⁸ EAC Treaty, Art 14 (2).

¹¹⁹ EAC Treaty, Art 14 (3) (1).

¹²⁰ EAC Treaty, Art 16.

¹²¹ EAC Treaty, Arts 14 (4) & 36.

¹²² The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulations 10 (8) & 33 (9); see also The EAC Customs Union (Anti-dumping Measures) Regulations, Regulation 19 (10).

hear appeals from the EAC Trade Remedies Committee's decisions.¹²³ It shall then make decisions that take the forms of directives. Where it fails to arrive at a decision, a party to a dispute is at liberty to refer the case to the EAC Court of Justice.¹²⁴

4. Resolution of Trade Remedies Disputes under Domestic Judicial Systems

The EAC Treaty does not preclude national courts from entertaining disputes which the EAC is a party.¹²⁵ National courts are mandated to give preliminary rulings on any issues concerning the application or interpretation of the EAC Treaty. They also have the mandate to decide on the validity of directives, regulations and decisions of the EAC.¹²⁶ The decisions of the EAC Court of Justice however have precedence over decisions by national courts.¹²⁷

As a general requirement, investigating authorities in each of the EAC member states are tasked with conducting investigations on trade remedies.¹²⁸ Safeguard measures for example can only be imposed by a member state after investigation by an investigating authority has been conducted.¹²⁹ Such investigations entail issuing public notices to interested parties. It further entails public hearings to ascertain whether a safeguard measure will be consistent with public interest.¹³⁰ The investigating authority is mandated to treat confidential information as such unless consent to disclose is given by the concerned party. In the end, the investigating authority is required to make public a report on its findings detailing the conclusions arrived at.¹³¹ This applies in equal measure to anti-dumping measures¹³² and countervailing measures. This is

¹²³ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulations 10 (9) & 33 (10).

¹²⁴ *Ibid*; see also The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulation 13 (6) & (7).

¹²⁵ EAC Treaty, Art 33.

¹²⁶ EAC Treaty, Art 34.

¹²⁷ *ibid*.

¹²⁸ The EAC Customs Union (Subsidies and Countervailing Measures) Regulations, Regulations 3 & 17; see EAC Customs Union (Safeguard Measures) Regulations, Regulation 3; see also EAC Customs Union (Anti-dumping Measures) Regulations, Regulations 3 & 6.

¹²⁹ The EAC Customs Union (Safeguard Measures) Regulations, Regulation 5 (1).

¹³⁰ *Ibid* sub-sec 2.

¹³¹ The EAC Customs Union (Safeguard Measures) Regulations, Regulations 5 (3), (4) & (5).

¹³² The EAC Customs Union (Anti-dumping Measures) Regulations, Regulations 10 (3) & 17.

illustrative of the irresistible mandate of investigating authorities in resolution of trade remedies by EAC members.

While this is the case, no dispute relating to safeguard measures, countervailing measures and anti-dumping measures has been instituted or resolved by any EAC member. Rwanda for example has to date not granted or maintained any trade remedy. It has also never established an authority to investigate trade remedies actions.¹³³ Importantly, Rwanda has no national legislation on trade remedies.¹³⁴ It would then result that it has no legal or institutional framework for addressing trade remedies disputes.

Uganda does not have legislation on trade remedies. It is however in the process of establishing a trade remedies law, which has been in the Uganda Parliament for over a decade now.¹³⁵ No trade remedies dispute has ever been instituted against it in any trade remedies resolution body.¹³⁶ Uganda has also to date not taken any trade remedies measures. In its only notification to the WTO on trade remedies, Uganda noted that it had never established an authority to initiate and conduct investigations on subsidies and countervailing measures.¹³⁷

Burundi notified the WTO in 2010 that it had neither established an authority to initiate and investigate anti-dumping actions nor taken any anti-dumping measures. It has not taken any anti-dumping measures to date.¹³⁸ Burundi has also not granted or maintained any form of subsidy, which affects

¹³³ See generally WTO Committee on Anti-Dumping Practices, 'Notification under Articles 16.4 and 16.5 of the Agreement' (26 February 2010) G/ADP/N/193/RWA.

¹³⁴ See World Trade Organization Trade Policy Review Body, 'Trade Policy Review Report by the Secretariat: East African Community' (13 February 2019), ANNEX 3 Rwanda 202 available at <https://www.wto.org/english/tratop_e/tpr_e/s384-03_e.pdf>;

¹³⁵ See Organisation of African, Caribbean and Pacific States, 'Uganda- Preparation of Draft Trade Remedies Laws Compatible with the WTO Agreements on Anti-dumping, Subsidies and Countervailing Measures and Safeguards' <http://www.acp.int/sites/acpsec.waw.be/files/acp_mts_programme/projects/0e3d1ab-77cf4f9.pdf> (accessed 1 April 2020)

¹³⁶ See World Trade Organization Trade Policy Review Body, 'Trade Policy Review Report by the Secretariat: East African Community' (13 February 2019), ANNEX 5 Uganda 373 available at <https://www.wto.org/english/tratop_e/tpr_e/s384-05_e.pdf>.

¹³⁷ WTO Committee on Subsidies and Countervailing Measures, 'Notification under Articles 25.11 and 25.12 of the Agreement on Subsidies and Countervailing Measures' (7 December 2015) G/SCM/N/202/UGA.

¹³⁸ WTO Committee on Anti-Dumping Practices, 'Notification under Articles 16.4 and 16.5 of the Agreement' (16 April 2010) G/ADP/N/193/BDI.

exports or imports either directly or indirectly.¹³⁹ Burundi does not also have a national legislation on trade remedies¹⁴⁰ and has never applied trade remedies.¹⁴¹ There is therefore no mechanism for resolving trade remedies disputes in Burundi.

South Sudan does not have legislation on trade remedies. It is also yet to establish an authority to investigate trade remedies in its territory. It similarly follows that there is no national mechanism for resolving trade remedies disputes. Importantly, no dispute has been instituted by or against South Sudan in any trade remedies resolution institution.¹⁴² This is because South Sudan recently gained independence from Sudan.¹⁴³

My analysis in the subsequent sub-sections is therefore narrowed down to Kenya and Tanzania, since they both have legislations and institutional frameworks for resolving trade remedies disputes, albeit in paper only.

4.1 Kenya

Kenya is the only country within EAC with a comprehensive legislation on trade remedies.¹⁴⁴ The Kenya Trade Remedies Act gives the mandate of resolution of disputes to the Kenya Trade Remedies Agency and the High Court.¹⁴⁵ The legislation also vest the Cabinet Secretary for international

¹³⁹ WTO Committee on Safeguards and Countervailing Measures, 'New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures' (18 April 2017) G/SCM/N/284/BDI & G/SCM/N/315/BDI.

¹⁴⁰ See WTO Committee on Anti-Dumping Practices and Committee on Subsidies and Countervailing Measures, 'Notifications of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements' (24 April 2001) G/ADP/N/1/BDI/1 & G/SCM/N/1/BDI/1; see also WTO Committee on Safeguards, 'Notification of Laws, Regulations and Administrative Procedures Relating to Safeguard Measures' (30 April 2001) G/SG/N/1/BDI/1.

¹⁴¹ World Trade Organization Trade Policy Review Body, 'Trade Policy Review Report by the Secretariat: East African Community' (13 February 2019), ANNEX 1 Burundi 75 available at <https://www.wto.org/english/tratop_e/tpr_e/s384-01_e.pdf>.

¹⁴² Emphasis mine.

¹⁴³ It became a member of United Nations on 14 July 2011, see United Nations, 'UN Welcomes South Sudan as 193rd Member State' <https://news.un.org/en/story/2011/07/381552> (accessed 1 April 2020).

¹⁴⁴ See WTO Committees on Anti-Dumping Practices, Subsidies and Countervailing Measures and Safeguards, 'Trade Remedies: Notification of Kenya on Trade Remedies Act 2017' (21 May 2019) G/ADP/N/1/KEN/3, G/SCM/N/1/KEN/3 & G/SG/N/1/KEN/2; see also See World Trade Organization Trade Policy Review Body, 'Trade Policy Review Report by the Secretariat: East African Community' (13 February 2019), ANNEX 2 Kenya 133 available at <https://www.wto.org/english/tratop_e/tpr_e/s384-02_e.pdf>.

¹⁴⁵ *Ibid*, Annex 2, paragraph 3.42.

trade with the power to impose anti-dumping and countervailing measures and Cabinet Secretary for finance with the mandate of imposing safeguard measures.¹⁴⁶ Kenya has never applied any of the three trade remedies under the national and EAC frameworks.¹⁴⁷ Kenya however, in 2002, used safeguard measures on sugar imports (maintained on extension until 2017) and wheat flour (maintained until 2008) under the COMESA Treaty.¹⁴⁸ No trade remedy dispute has been brought against or by Kenya. As discussed previously in this paper, it has appeared as a third party in Japan –Customs, Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages.¹⁴⁹

4.1.1 Kenya Trade Remedies Agency

The Kenya Trade Remedies Act allows for the creation of the Kenya Trade Remedies Agency¹⁵⁰ to investigate and evaluate dumped and subsidized imported products and evaluate request for safeguard measures.¹⁵¹ The Kenya Trade Remedies Agency is further obligated to vary or set aside its recommendation, determination or decision to the extent of addressing an existing obvious error, ambiguity or omission.¹⁵² Where a determination, decision or recommendation was made by a common mistake that affects all relevant parties, a variation or setting aside can also be made.¹⁵³ Establishment of the Kenya Trade Remedies Agency is currently on-going.

4.1.2 Kenya High Court

The High Court in Kenya has the mandate to review an appeal from a decision, determination or recommendation of the Kenya Trade Remedies Agency.¹⁵⁴ The High Court also has jurisdiction to entertain a judicial review application challenging a Kenya Trade Remedies Agency review or final determination on the imposition of a countervailing measure or anti-dumping

¹⁴⁶ *ibid*; See also Kenya Trade Remedies Act, section 23 (1) & (2).

¹⁴⁷ *Ibid*, Annex 2, paragraph 3.45.

¹⁴⁸ Kenya relied on the Treaty Establishing the Common Market for Eastern and Southern Africa, signed on 5 November 1993, Article 61. This provision allows member states to take safeguard measures for a period of up to one year subject to extension by the COMESA Council of Ministers on satisfaction that necessary measures were taken to in the application of the safeguard measure.

¹⁴⁹ See note 42 above.

¹⁵⁰ Section 3 (1).

¹⁵¹ Section 5 (a) & (b).

¹⁵² Kenya Trade Remedies Act of 2007, section 36 (a).

¹⁵³ *ibid*, section 36 (b).

¹⁵⁴ Kenya Trade Remedies Act of 2017, section 35.

duty.¹⁵⁵ The High Court on application by a party, further has the mandate to protect confidential information relating to a trade remedy.¹⁵⁶ These mandates reaffirm the mandate of the High Court, under The Constitution of Kenya, 2010, to entertain any dispute referred to it by legislation.¹⁵⁷

5. Tanzania

Since it became a member of the WTO, Tanzania has only given one notification to the WTO on trade remedies. In 2010, it notified the WTO that it had not taken any anti-dumping measures and neither had it established any authority to investigate any anti-dumping actions.¹⁵⁸ In 2004, Tanzania enacted the Anti-dumping and Countervailing Measures Act¹⁵⁹ but has to date never been applied owing to non-establishment of the Anti-Dumping and Countervailing Measures Advisory Committee responsible for its implementation.¹⁶⁰ The Anti-dumping and Countervailing Measures Act is currently under review and is yet to be notified to the WTO.¹⁶¹ The mandates of the Anti-Dumping and Countervailing Measures Advisory Committee are limited to investigation and application of anti-dumping and countervailing measures.¹⁶²

Though dispute resolution of anti-dumping and countervailing measures is not expressly provided for, the Tanzania High Court is mandated to entertain an appeal against a decision of the Anti-Dumping and Countervailing Measures Advisory Committee.¹⁶³ The Minister is also tasked with prescribing regulations for dispute resolution.¹⁶⁴ This is yet to be actualised. Interesting to note, the Anti-dumping and Countervailing Measures Act criminalises giving of misleading or false information or refusing to give information without

¹⁵⁵ *ibid*, Second Schedule, paragraph 55

¹⁵⁶ Kenya Trade Remedies Act of 2017, section 29 (4) & (5).

¹⁵⁷ Article 165 (3) (e); see also Article 165 (3) (a) on the unlimited original jurisdiction of the High Court over civil matters.

¹⁵⁸ WTO Committee on Anti-Dumping Practices, 'Notification under Articles 16.4 and 16.5 of the Agreement' (22 June 2010) G/ADP/N/193/TZA.

¹⁵⁹ Act No. 1 of 2004, assented on 14 April 2004.

¹⁶⁰ See World Trade Organization Trade Policy Review Body, 'Trade Policy Review Report by the Secretariat: East African Community' (13 February 2019), ANNEX 4 Tanzania 276 available at <https://www.wto.org/english/tratop_e/tpr_e/s384-04_e.pdf>.

¹⁶¹ *Ibid*; See Tanzania Anti-dumping and Countervailing Measures Act, section 4.

¹⁶² See generally Tanzania Anti-dumping and Countervailing Measures Act.

¹⁶³ Tanzania Anti-dumping and Countervailing Measures Act, section 76.

¹⁶⁴ Tanzania Anti-dumping and Countervailing Measures Act, section 77 (a).

a lawful excuse and disclosure of confidential information.¹⁶⁵ A person who commits any such offence is liable to a fine of five hundred thousand shillings or six months imprisonment or both.¹⁶⁶

6. Analysis of the Framework for Resolution of Trade Remedies disputes under the EAC Customs Union and by Partner States

Resolution of trade remedies under the EAC Customs Union is an area that has not received significant examination beyond a brief analysis by the Trade Law Centre.¹⁶⁷ EAC member states as has been pointed out elsewhere in this paper have not lodged complaints on trade remedies either under their domestic regimes or EAC trade remedies framework.¹⁶⁸ Again, the author narrows down the analysis to domestic institutional frameworks on trade remedies to only Kenya and Tanzania since they are so far the only EAC members with domestic legislations on trade remedies. Any reference to domestic frameworks in the subsequent paragraphs therefore connotes these two domestic frameworks. This analytical section aims to point out the similarities and differences that exist between the two regimes (for EAC and EAC members' domestic frameworks).

To begin with, both regimes establish institutions responsible for initiation and investigation of trade remedies. Though they bare different names; EAC Trade Remedies Committee, Kenya Trade Remedies Agency and Tanzania Anti-dumping and Countervailing Measures Advisory Committee, their mandates are worded in almost similar terms.¹⁶⁹ All these three institutions are yet to be established.¹⁷⁰ In both regimes, evidence of lack of political good will are overwhelming in the failure to implement laws on trade remedies. In the case of Tanzania, the Anti-dumping and Countervailing Measures Advisory

¹⁶⁵ Tanzania Anti-dumping and Countervailing Measures Act, section 75.

¹⁶⁶ *ibid.*

¹⁶⁷ TRALAC (n 5).

¹⁶⁸ See TRALAC, 'Customised Trade Remedies in Africa- The Case of the COMESA-EAC-SADC Tripartite Free Trade Area' <http://www.acp.int/sites/acpsec.waw.be/files/acp_mts_programme/projects/0e3d1ab-77cf4f9.pdf> (accessed 2 April 2020).

¹⁶⁹ Refer to notes 65, 126, 139 & 140 of this paper.

¹⁷⁰ See sections 2 and 3 of this paper, specifically discussions on EAC Trade Remedies Committee, Kenya and Tanzania.

Committee is yet to be established, sixteen years later, following the enactment of the Ant-dumping and Countervailing Measures Act in 2004. Within the EAC, the Amendment to Article 24(2)(a) of the Customs Union Protocol allowing for the setting up of the EAC Trade Remedies Agency, is yet to be ratified, eleven years later, by the EAC member states. It is also important for me to note the Uganda's legislation on trade remedies that has been in Uganda Parliament for over a decade now. Kenya, however, seems to be moving in the right direction as it is in the process of setting up its Trade Remedies Agency.

The trade remedy agency or committee under both regimes carry out their mandates with the assistance of investigating authorities. Similarly, no investigating authority has been set up under the two regimes. In the same vein, no use of trade remedies has been deemed necessary so as to necessitate the establishment of an investigating authority. This argument does not however suggest that there are no domestic industries within the EAC that needs protection through the use of trade remedies. This is an area that is yet to be explored.

The EAC laws on trade remedies are fragmented as they provide for general terms under the EAC Treaty and Customs Union Protocol and address comprehensive rules in each of the trade remedies regulations.¹⁷¹ While the Tanzania trade remedy law appear in a single instrument, it addresses only anti-dumping measures and countervailing measures, leaving out safeguard measures.¹⁷² In the case of Kenya, the laws on trade remedies appear in a single instrument.¹⁷³ While the EAC legal framework is applicable in all the six EAC member countries, the domestic regimes would generally be applicable within the specific member state's territory. The Kenya Trade Remedies Act seems to however suggest that it is applicable in the EAC region based on its definition of "domestic market" to include the EAC as a single customs territory'.¹⁷⁴

The EAC rules on trade remedies provides for comprehensive ways for resolving trade remedies. It encourages disputants to resort to consultation as

¹⁷¹ See generally the Anti-dumping Measures Regulations, Safeguard Measures Regulations and Subsidies and Countervailing Measures Regulations.

¹⁷² See generally Tanzania Anti-dumping and Countervailing Measures Act, 2004.

¹⁷³ See Kenya Trade Remedies Act, 2017.

¹⁷⁴ Section 2.

a first recourse for resolving trade remedies disputes,¹⁷⁵ this is not provided for under both the Kenya and Tanzania legal regimes. The EAC Customs Union permits parties to the disputes to appeal cases to the EAC Trade Remedies Committee, if dissatisfied, they can appeal further to the EAC Council and they can also appeal further to the EAC Court of Justice.¹⁷⁶ The domestic mechanisms on the other hand, in the case of Kenya, mandate the Kenya Trade Remedies Agency to review its own decisions and parties to appeal against the decision of the Kenya Trade Remedies Agency to the High Court.¹⁷⁷ In Tanzania, no elaborate dispute resolution is given, disputants are however permitted to appeal against a decision on the imposition of trade remedies by the Anti-dumping and Countervailing Measures Advisory Committee to the High Court.¹⁷⁸

Resolution of safeguard measures disputes is barely addressed under both regimes. The EAC regime only gives the EAC Trade Remedies Committee the mandate to hear safeguards measures disputes, apart from this, no comprehensive procedure for their resolution is given. Kenya also gives the Trade Remedies Agency mandate to review its own decisions as regard safeguard measures to legislate on their appeals or application for judicial review to the High Court, in comparison with countervailing and anti-dumping measures. Tanzania has only legislated on anti-dumping and countervailing measures, leaving out safeguard measures.¹⁷⁹

7. Conclusion

In conclusion, trade remedies were introduced to protect domestic industries from injuries caused to it by prohibited subsidies and dumped imports and to restrict import surges.¹⁸⁰ While trade remedies disputes make up a large share of disputes before the WTO Dispute Settlement Body, none has been instituted by or against any EAC member state. This is not to say that EAC members have no domestic industries to protect or rather deem it unneces-

¹⁷⁵ See EAC Customs Union Protocol (n 7), Art 41 (1) (b); see also the EAC Customs Union (Dispute Settlement Mechanism) Regulations, Regulation 5 (1).

¹⁷⁶ Refer to section 2 of this paper.

¹⁷⁷ Refer to section 3 of this paper, discussions on Kenya.

¹⁷⁸ Refer to section 3 of this paper, discussions on Tanzania.

¹⁷⁹ See sections 2 and 3 of this paper.

¹⁸⁰ TRALAC (N 155).

sary to apply trade remedies to protect domestic industries but rather, there is overwhelming evidence that suggest that EAC members lack the political will to apply trade remedies in their territories. This is evident in their lack of ratification, over a decade later, of the Amended Article 24(2)(a) of the Customs Union Protocol allowing for the setting up of the EAC Trade Remedies Agency. There is also deliberate refusal to implement domestic legislations on trade remedies, the case for Tanzania and Uganda. This might not be entirely the case as the failure to implement laws or apply trade remedies could be attributed to the expensive nature of trade remedies and the stringent laws connected to them. Under both the EAC and member states', there is inordinate delay in establishment of institutions to resolve trade remedies disputes. There is however hope in the case of Kenya since it is in the process of setting up its Trade Remedies Agency. If EAC members also honour the pledge to see to it that Amended Article 24(2)(a) of the Customs Union Protocol is ratified before end of 2020, there is an array of hope on the establishment of the EAC Trade Remedies Committee in the coming years. This area however generally remains under-developed.



ISSN 2709-1260



977-2709-1260