

WORLD TRADE ORGANIZATION

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Committee on Customs Valuation

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**NOTIFICATION UNDER ARTICLE 22 OF THE
AGREEMENT ON IMPLEMENTATION OF ARTICLE VII OF
THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994**

KENYA

The following communication, dated 9 January 2002, has been received from the Permanent Mission of Kenya.

In accordance with the Decision of the Committee on Customs Valuation of 12 May 1995, I have the honour to notify the Committee on Customs Valuation of the legislation¹ of Kenya relevant to customs valuation, as contained in clauses 10 and 17 of the Finance Act 2000, a copy of which is attached.

¹ In English only.

Value of Imported Goods, Excisable Goods, and Goods for Export

Determination of
value of imported
goods

8 of 1985, s.3

4 of 1983, s.12

5 of 1998, s.7

127.(1) The value of imported goods, whether exempt from duty, liable to specific duty or liable to *ad valorem* duty, shall be as laid down in the Seventh Schedule.

(2) In the case of goods imported under a contract of sale, the price paid or payable on that sale shall be deemed to be the value;

Provided that the price is properly adjusted to take account of circumstances which differ from a sale as is contemplated by the Seventh Schedule

(3) The rate of exchange to be used for determining the equivalent in Kenya currency of any foreign currency shall be the prevailing current selling rate of sight drafts as last notified by the Central Bank, or the rate applied by banks or financial institutions, whichever is the higher, when an entry is presented and accepted by the proper officer in accordance with section 127A.

(4) Notwithstanding subsection (3), the rate applicable shall be further determined by the Commissioner as the weighted average of the prevailing selling rates in force during the previous week and, subject to any official revaluation or devaluation of any currency as notified by the Central Bank, shall remain valid throughout the week.

(5) Notwithstanding subsection (3) and (4) and section 127A, the Minister may, by notice in the Gazette, declare the rate of exchange to be used from time to time in determining the equivalent in Kenya currency of any foreign currency.

(6) Subject to subsections (3) and (4), the Commissioner may require any bank or financial institution to submit details or any information in respect of the rates of exchange of foreign currency and such details or information shall be given immediately.

(7) Any bank or financial institution which fails to comply with subsection (6) shall be guilty of an offence.

(8) Where an entry has been checked and accepted by the proper officer, the duty payable shall be paid within five days from the date of the acceptance, and in default a new assessment of the value shall be determined in accordance with subsections (3) and (4).

Determination of
value of goods
for export

10 of 1986, s.6

9 of 1992, s.10

4 of 1993, s.13

5 of 1998, s.8

127A(1) The value of goods for export, whether exempt from duty, liable to specific duty or liable to *ad valorem* duty, shall include:

(a) the cost of the goods to the buyer outside Kenya;

(b) packing charges;

(c) transport and all other charges up to the time of delivery of the goods on board the exporting aircraft or vessel, or at the place of exit from Kenya;

- (d) any levy, excess, duty or tax
- (2) In the case of goods for re-exportation, the value shall include:
 - (a) the landed cost at the time of importation;
 - (b) all other charges, including transport up to the time of the delivery of the goods or, board the exporting aircraft or vessel or to the place of exit from Kenya.
- (3) The rate of exchange to be used for determining the equivalent in Kenya currency of any foreign currency shall be the prevailing current buying rate of sight drafts as last notified by the Central Bank, or the rate applied by banks or financial institutions, whichever is the higher, when an entry is presented and accepted by the proper officer in accordance with section 63.
- (4) Notwithstanding subsection (3), the rate applicable shall be further determined by the Commissioner as the weighted average of the prevailing buying rates in force during the previous week and, subject to any official revaluation or devaluation of any currency as notified by the Central Bank, shall remain valid throughout the week.
- (5) Subject to subsections (3) and (4), the Commissioner may require any bank or financial institution to submit details or any information in respect of the rates of exchange of foreign currency and such details or information shall be given immediately.
- (6) Any bank or financial institution which fails to comply with subsection (5) shall be guilty of an offence.
- (7) Where an entry has been checked and accepted by the proper officer, the duty payable shall be paid within five days from the date of the acceptance, and in default, a new assessment of the value shall be determined in accordance with subsections (3) and (4).

Appraisal of
value of imported
goods, etc.
10 of 1988, s.11.
4 of 1999, s.10

- 127B**(1) Notwithstanding any other provisions of this Act, where the proper officer, or any other officer authorized by the Commissioner, has reason to believe that the value of the imported goods or goods for export or goods for re-exportation is below or above the transaction value, the proper officer or authorized person shall appraise in accordance with the methods set out in the Seventh Schedule.
- (2) A certificate of the appraised value given under the hand of the proper officer or other persons authorized by the Commissioner shall be prima facie evidence of the value of those goods.
 - (3) Upon written request, the importer shall be entitled to an explanation, in writing, from the proper officer or person authorized by the Commissioner as to the method applied in appraising the goods pursuant to this section.
 - (4) Where a dispute arises regarding the decision of the proper officer or other persons authorized by the Commissioner under the foregoing subsections, the importer or other person liable for the payment of duty may within

thirty days of the day he is notified of the decision, appeal to the Tribunal established under section 127E.

- (5) The Tribunal shall consider and determine every appeal made under subsection (4) shall cause his decision thereon to be served upon the appellant specifying reasons therefor.
- (6) A person aggrieved by a decision of the Tribunal under subsection (5) may appeal to the High Court within fourteen days.
- (7) An importer may remove goods subject to an appraisal under this section from customs authority pending final determination of the value thereof by the proper officer or other person authorized by the Commissioner upon payment of a cash deposit equivalent to the assessed duty, and any excess thereof shall be refunded within thirty days from the date of final determination of duty payable.
- (8) The Commissioner shall cause to be kept records of all administrative and judicial decisions taken under this section in conformity with the Agreement on Customs Valuation.
- (9) In this section, the expression "Agreement on Customs Valuation" refers to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade on Customs Valuation signed in Marrakesh, Morocco, on the 15th April 1994.

Value of goods
for excise duty
purposes
8 of 1991, s.11,
4 of 1993, s.14,
6 of 1994, s.4

- 127C.** (1) The value of imported goods for purposes of levying excise duty shall be the sum of:
- (a) the value of such goods ascertained for the purpose of import duty, and,
 - (b) the amount of import duty, suspended duty and dumping duty if any.
- (2) The value of locally manufactured goods for purposes of levying *ad valorem* excise duty shall be the ex-factory selling price.
- (3) For the purposes of subsection (2), the ex-factory selling price shall include:
- (a) The cost of any wrapper, package, box, bottle or other container in which the excisable goods are packed;
 - (b) the cost of any other goods contained in or attached to the wrapper, package, box, bottle or other container; and
 - (c) any other cost incidental to the sale of the goods including advertising, financing, warranty, commission, transportation, mark-up or any other cost incurred related to delivery to the point of sale.
- (4) Notwithstanding subsection (3)b., the cost of returnable containers shall be excluded from the excisable value.

Preshipment
inspection of

- 127D.**(1)Notwithstanding any other provision of the Act, the Minister may, by, notice in the Gazette, prescribe certain imported goods which shall be

imported goods
8 of 1996, s.4

subject to pre-shipment inspection.

- (2) The Commissioner may appoint any person for the purposes of conducting pre-shipment inspection of the goods prescribed under subsection (1).
- (3) An appointment under subsection (2) shall be subject to such terms and conditions as may be agreed in writing between the Government and the appointed person.
- (4) A person appointed under subsection (2) shall, on completion of pre-shipment inspection of any goods, issue a certificate of such inspection to the Commissioner and to the importer.
- (4A) Goods in respect of which a certificate has been issued under subsection (4) shall not be subjected to any further inspection except by a proper officer.
- (5) A person, who, at the commencement of this section is appointed by the Minister to conduct pre-shipment inspection, shall be deemed to be a person appointed by the Commissioner and to the importer.
- (6) In this section, the expression "pre-shipment inspection" means the examination of imported goods prior to shipment in order to ascertain the description, quality, quantity and the value of such goods.

Establishment of
Appeals Tribunal

127E. (1) The Minister shall, by order publish in the Gazette, establish an Appeals Tribunal for purpose of hearing appeals under section 127B.

- (2) The Tribunal shall consist of a Chairman and not less than four but not more than six members who shall be appointed by the Minister and who shall hold office for such period and upon such terms and conditions as the Minister may determine.
- (3) The quorum for meeting of the Tribunal shall be the Chairman and two other members.
- (4) All matters before the Tribunal shall, in the event of a difference of opinion, be decided by the votes of the majority of the members thereof.

127F. (1) A person shall, before filing an appeal with the Tribunal, deposit with the Commissioner the full duty assessed under section 127B.

- (2) Any duty deposited with the Commissioner under subsection (1) shall, where the decision of the Tribunal or the High Court, as the case may be, is in favour of the aggrieved persons, be refunded to such person, less the amount of duty which was not disputed.
- (3) On hearing an appeal, the Tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.

- (4) Where the Tribunal considers it desirable for the purpose of avoiding expense or delay or any other special reasons to do so, it may receive evidence by affidavit and administer interrogations and require the person to whom the interrogations are administered to make a full and true reply to the interrogations within the time specified by the Tribunal.
- (5) In its determination of any matter the Tribunal may take into consideration any evidence which it considers relevant to the subject of an appeal before it, notwithstanding that the evidence would not otherwise be admissible under the law relating to evidence.
- (6) The Tribunal shall have the power to award the costs of any proceedings before it and to direct that such costs be taxed in accordance with any scale prescribed for suits in the High Court or to award a specified sum of costs.
- (7) All summons, notices or other documents issued under the hand of the Chairman of the Tribunal shall be deemed to be issued by the Tribunal.
- (8) Any interested party may be represented before the Tribunal by an advocate or by any other person whom the Tribunal may, in its discretion, admit to be heard on behalf of the party.
- (9) Any person summoned by the Tribunal to attend and give evidence or to produce any records, books of account, statements, or other documents, or required to answer interrogations and who without sufficient cause:
 - (a) refuses or fails to attend at the time and place mentioned in the summons served on him; or
 - (b) refuses or fails to answer fully and satisfactorily, to the best of his knowledge and belief all questions lawfully put to him by or with the concurrence of the Tribunal, or
 - (c) refuses or fails to produce any records, books of account, statements or other documents which are in his possession or under his control mentioned or referred to in any summons served on him.

Shall be guilty of an offence and liable to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding two years or both.

- (10) Where the Tribunal awards costs in any appeal, it shall, on application by the person to whom the costs are awarded, issue to him a certificate stating the amount of costs.
- Cap.40.
- (11) Every certificate issued under subsection (10) may be filed in the High Court by the person in whose favour the costs have been awarded and upon being so filled shall be deemed to be a decree of the High Court and may be executed as such provided that an order for costs against the Government shall not be enforced save in the manner provided for by the Government Proceedings Act.
- Cap.21
- (12) The Chief Justice may make rules governing appeals and providing for the fees to be paid, the scale of costs of any such appeal, the procedure to be followed therein and the manner of notifying the parties thereto; and until

such rules are made, and subject thereto, the provisions of the Civil Procedure Act shall apply as if the matter appealed against were a decree of a subordinate court exercising original jurisdiction.

- (13) Where in any suit for the recovery of any tax, or other amount payable under this Act, the Court is satisfied that any party to the suit has appeal to the Tribunal, the Court shall on such conditions as it may think fit stay the proceedings in the suit pending the determination of the appeal.

SEVENTH SCHEDULE
VALUE OF IMPORTED GOODS
(s127B)

The customs value of imported goods shall be determined through application of the following Articles in the sequence indicated except where otherwise stated.

ARTICLE 1

Value of the Goods

The customs value of imported goods shall be the price actually paid or payable for the goods when sold for export to Kenya, adjusted in accordance with the provisions of Article 8, provided:

- (1)(a) That there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which:
- (i) are imposed or required by law;
 - (ii) limit the geographical area in which the goods may be resold; or
 - (iii) do not substantially affect the value of the goods; and
- (b) That the price is not subject to some condition or consideration for which a value cannot be determined with respect to the value of the goods being valued.
- (c) That no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Article 8; and
- (d) That the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is accepted for customs purposes under the provisions of paragraph (2).
- (2)(a) (i) in cases where the buyer and the seller are related, within the meaning of Article 15, the transaction value shall be accepted provided that the relationship did not influence the price;
- (ii) where the customs has grounds for considering that the relationship influenced the price of the goods, it shall communicate the grounds in writing to the importer and shall afford reasonable time for the importer to respond thereto.
- (b) The customs shall accept the transaction value in a sale between related persons where the importer demonstrates that such value closely approximates to one of the following occurring at or about the same time:

- (i) the transaction value in sales by the same party to unrelated buyers of identical or similar goods sold for export to Kenya;
 - (ii) the customs value of identical or similar goods as determined under the provisions of Article 5;
 - (iii) the customs value of identical or similar goods as determined under the provisions of Article 6.
- (c) In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 8 and costs incurred by the seller in sales in which the seller and the buyer are related.
- (d) The tests set forth in paragraph (2)(b) shall be applied at the initiative of the importer and only for comparison purposes.

ARTICLE 2

Transaction Value of Identical Goods

- (1)(a) If the customs value of imported goods cannot be determined under the provisions of Article 1, the customs value shall be the transaction value of identical goods sold by other sellers for export to Kenya at or about the same time as the goods being valued.
- (b) Under this Article, the transaction value of goods shall be:
 - (i) the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the good being valued; or shall be used to determine the customs value;
 - (ii) where no such sale is found, the transaction value of identical goods sold at a different commercial level or in different quantities adjusted to take account of differences attributable to commercial level or to quantity.

Provided that such adjustments are made on the basis of demonstrated evidence which establishes the reasonableness and accuracy of adjustment, whether the adjustment leads to an increase or a decrease in the value.

- (2) Where the cost and charges referred to in paragraph (2) of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in cost and charges between the imported goods and the identical goods in question arising from differences in distances and mode of transport.

- (3) If, in applying this Article, more than one transaction value of identical goods is found, the lowest such value shall be used to determine the customs value of the imported goods being valued.

ARTICLE 3

Transaction Value of Similar Goods

- (1)(a) If the customs value of the imported goods cannot be determined under the provisions of Articles 1 or 2, the customs value shall be the transaction value of similar goods sold for export to Kenya and exported at or about the same time as the goods being valued.
- (b) Under this method, the transaction value shall be determined using:

- (i) the transaction value of similar goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued; or
- (ii) the transaction value of similar goods sold at a different commercial level or in different quantities adjusted to take account of differences attributable to commercial level or to quantity:

Provided that such adjustments are on basis of demonstrated evidence which establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or decrease in value.

(2) Where the cost and charges referred to in paragraph (2) of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the similar goods in question arising from differences in distances and modes of transport.

(3) If, in applying this Article, more than one transaction value of similar goods is found, the lowest such value shall be used to determine the customs value of the imported goods being valued.

ARTICLE 4

Where the customs value of imported goods cannot be determined under the provisions of Articles 1, 2 or 3, Articles 5 and 6 may be applied, and the sequence of application shall be reversed at the request of the importer.

ARTICLE 5

Deductive Value

- (1)(a) If the imported good or identical or similar imported goods are sold in Kenya in the same condition as they were imported the customs value of the imported goods under the provisions of this Article shall be based on the unit price at which the imported goods or identical or similar goods are sold in the greatest aggregate quantity, at or about the time of importation of the goods being appraised, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:
- (i) either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales of such goods or goods of the same class or kind imported into Kenya;
 - (ii) the usual costs of transport and insurance and associated costs within Kenya territory;
 - (iii) where appropriate, the costs and charges referred to in paragraph (2) of Article 8; and
 - (iv) the customs duties and other national taxes (Value Added Tax, excise, etc.) payable in Kenya by reason of importation or the sales of the goods.
- (b) If neither the imported goods nor identical nor similar imported goods are sold at or about the same time of importation as the goods being appraised, the customs value shall, subject to the provisions of paragraph (1)(a) be based on the unit price at which the imported goods or identical or similar imported goods are sold in Kenya in the same condition as imported at the earliest date after importation of the goods being appraised but before the expiration of ninety days after such importation.
- (2) If neither the imported goods nor identical nor similar imported goods are sold in Kenya in the same conditions as imported, then, if the importer so requests, the customs value shall be based on

the unit price at which the imported goods, after further processing are sold in the greatest aggregate quantity to persons in Kenya who are not related to the persons from whom they bought such goods, due allowance being made for the value added by such processing and the deductions provided for in paragraph 1(a).

(3) The term "unit price at which goods are sold in the greatest aggregate quantity" means the price at which the greatest number of units is sold in sales to persons who are not related to the persons from whom they bought such goods at the first commercial level after importation at which such sales take place.

ARTICLE 6

Computed Value as Value for Duty

(1) Subject to provisions under this Article, the value for customs purposes shall be based on the computed value. The computed value of goods being appraised is the aggregate of amounts equal to:

(a) Subject to paragraph (2), the cost, charges and expenses incurred in respect of, or the value of:

- (i) materials employed in producing the goods being appraised; and
- (ii) the production or other processing of the goods being appraised; and determined in the manner prescribed; and

(b) The amount, determined in the manner prescribed, for profit and general expenses considered together as a whole, that is generally reflected in sales for export into Kenya of goods of the same class or kind as the goods being appraised made by the producer in the country of export.

(2) Without limiting the generality of paragraph (1)(a) the cost charges, expenses, and value referred to in that paragraph include:

- (i) the cost or value of materials and fabrication or other processing employed in producing the imported goods;
- (ii) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being appraised which are made by producers in the country of exportation for export to Kenya;
- (iii) the cost or value of all other expenses necessary to reflect adjustment in paragraph (2) of Article 8.

(3) To allow access to any account or other record for the purposes of determining a computed value the importer shall maintain proper books of account, (including sales contract, purchase orders, invoices or agreements) and shall be responsible for the information supplied by the seller of the goods being appraised. However, the Commissioner as provided under Section 8 of this Act shall verify information supplied by the producer of the goods, through the importer in the country of export.

ARTICLE 7

(1) If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, the customs value shall be determined using reasonable means consistent with the principles and general provisions of the World Trade Organization (WTO) Agreement on Customs

Valuation and of Article VII of GATT 1994 and on the basis of available data collected by customs or supplied by the importer.

- (2) However, no customs value shall be determined under the provisions of this Act on the basis of:
- (a) the selling price of identical or similar goods produced in Kenya;
 - (b) a system which provides for the acceptance for customs purposes the higher of two alternative values;
 - (c) the price of goods on the domestic market of the country of exportation;
 - (d) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6;
 - (e) the price of goods or export to another country other than Kenya from the country of export;
 - (f) minimum customs values; or
 - (g) arbitrary or fictitious values.
- (3) If the importer so requests, the importer shall be informed in writing of the customs value determined under the provisions of this Act and the Article used to determine such value.

ARTICLE 8

- (1) In determining the customs value under the provisions of Article 1 of this Schedule there shall be added to the price paid or payable for imported goods:
- (a) The following, to the extent they are incurred by the buyer but are not included in the transaction price:
 - (i) commissions and brokerage, except buying commissions;
 - (ii) the cost of containers which are treated as being one for customs purposes with the goods in question;
 - (iii) the cost of packing whether for labour or materials.
 - (b) The value apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods to the extent that such value has not been included in the transaction value:
 - (i) material, components, parts and similar items incorporated in the imported goods;
 - (ii) tools, dies, moulds and similar items used in the production of the imported goods;
 - (iii) material consumed in the production of the imported goods, engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in Kenya and necessary for the production of the imported goods.
 - (c) Royalties and licence fees related to the goods being valued payable by the buyer, to the extent that such royalties and fees are not included in the transaction value.

- (d) The value or any part of the proceeds of any subsequent sale, resale, disposal or use of the imported goods that accrues directly or indirectly to the seller.
 - (e) The freight cost or the cost of transport of the imported goods to the port of discharge (point of entry).
 - (f) The handling charges associated with the transport of the goods to the port or place of importation.
 - (g) The cost of insurance to either marine or aviation or overland risk.
 - (h) Other costs associated to the transport of the imported goods.
- (2) Additions to the price paid or payable shall be made under this Act only on the basis of objective and quantifiable data.
- (3) No additions shall be made to the price or payable in determining the customs value except as provided under this Schedule.

ARTICLE 15

Related Persons

- (1) For the purposes of this Act, persons shall be deemed to be related if:
 - (a) They are officers or directors of one another's businesses.
 - (b) They are legally recognized partners in business.
 - (c) One is an employee of the other.
 - (d) One person directly or indirectly owns, controls or hold five percent or more of the outstanding voting stock or shares of both of them.
 - (e) One of them directly or indirectly controls the other.
 - (f) Both of them are directly or indirectly controlled by a third person; or
 - (g) Together they directly or indirectly control a third; or
 - (h) They are members of the same family.
-