SAFEGUARD MEASURES (THE ESCAPE CLAUSE) UNDER THE COMESA TREATY

THE CASE OF THE KENYA SUGAR INDUSTRY

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This is a project paper presented by Yufnalis N. Okubo in part fulfillment of the requirements for the award of the Masters of Laws (LLM) Degree of the University of Nairobi, 2005

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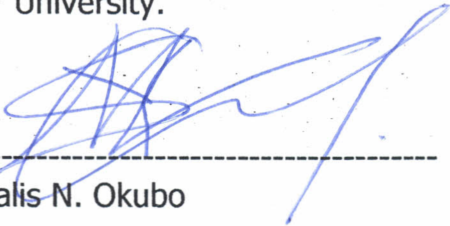
I am indebted to Dr. A. O. Adede, my project supervisor, whose guidance in the preparation of this paper was most helpful.

DECLARATION

I, Yufnalis N. Okubo do hereby declare that this project is my original work and has not been submitted and is not currently being submitted for a degree in any other University.



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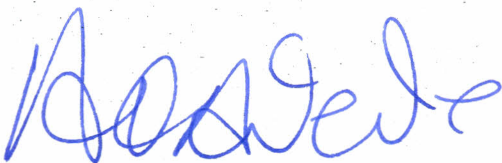
This project has been submitted for examination with my approval as the University supervisor.



DR.A.O.ADEDE

ABBREVIATIONS AND ACRONYMS

CAP	-	Chapter
CIF	-	Cost Insurance and Freight
COMESA	-	Common Market for Eastern and Southern Africa
CU	-	Custom Union
EC	-	European Community
FTA	-	Free Trade Area
GATT	-	General Agreement on Trade and Tariffs
KSB	-	Kenya Sugar Board
KRA	-	Kenya Revenue Authority
MFN	-	Most Favoured Nations
NTB	-	Non Tariff Barriers
SADC	-	South African Development Community
SGA	-	Safeguard Agreement
SUCAM	-	Sugar Campaign for Change
TSA	-	Temporary Safeguard Authority
USITC	-	United States International Commission
VER	-	Voluntary Exports Restraint
WTO	-	World Trade Organization

Table of Cases Referred

1. *Nairobi High Court Misc. App. No. 453 of 2003*
   Ex-parte Association of Sugar Imports vs Hon Minister for Agriculture and Kenya Sugar Board (unreported).

2. *Mombasa High Court Misc. C. App. No. 192 of 2004*
   Ex-parte Mat International vs Kenya Sugar Board and the Minister for Agriculture (unreported)

3. *Nairobi High Court Misc. C. App. No. 495 of 2004*
   Ex-parte Aberdares Freight Services Limited vs Kenya Sugar Board (unreported).

4. *Mombasa High Court Misc. C. App. No. 521 of 2004*
   Ex-parte Commodity House Limited vs Kenya Sugar Board and Kenya Revenue Authority (unreported)

5. *Mombasa High Court Misc. C. App. No. 619 of 2004*
   Ex-parte African Synergy Limited vs Kenya Revenue Authority and Kenya Sugar Board (unreported)

6. *Nairobi High Court Misc. App. No. 946 of 2004*
   Ex-parte Aberdares Freight Services Limited vs Kenya Sugar Board, Kenya Revenue Authority, Krish Commodities and Mumias Sugar Company (unreported)

7. *Nairobi Court of Appeal Civil Appeal No. 263 of 2004*
   Aberdares Freight Services Limited vs Kenya Revenue Authority

and Kenya Sugar Board (unreported)

8. *COMESA Court of Justice Reference No. 1 of 2005 Aberdares Freight Services vs Kenya Revenue Authority and Kenya Sugar Board (pending hearing)*

9. *Mombasa High Court Misc. C. App. No. 134 of 2005. Ex-parte Transouth Conveyors Limited vs Kenya Sugar Board, Kenya Revenue Authority, Minister for Agriculture, Minister for Finance, Minister for Trade and Industry (unreported)*

10. *Nairobi Court of Appeal Civil Application No. NAI 101 of 2005 Kenya Sugar Board vs Transouth Conveyors (unreported)*

11. *Mombasa High Court Misc. C. App. No. 532 of 2004 Ex-parte Krish Commodities vs Kenya Sugar Board, Kenya Revenue Authority and Minister for Agriculture (unreported)*

12. *Nairobi Misc. C. App. No. 421 of 2005 Ex-parte Krish Commodities vs Kenya Sugar Board, Kenya Revenue Authority, Minister for Finance, Minister for Agriculture and Pink Investments Limited, Transroads Limited and Mat International Limited (unreported)*

13, *Certain German interest in Polish Upper Silesia PICJ – Series A No.7.*

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SAFEGUARD MEASURES (THE ESCAPE CLAUSE) UNDER THE COMESA TREATY

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CHAPTER ONE

I. INTRODUCTION

Safeguard Measures are a form of temporary relief. They are used when imports of a particular product, as a result of tariff concession or other World Trade Organizations (WTO) obligations undertaken by the importing country increase unexpectedly to a point that they cause or threaten serious injury to domestic producers of "like or competitive products". Safeguard Measures give domestic producers a grace period in which to become more Competitive. Wherever this happens the Governments of the importing country may suspend the concession or obligation with or without compensation; otherwise the country members affected may retaliate by withdrawing equivalent concessions. Safeguards usually take the form of duty increases to higher than bound rates or quantitative restriction on imports.

The root of this trade remedy lay in Article XIX of the 1947 General Agreement on Trade and Tariffs (GATT 1947) and its GATT – WTO version. This provision allows a WTO member to restrict temporarily imports of a

product (known as "safeguard" action) if its domestic industry is affected by the surge in imports.

Various Treaties establishing Regional bodies and trading blocks provide for safeguard measures which are also referred to as "The Escape Clause". They are referred to as "escape clause" because they enable a Government to escape from its international obligations for a temporary period. This is in line with Article XIX of GATT so that the Regional trading blocks whether a Customs union (CU) or a Free Trade Area (FTA) have provisions for safeguard measures. COMESA as (a trading block that has) an FTA also provides for safeguard measures under its treaty in Article 61.

Prior to Kenya invoking the safeguard measures, the Sugar Industry was faced with major problems that necessitated the application of the safeguard measures. The sugar industry was highly uncompetitive regionally and internationally because of a number of factors that relate to both production and management structures, which led to high cost of production and low price competitiveness. The Cost Insurance and Freight (C.I.F.) prices for imported sugar are much lower than the ex-factory prices showing that imports are much more cheaper and much more price competitive than locally produced sugar. For example, the C.I.F. Mombasa price of sugar at

Ksh. 22 per Kilogram in 2002 was much cheaper than the ex-factory price for sugar at about Ksh.40 per Kilogram.

Other factors that made Kenya's sugar industry to be uncompetitive include poor management, poor crop husbandry, poor financial and capital base, lack of diversification and overdependence on sugar as the major product while not putting adequate attention on utilization of co-products resulting in poor returns amongst others[1].

All these combined and especially the high cost of production made Kenya attractive to importers of sugar leading to further deterioration. As a result there were massive imports of sugar from the COMESA region leading to a significant idling of the local production facilities that was injuring the domestic industry as the factories could then not produce to their full capacity ,therefore could not operate profitably; with low capacity production there was an increase in unemployment within the industry; there was also a significant decline in the market share attributed to the increase in imports; there was a high and growing level of stocks which the factories could not sell; the domestic industry could not therefore generate any funds to modernize their plants and machinery. All these were attributed to increase in imports and caused a major injury to the domestic industry to a point of near collapse. The industry therefore needed a quick escape route and that could

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[1] *A case study on the competitiveness of the sugar industry in the COMESA region-The case for Sugar by Thomas Barasa, -Resources Oriental Development Initiatives.*

only be provided via Article 61 of COMESA Treaty. However, some COMESA member countries like Zimbabwe, Swaziland and Mauritius have a favorable cost of production. South Africa which belongs to the South Africa Development Community (SADC) is also a low cost producer.

Kenya as a member of COMESA applied to the COMESA Council of Ministers for safeguard measures to protect the sugar industry in 2003 and was granted four years safeguards[2] period within which it is expected to restructure the sugar industry to be competitive in the region

As a process of restructuring the industry the Minister for Agriculture invoked section 33 of the Sugar Act 2001 and gazetted Sugar (Imports, Exports and By Products) Regulation 2003 to control sugar imports into the country as part of the safeguard administration. It is the administration of these regulations with other local legislations that have given raise to legal problems as they are not in harmony with the COMESA and WTO provisions on Safeguards that this paper seeks to examine.

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[2] *The application for the safeguard was presented to the COMESA Council of Ministers meeting held in November 2003 in a document on the recovery of the Kenya sugar industry and in the report of the Council meeting document COM/CM/XVI/2 paragraph 57 the Council of Ministers granted the request. See Appendix 1.*

2. BACKGROUND TO THE PROBLEM

The COMESA council of Ministers exercising its powers of granting the safeguards spells out the conditions upon which the agreed safeguards shall be administered as envisaged under Articles 49, 55 and 61 of the COMESA Treaty. The Kenya Sugar (Imports, Exports and By Products) Regulations 2003 issued under the sugar Act no.10 Of 2001 to implement the safeguards granted by COMESA sets provisions on how sugar imports under the safeguard regime were to be administered. The provisions of these legislations are clearly not in harmony with the COMESA Treaty. This has resulted in unprecedented court cases, ensuing from the conflict between the Kenya local legislation and the COMESA rules on the administration of safeguards.

3. STATEMENT OF THE PROBLEM

This paper is designed to discuss the problems of the Safeguard Measures under the Common Markets of Eastern and Southern Africa (COMESA), their application and impact of the measures on the Kenya Sugar industry and the conflict between the local legislations and the provisions of the COMESA Treaty.

The rules governing safeguard measure under the existing Kenyan legislation are not in harmony with those established under the COMESA Treaty to which Kenya is a party; compliance with the safeguard rules under the local legislation is in direct conflict and breach of the international obligations of the Government of Kenya which is causing a lot of unnecessary problems in the sugar industry. It is a well known principle of international law that a state is not permitted to invoke its national legislations to avoid the international obligations which it has accepted[3].Article 27 of 1969 Vienna Convention on the law of treaties provides that a party may not invoke the provisions of its national law as justification for its failure to perform a treaty. The continued application of the Kenyans national legislation in contravention of the COMESA rules is a problem that needs to be addressed in accordance with the applicable international law. The problem has reached the courts which as shown in this paper have failed to give convincing judgments.

4. LITERATURE REVIEW

It must be noted that Kenya is the pioneer country to apply and invoke safeguard measures under the COMESA Treaty. This was done in respect of sugar and wheat which were negatively affected by Kenya's participation in the FTA. So far, it is only Kenya out of the 20 member states in COMESA that has taken advantage of the safeguard provisions. Consequently, not much has been written on the application of safeguard measures and its administration in

[3] *Certain German interests in Polish upper Silesia PICJ-series A No. 7*

Kenya. Any literature review may therefore not cover COMESA and specifically Kenya.

In New Zealand, there is The Temporary Safeguard Authority Act 1987 (TSA) This provides for the appointment of Temporary Safeguard Authority to inquire into the referees made to the authority by the minister for commerce.[4]

Following the negotiation of an Agreement on Safeguard, (SG Agreement) in the WTO/GATT1994, it became necessary to amend the Temporary Safeguard Authorities Act to reflect obligations of the new Agreement. In particular, it was necessary to reflect the SG agreements requirements for "Serious Injury" and to permit safeguard action on behalf of industries producing "like or directly competitive goods". Also the Act was amended to ensure that the SG Agreement requirements regarding the duration and conditions of any safeguard action were met.

It should be noted that unlike anti-dumping and countervailing duties which are imposed on individual exporters or countries , safeguard action can normally be taken only on an MFN basis and deals with the consequences of increased imports, not their cause.

The Authority may recommend safeguard measures, if such measures are compatible with New Zealand's obligations as a party to the WTO's Agreement, including the imposition or variation of any duty, the restriction of imports, or any other action considered appropriate. The reference to WTO obligations is intended to cover the S.G. Agreements provisions relating to the duration and

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[4] *Safeguard law and practice in New Zealand-Trade remedies pg118*

condition of safeguard action, including general application, digressively and limitations on repeat actions.

Thus a safeguard measure is currently not a temporary supplementary measure, unlike anti-dumping or counter-veiling duties, but is a change in the substantive level of protection. This would appear to be inconsistent with the view that a safeguard measure is a temporary and emergency action. It is clear that New Zealand unlike Kenya has comprehensive provisions on safeguards.

Two other Scholars, Araki Ichiro and Kawase Tsuyoshi have also extensively written on safeguard measures[5]. They have argued (rightly so) that academics and practitioners traditionally have not paid much attention to the importance of safeguard measures.

To avoid the Voluntary Export Restraint (VER) which largely escaped the multilateral discipline on safeguard, it became important that improvements in the International System on Safeguard were agreed on as an agenda item of the Uruguay Rounds of Trade talks aimed at registering the health of multilateral trading systems. The resulting Agreement on Safeguard became an integral part of WTO Agreement. National invocation of safeguard measures increased following the inauguration of the WTO, while on the other hand, there have been Significant WTO disputes settlement cases involving safeguards. The pros and cons of the imposition of safeguards have called for wide national debate in the mass media. Of particular note is a symposium on the theme of safeguards, held

[5] *Safeguards under the WTO Agreements. Issues and Proposals for a more effective mechanism by Araki Ichiro and Kawase Tsuyoshi - Associate Professors, International Graduate Social Sciences – York National University.*

in 2002 where a number of scholars in various fields and actual participants in the safeguard investigation process presented their views.

The work of Araki and Kawase[6] scans each point at issue in the actual operational management of safeguard within WTO framework. It analyses problem areas in current system in detail and in general, mainly from a legal perspective, and makes suggestions regarding possible directions for the improvement of the system. The scholars examine the broad overview of the actual conditions for the operational management of the safeguards under the WTO; their work also examines the comparative discussions of safeguards and other trade remedy measures proceeds to verify whether or not the explanations are consistent with the actual existing legal structure of the WTO.

Their third chapter is concerned with the standards used in the definition of "Domestic Industry" under the safeguards. Their research up to this point has mainly focused on the obligations of National Treatment under article III of GATT. There is an accumulation of precedence related to GATT article III (2) with respect to the definitions of markets based on a products' potential for direct competition in GATT dispute settlement procedures. Since the GATT explanatory notes contain the wording "Competition with directly competitive or substitutable products" with this as a lead, the author presents an interpretive discussion of the wordings "directly competitive products" in GATT article XIX. The authors also present a critical examination of the current product focused management of domestic industry definition standards, while making reference to the practices of the United States International Trade Commission (USITC).

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[6] *Symposium Held in 2002, Research Convention of the Japan Association of International Economic Law*

Peter Kegode the Sugar Campaign for Change (SUCAM) has argued that the margin of dumping sugar in the country has not been established[7]. The problems that led Kenya to ask for safeguards could be linked to cases of under valuation, or under invoicing or lack of proper control at the country's borders.

The Secretary General of COMESA had also expressed his opinion that the proposed regulations (that were later published as Legal Notice no.39 of 2003) were going to be in contravention of the COMESA Treaty. The Secretary General wrote:-

> *"We have been sent a copy of the draft sugar (imports, exports and by – products) Regulations 2002 which we have studied. On the basis of the foregoing.............the proposed draft Regulations would be in contravention of the COMESA Treaty as they would negate deeper integration that the region seeks to develop."*[8]

Therefore long before the imports regulations had been gazetted the COMESA secretariat had made it clear that the implementation of those regulations would be in violation of the Treaty.

The concern of COMESA Secretariat did not stop there. After the imports regulations had been gazetted and applied for the first time in the year 2004, the Secretariat once again wrote to the Permanent Secretary in the Ministry of Trade and Industry. The acting Secretary General wrote:-

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[7] *Sugar campaign for Change in a paper presented in a sugar symposium at Mayfair Hotel ,Nairobi in February 2004.*

[8] *Letter dated 18th November,2002 from COMESA secretary General Mr. Erastus J.O. Mwencha to Hon Dr. Godana Bonaya the Minister For Agriculture and Rural Development. Appendix 2*

"...........the meeting discussed a number of ways of administering the safeguard extension including the option of administratively allocating or rationing quotas.

We would like to appeal that the extended safeguard especially the 89,000 metric tones of brown sugar, be implemented in accordance with the treaty provisions including Articles 49,55, and 61 and in accordance with the terms of the original safeguard, on the basis of which the extension was given. We hasten to point out that administrative allocation of quotas to importers would be in breach of these provisions and would be a recipe for rent seeking behaviors among importers. We therefore request that the extended sugar imports safeguards be implemented in the same manner as the original safeguard."[9]

Notwithstanding this caution the Kenya Government proceeded and published the imports regulations thus creating a legal problem resulting in various court battles. But the problem was not just between the Kenya Government and COMESA Secretariat; there were other internal administrative problems between the different arms of the Government. Gordon Opiyo in an article titled "Major split in Government over sugar importation"[10] wrote

.... a major conflict looms in the Government over the contentious issue of sugar importation with a rift emerging between key ministries that are involved in the saga.

On the one hand the ministry of Agriculture insisted that the time to open up the market for imports has not yet come. On the other hand the Treasury and the Ministry of Trade and Industry say that the Government

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9 *Letter from the office of the COMESA Secretary General to the Permanent Secretary ministry of Trade and Industry dated 8th February 2004. Appendix 3*

10 *The Kenya Farmer magazine. May/June 2004 page 8*

must stick to treaties signed under international agreements such as COMESA. Even more peculiar in his regard was the decision by the Permanent Secretary Ministry of Finance to write to the Ministry of Agriculture directing that the Kenya Sugar Board should keep off the affairs of sugar imports despite an Act[11] of Parliament vesting such powers in the Board. The Permanent Secretary Ministry of Trade and Industry also wrote to the Ministry of Agriculture asking the ministry to restrain the Sugar Board from regulating the importation. They argued that the restrictions being put by the Sugar Board are in direct contravention with the COMESA Agreement and the country runs the risk of a major backlash in case of any trade war in the region. The ministry of Agriculture however insisted that their primary responsibility was to protect the sugar farmer. Legally speaking the importers have a strong case. They had the COMESA protocol as a strong argument against sugar regulation.

5. OBJECTIVES OF THE RESEARCH

The objectives of this paper are:-

- to examine the extent to which the local legislations are in conflict with the provisions of the COMESA Treaty;
- how the conflict has affected the administration of sugar imports under the safeguards regime in Kenya;

[11] *Act no. 10 of 2001*

- The paper also aims at making recommendations on how to harmonize the relevant Kenyan law (The Customs and Excise Act, and The Sugar Act) and the COMESA rules to create a level playing ground devoid of controversies.

7. HYPOTHESES

The paper proceeds on hypotheses that it is possible to provide safeguards to our domestic sugar industry without necessarily infringing our international obligation under COMESA. The fact that we have various domestic pieces of legislations being administered by different ministries or departments of the Government, more often than not without consultation with one another, is a hindrance to free trade under the WTO and COMESA, as they infact end up in themselves constituting Non-Tariff Barriers (NTBs).

8. RESEARCH QUESTIONS SOUGHT TO BE ANSWERED

This project aims at answering the following questions:

- What are the implications of the continued application of the local legislations in contravention of the COMESA Treaty?
- Are the local national legislations being applied in Kenya in a way that attempts to comply with the spirit of COMESA integration?
- Are the local courts competent to determine the disputes?

- How could the local legislations and the provisions of the COMESA Treaty on safeguards be harmonized so as to avoid the conflict?

9. METHODOLOGY TO BE USED

The methods to be applied in this research shall include interviews with the COMESA desk officer at the Ministry of Trade and Industry which is the lead ministry in all issues of COMESA and obtained relevant documents; interviews with staff of Kenya Sugar Board which is the regulator; obtain reading materials from the COMESA secretariats library. Library research and Internet research by searching various websites with information on safeguards; lastly ,library research on WTO texts.

10. CHAPTER BREAKDOWN

This thesis is divided into five chapters. Chapter one is the introduction which examines the statement of the problem, objectives of the research, the research question, hypotheses and the methodology.

Chapter two shall discuss the safeguard provisions under the WTO and the Agreement on Safeguard; it will also discuss the provisions of safeguards under the COMESA, the COMESA Regulations on Trade Remedy Measures and how they conform to the WTO Agreement on Safeguards.

Chapter three shall analyse the local Kenyan legislation regulating sugar imports or with an impact on importation of sugar and also analyse the legal conflicts between the provisions of COMESA safeguard rules and the Kenyan legislations. Specifically it will analyse the Standards Act, the Customs and Excise Act, the Sugar Act, and Articles 49, 55, and 61 if the COMESA Treaty and show how they are in conflict.

Chapter four shall discuss the arising legal issues in the administration of sugar imports under COMESA. In particular it shall discuss various court cases and the legal points canvassed and the various interpretations given by Kenyan courts on the administration of COMESA safeguard rules. This chapter shall also give an analysis of the decisions to understand any jurisprudence created.

Chapter five shall discuss the findings of the research and recommendations on how the local legislations should be harmonized with the COMESA provisions to avoid the legal conflicts that have led to various court battles so as to avoid anything that may hinder regional integration..

CHAPTER TWO

SAFEGUARDS UNDER THE WTO/GATT

According to the "Dictionary of Trade Policy terms", Safeguards are described as "temporary measures designed to slow imports to enable a particular industry to adjust heightened competition from foreign suppliers". Most commonly, "safeguards" refers to action taken under Article XIX (Emergency action on Imports of Particular Products) of the GATT, the so-called escape clause, but safeguards action is possible also under *inter alia* Article XII (restriction to safeguard the balance of payments) and Article XVIII (Governmental Assistance to Economic Development)[12].

A. The Article XIX Regime under GATT 1947

Under GATT 1947, safeguards were regulated only by article XIX[13], and it was the Uruguay Round of multilateral Trade Negotiations which established the WTO in 1994 that created the Agreement on Safeguards ("SG Agreement")[14], which adds clarity and introduces certain changes. The SG Agreement was negotiated in large part because GATT Contracting Parties had been increasingly applying a

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[12] *Dictionary of Trade Policy Terms, walter Goode, Centre for Economic Sturdies,University of Adelaide,1998.*
[13] *See Appendix 4*
[14] *See Appendix 5*

variety of so-called "grey-area" measures (bilateral voluntary export restraints, orderly marketing agreements, and similar measures) to limit imports of certain products. These measures were not imposed pursuant to Article XIX, and thus the "grey areas" were not subject to multilateral discipline through the GATT. Accordingly the legality of such measures under the GATT was doubtful.

The Agreement under GATT1994 or WTO[15], now clearly prohibits such measures, and has specific provision for eliminating those that were in place at the time the WTO Agreement entered into force. Moreover, the Agreement details procedures and rules on how safeguard measures can be taken.

B. The Safeguard Measures Under GATT 1994

The SG Agreement, which explicitly applies equally to all WTO Members, aims to: Clarify and reinforce GATT disciplines, particularly those of Article XIX; re-establish multi-lateral control over safeguards and eliminate measures that escape such controls; and encourage structural adjustment on the part of the industries adversely affected by increased imports, thereby enhancing competition in international markets.

The Agreement consists of fourteen (14) articles and one annex. In general terms, it has four main components: The general provisions (Articles 1 and 2);

[15] *In this paper "GATT 1994" is used interchangeably with WTO to distinguish them from the original GATT 1947.*

Rules governing WTO Members' application of new safeguard measures (i.e., those applied after entry into force of WTO Agreement (Articles 3 – 9);Rules pertaining to pre-existing measures that were applied before WTO entry into force (Articles 10 and 11); and Notification and Institutional arrangements (Articles 12 – 14).

Art.1 establishes that the S.G Agreement is the vehicle through which measures may be applied pursuant to Article XIX of GATT 1994. That is, any measures for which the coverage of Article XIX (which allows suspension of GATT concessions and obligations under "emergency" circumstances) is invoked must be taken in accordance with the provisions of the SG Agreement. The Agreement explicitly does not apply to measures taken pursuant to other provisions of GATT 1994, to other Annex 1A Multilateral Trade Agreements, or to protocols and agreements or arrangements concluded within the framework of GATT 1994[16].

Art.2 contains the requirement that such measures be applied on an MFN basis[17]. Art.2 also sets forth the conditions under which safeguard measures may be applied. These conditions are increased imports, serious injury or threat of serious injury caused by such increased imports and to the domestic industry, there must be causation or a casual link between the increased imports and the injury suffered which relates to other concepts as shown below:

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[16] *SG Agreement Article 11.1(c)*
[17] *Ibid Article 2.2 (for exceptions see Article 5.2(b))*

(i) Increased Imports.

An increase in imports can be said to occur in one of the two ways;-

a) the absolute value of imports may have increased,
b) the import share of the domestic market may increase even though the total volume of imports decline.

GATT Article XIX requires that imports be in increased quantities, however other GATT materials suggest that the increase may be relative and not in absolute terms. The SG Agreement stipulates that an increase in market share would suffice. Article 2(1) of the SG Agreement states that increased quantity of imports that must take place can be either absolute or relative to domestic production. An issue connected to the increased imports is the selection of the time period over which the imports have to be measured. The SG Agreement does not address this period though it has been taken to be five years. The increase in imports must also be as a consequence of a trade concession given by the WTO member countries and not due to an increase in demand or increase in wealth or income of the country.

(ii) Serious injury or threat thereof caused by such increased imports.

The Agreement defines "Serious injury" as a significant overall impairment in the position of a domestic industry[18]. In determining whether serious injury is present, investigating authorities are to evaluate all relevant factors having a

[18] *Ibid Article 4.1(a)*

bearing on the condition of the industry. The domestic industry must be materially injured or there must be a threat to such injury. The following factors are pointers in determining whether there is injury of threat thereof:

a) a significant idling of production facilities in the domestic industry;
b) the inability of a significant number of firms to carry out domestic production at a reasonable level of profits;
c) an increase in unemployment or under employment within the domestic market;
d) a decline in sales or market share which decline is attributable to increased imports;
e) a higher and growing inventory or stocks which is not being sold;
f) increase in the domestic industry's inability to generate adequate capital to finance the modernization of their plant and equipments;
g) reduction in reserves devoted to research and development.

When all these factors are taken onto account and attributed to increased imports then a domestic industry is either being injured or there is threat to serious injury. Injury or threat thereof must be clearly shown by facts and not based on mere allegations. Conjecture or remote possibility of injury would not suffice; an objective determination and evidence if existence of a casual link between increased imports and serious injury must be demonstrated[19].

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[19] *Ibid Article 4.2(a)and (b)*

(iii) To a Domestic Industry

A "Domestic Industry" is defined as the producers as a whole of the like or directly competitive products operating within the territory of a Member, or Producers who collectively account for a major proportion of the total domestic production of those products. This definition allows a broader definition of domestic industry than in anti-dumping or countervailing cases[20].

New safeguard measures may be applied only following an investigation conducted by competent authorities in accordance with established procedures (Art. 3). Under Article XIX of GATT 1947, there was no explicit requirement for an investigation. Investigating authorities are required to hold public hearings or provide other appropriate means for interested parties (importers, exporters, producers, etc) to present their views and to respond to the views of others with respect to the matters being investigated. Among the topics on which parties' views are required to be sought is whether or not a safeguard measure would be in public interest[21].

The Agreement also contains specific rules for the handling of confidential information in the context of an investigation. In general, there is a basic obligation to respect the confidentiality of information upon good cause shown. Information for which confidential treatment is requested must be accompanied

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[20] *Ibid Article 4.1(c)*
[21] *Ibid Article 3.1*

by a public summary thereof, or an explanation why no such summary is possible. If confidentiality is found not to be warranted, and the party submitting the information is unwilling to summarize it or authorize its disclosure, the authorities may disregard the information, unless through other sources it is demonstrated that the information is correct[22].

Investigation procedures must be established and published prior to being used. Although the Agreement does not contain detailed procedural requirements, it does require reasonable public notice of the investigation. The relevant authorities are obligated to publish a report on the case explaining their findings and reasoned conclusions on all pertinent issues, including a demonstration of the relevance of the factors examined[23].

Other than the general requirement that safeguard measures be applied only to the extent necessary to remedy or prevent serious injury and to facilitate adjustment, the Agreement provides no guidance as to how the level of a Safeguard measures in the form of an increase in the tariff above the bound rate should be set[24]. If the measure takes the form of a quantitative restriction, the level must not be below the actual import level of the most recent three

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[22] *Ibid Article 3.2*
[23] *Ibid Article4.2(c)*
[24] *Ibid Article 5.1*

representative years, unless there is clear justification for setting a different, lower, level[25].

Rules also govern how quota shares are to be allocated among supplier countries based on past market shares[26]. These levels may be departed from (i.e. the quota levels may be modulated), if: under Article 5.2(b)(i) the percentage increase in imports from certain Members has been disproportionate to the overall increase in imports; or under Article 5.2(b)(ii) the reasons for the departure from the general rule are justified; and under Article 5.2(b)(iii)) the conditions of such a departure are equitable to all suppliers of the product concerned.

Under critical circumstances, defined as circumstances where delay would cause damage that would be difficult to repair, provisional measures may be imposed, on the basis of a preliminary determination that there is clear evidence that increased imports have caused or have threatened to cause serious injury. Such measures should be in the form of refundable tariff increases and may be kept in place for a maximum of 200 days. The period of application of any provisional measures must be included in the total period of application of a safeguard measure[27].

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[25] *Ibid Article 5.1*
[26] *Ibid Article 5.2(a)*
[27] *Ibid Article 6.*

The maximum duration of any safeguard measure is four years, unless it is extended consistent with the Agreement's provisions. In particular, a measure may be extended only if it is found, through a new investigation, that its continuation is necessary to prevent or remedy serious injury, and only if evidence shows that the industry is adjusting[28]. The initial period of application plus any extension generally cannot exceed eight years[29]. In addition, safeguard measures in place for longer than one year must be progressively liberalized at regular intervals during the period of application. If a measure is extended beyond the initial period, it should continue to be liberalized. Any measure of more than three years duration must be reviewed at mid-term. If appropriate, based on that review, the Member applying the measure must withdraw it or increase the pace of its liberalization[30].

Special rules limit re-application of safeguard measures to a given product[31]. Ordinarily, a safeguard may not be applied again to a product until a period equal to the duration of the original safeguard measure has elapsed provided that such period of non–application must generally be at least two years. Nonetheless, if a new safeguard measure has a duration of 180 days or less, it may be applied so long as one year has elapsed since the date the original safeguard measure was introduced, and so long as no more than two safeguard

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[28] *Ibid Articles 7.1 and 7.2*
[29] *Ibid Article 7.3*
[30] *Ibid Article 7.4*
[31] *Ibid Article 7.5*

measures have been applied on the product during the five years immediately preceding the date of introduction of the new safeguard measure.

Members applying safeguard measures generally must "pay" for them through payment of compensation. A Member applying a safeguard measure must maintain a substantially equivalent level of concessions and other obligations with respect to affected exporting members. To do so, any adequate means of trade compensation may be agreed among the affected members through consultation. Absent such agreement on compensation within 30 days, the affected exporting members individually may suspend equivalent concessions and other obligations (i.e. "retaliate") unless the Council for Trade in Goods disapproves[32]. The right to retaliate, if compensation is not agreed on, cannot be exercised during the first three years of application of a safeguard measure if the measure is taken based on an absolute increase in imports, and otherwise conforms to the provisions of the Agreement[33].

The Agreement contains specific provisions on Special and differential treatment granted to developing country members[34].

There are also rules concerning pre-existing measures. Article XIX provides that measures that were in effect at the time of the WTO Agreement's entry into

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[32] *Ibid Articles 8.1 and 8.2*
[33] *Ibid Article 8.3*
[34] *Ibid Article 9*

force (1st January 1995) are to be terminated no later than eight years after they were first applied, or five years after the entry into force of the WTO Agreement, whichever comes later[35] "Grey area" measures that were in effect at the time of the WTO Agreements entry into force had to be brought into conformity with the SG Agreement or phased out - pursuant to timetables to have been presented to the SG committee by 30 June 1995 – within four years of the WTO's entry into force (i.e. by 31 December 1998). Although all members had the right to an exception with respect to a single specific measure, whereby they would have had until 31 December 1999 for the required phase-out, no Member other than the Economic Community (EC) (whose single exception is contained in the Annex to the Agreement itself) exercised this option[36].

A Committee on Safeguards is established under the authority of the Council for Trade in Goods. The Committee is charged with reviewing safeguard notifications, among other duties. The Committees role is to monitor and report the implementation and operations of the Agreement, to review Members notification, and to make findings as to Members compliance with respect to the Agreement for the application of the safeguard measures[37].

The Agreement sets out elaborate provisions for the requirement of notifications. Essentially, the notification provisions require members to notify the actions

[35] *Ibid Article 10*
[36] *Ibid Article 11*
[37] *Ibid Article 13*

taken leading to the imposition or extension of a provisional or a final safeguard measure, as well as results of the consultations required by the Agreement and the existence of and plan to eliminate measures terminated or prohibited by the Agreement[38].

Consultations and disputes arising under the Agreement are to be conducted in accordance with Article XXII and XXIII of GATT 1994 as elaborated by the Dispute Settlement Understanding[39].

Developing country members receive special and differential treatment with respect to other Members' safeguard measures, in the form of a "de minimis" import volume exemption. As users of safeguards, developing country members receive special and differential treatment with regard to permitted duration of extensions, and with respect to re-application of measures.

"*De minimis*" also implies import exemption. A safeguard measure shall not be applied to low volume imports from developing country members. That is, where imports from a single developing country Member account for no more than three percent of the total imports of the product concerned, and provided developing country Members below this threshold on an individual basis do not

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[38] *Ibid Article 12*
[39] *Ibid Article 14*

collectively account for more than 9 percent of those imports, such imports shall be excluded from the measure[40].

The SG Agreement also provides for the duration of extensions of measures (when developing countries are users): In applying safeguard measures, developing country Members may extend the application of a safeguard for an extra two years beyond that normally permitted (i.e. to a total of six years, meaning that developing countries may apply a measure for a total of ten years as compared with the usual eight)[41].

The rules for re-applying safeguard measures with respect to a given product are relaxed for developing country Members. (The minimum period of non-application for developing countries in most cases is one-half the duration of the original measure, so long as this period is at least two years)[42].

(c) Safeguard provisions under COMESA.

Article XXIV of WTO provides for creation of Regional Trading Blocks of either a Customs Union (CU) or a Free Trade Area (FTA) that requires notification to the WTO. COMESA came into being in 1994 as the successor of the Preferential Trade Area (PTA) for Eastern and Southern African States, set up in 1982. The

[40] *Ibid Article 9.1*
[41] *Ibid Article 9.2*
[42] *Ibid Article 9.2*

COMESA treaty was signed in November 1993 and came into force in December 1994. As of now COMESA is made up of twenty member states[43]. It was established as an organization of free, independent sovereign states which agreed to cooperate in developing their natural and human resources for the good of their people. Its main focus was the formation of a large economic and trading unit capable of overcoming some of the barriers that are faced by individual states. It hoped to remove all internal tariff barriers amongst member states and introduce a Common External Tariff structure to deal with all third party trade. On 31st October 2000 tariff and non tariff barriers were eliminated amongst nine member states when the Free Trade Area (FTA) was established. The nine countries then accounted for more than 50% of regions population and 79% of its GDP. COMESA member states out of the pioneer group of nine have over the past four years been urged to take the necessary measures to join the FTA and indeed Rwanda and Burundi joined in January 2004 and other member states are committed to joining as soon as possible.

Trade between member states of the FTA has continued to grow .Disputes have arisen from such increased trading which have seen amicable resolutions while others have proceeded to domestic courts up to the COMESA Court of Justice. To ensure that there is uniformity among member states of COMESA in the conduct of trade remedy investigations, the COMESA council of Ministers meeting

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[43] *Egypt,Sudan,Kenya,Zambia,Zimbabwe,Madagascar,Malawi,Mauritius,Rwanda,Burundi,Ethiopia,Eritrea Uganda, DRC Congo, Angola, Seychelles, The Comoros, Swaziland ,Mozambique and Libya.*

held in Lusaka, Zambia in November 2001 adopted Regulations on Trade Remedy Measures[44] in line with the provisions of Article 10(1) of the COMESA Treaty. These measures were to reinforce trading practices within the region and ensure that investigations are within the framework of the WTO Safeguard Agreement. The regulations on trade remedy are binding to all member states in its entirety[45].Article 61 of the COMESA treaty was subsequently amended to address the trade remedy measure.

COMESA safeguards regulations establish rules for the conduct of investigations and the application of safeguard measures[46]. The safeguard measures are applied in conjunction with the existing national legislation for conducting safeguard investigations and reviews in the individual COMESA member states. The member states of COMESA also recognize that most of them are also signatories to the WTO and may have national legislations that are consistent with the WTO agreement on safeguards. All COMESA member states recognize that they have the right to apply their national legislations without amendments in conducting safeguard investigations from the date the safeguard regulations came into force, if their national legislations complies with both the WTO Agreement and the COMESA Regulations on safeguards[47]. It must be noted that currently Kenya does not have legislation to govern the conduct of safeguard

[44] *See Appendix 6 (in relation to safeguards only)*
[45] *COMESA Treaty Article 10(1) and(2)*
[46] *COMESA Regulations on Trade Remedy Measures*, Regulation 7
[47] *Ibid Regulation 3(2)*

investigations thus contrary to Regulation 4 of the Trade Remedy Measures that requires each member state to enact empowering national legislations leading to the formation of a National Authority for the conduct of such investigations to reflect the provision of the regulations as soon as practicable.

If an investigation initiated by a COMESA member state finds that the industry under investigation includes imported products only from COMESA countries the provisions to be applied are the COMESA trade remedy regulations[48].

If an investigation initiated by a COMESA member state finds that the industry under investigation includes imported products only from non COMESA WTO member countries, the provision to be applied is the WTO Agreement on safeguards[49].

If investigations initiated by a COMESA member state finds that the industry under investigation include imported products from both COMESA and non COMESA member countries, the provisions to be applied are the WTO Agreement on safeguards, and where not otherwise provided for by WTO, the provisions of the COMESA Regulations on trade remedy will apply.

A member may apply a safeguard measure to a product only if that member has determined that such product is being imported into its territory in such

[48] *Ibid Regulation 3(3)*
[49] *Ibid Regulation 3(4)*

increased quantities absolute or relative to domestic production and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. Safeguard measures shall be applies to a product being imported irrespective of its source within COMESA[50].

A member may apply a safeguard measure only following an investigation by the investigating authority of that member state. The investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentation of other parties and to submit their views as to whether or not the application of a safeguard measure would be in the public interest. The investigating authority shall publish a report setting forth its findings and reasoned conclusions reached on all pertinent issues of fact and law[51]. But a country whose exports shall be affected upon receipt of a notice to initiate investigations shall examine the facts regarding serious in jury as alleged in the notice and may contest the matter before the competent authority of the investigating country, mainly on grounds of non existence of serious injury, its threat or lack of linkage between increased imports and injury. If a member state whose exports have been subject of investigation is dissatisfied with the

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[50] *Ibid Regulation 3(5), Regulation 7(2)*
[51] *Ibid Regulation 8*

action of the member investigating the matter, the former may refer the matter to a dispute settlement panel established by COMESA.

In critical circumstances where delay would cause damage, which would be difficult to repair, a member may take a provisional safeguard measure for a period not exceeding 200 days during which investigation for the application of safeguard measures would have been finalized[52].

The period for the initial application of the safeguard measure shall not exceed four years. However this period can be extended provided the total period of application of safeguard including the period of the initial application of any extension thereof shall not exceed eight years. No safeguard measure shall be applied again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the safeguard regulations on trade remedy, for a period of time equal to that during which such measure had been previously applied, provided that the period of non application is at least two years[53].

A member shall immediately notify the committee on trade remedies upon initiating an investigatory process relating to serious injury or threat thereof and reasons for it; Making a finding of serious injury or threat thereof caused by increased imports; Taking a decision to apply or extend safeguard measures. In

[52] *Ibid Regulation 11*
[53] *Ibid Regulation 12*

making the above referred notifications, the member proposing to apply safeguard measures shall provide the COMESA committee on Trade Remedies with all pertinent information which shall include evidence or report of serious injury or threat thereof caused by increased imports, proposed safeguard measures, proposed date of introduction, expected duration and timetable for progressive liberalization and restructuring of the industry[54].

A member state proposing to apply or extend a safeguard measure shall provide adequate opportunity for consultations with member states having a substantial interest as exporters of the product concerned with a view to exchanging ideas to the proposed safeguard measures. Member states shall notify promptly the committee on Trade Remedies of their respective laws, regulations and respective procedures relating to safeguard measures as well as any modification made on them. All notification on safeguards shall be made through the COMESA Committee on Safeguards[55].

The new safeguard rules under COMESA reinforce the WTO rules providing for security of market access. Under the current WTO system, importing countries are prohibited from requesting exporting countries to ask their enterprises to restrain their exports under the Voluntary Exports Restraints (VER) or similar arrangements. Under the WTO, tariffs have been bound against further increases, thus restricting the right of countries to raise tariffs as and when they

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[54] *Ibid Regulation 15(1) and (2)*
[55] *Ibid Regulation 15(3), (7), (9)*

decide to do so. The COMESA rules on safeguards measures require importing countries to take measures to restrict imports only when investigations, after an application by the concerned industry have established that increased imports are causing or threatening to cause serious injury to the industries. The rules further try to protect the interest of the exporting countries and enterprises by giving them the right to defend their interests during the investigations and to produce, if necessary, evidence to establish that the imposition of restriction would not be in the interest of the consuming public in the importing country[56]. It is therefore essential to look at the COMESA safeguard rules not only from the viewpoint of the exporting countries and enterprises but also from the perspective of enterprises which as a result of sudden surge in imports are finding it difficult to compete with foreign suppliers in their domestic markets. These enterprises also have the right to make a representation to their Governments to take safeguard actions to restrict imports.

Such petitions cannot be made by a few enterprises, but by producers whose production constitute a major proportion of total domestic production. In practice such applications or petitions are often made on behalf of producers. Petitions or applications can be submitted only when it is possible to establish that there is a casual link between the increased imports and the alleged serious injury to the industry. Complaints of serious injury to the domestic industry as a result of a

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[56] *Ibid Regulation 8*

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surge in the imported products from the COMESA region are on the increase. While most of these complaints are due to the inability of domestic industries, long accustomed to heavy levels of protection, to adjust to the changed competition situation under COMESA trade regime, some are undoubtedly genuine.

The ability of the affected industries to take advantage of the COMESA safeguard provisions will depend on how far they are able to build up the case for such temporary protection, taking into account the Agreements strict conditions for the imposition of safeguard measures.

In the case of Kenya's sugar imports a quantitative restriction was imposed without any investigations having been made to determine the extent of the injury or material injury and the casual link to the affected industry other than a sturdy that was conducted outside the provisions of the Regulations on trade remedies. Kenya has equally not complied with regulation 6 to enact a legislation that will govern all safeguard issues as set out in the Trade Remedy Regulations. Even the margin of dumping has not been established. The cause of sugar imports into Kenya can therefore be linked to cases of undervaluation or under-invoicing by importers or lack of proper controls at our borders by the Government. It was thus under these circumstances that in a hurry the Sugar

(Imports, Exports and by-products) Regulations 2003[57] were enacted and resulting in a legal problem in the administration of the safeguard regime with legal cases.

But the safeguard measures are inappropriate in two main ways:

1) Regulation 12 provides for the duration of the safeguard period. The limitation of the duration of the period to not exceeding four years with a provisional one year safeguard application is quite short for an industry like sugar as it is too short to allow a reasonable level of adjustment. Sugarcane is a perennial crop with the first crop being harvested on average after eighteen months (in Kenya). Its supply is fixed on the short run and cannot be increased in such a short time to stem imports unlike seasonal crops such as rice whose production could be increased faster. This means that a member state has to keep applying for safeguard measures on a yearly basis instead of concentrating efforts on revitalizing the industry.

2) Regulation 12(4) of the trade remedy measures requires that where the expected duration of a safeguard measure is over one year, the member applying the measure shall progressively liberalize the sector at regular intervals during the period of application. This provision

[57] *See Appendix 7*

contradicts and may effectively reverse any gains that the injured industry could be making as a result of protection under the safeguard measure since the negative impact of imports that are allowed into the country under the progressive liberalization may negate the gains from adjustment. The liberalization process should start at the end of application of safeguard measures and not during the period of adjustment or allow full recovery of the injured sector. Protection (which will heal the injured sector) cannot go hand in hand with liberalization (which was causing injury in the first place).

CHAPTER THREE

CONFLICT BETWEEN KENYAN LEGISLATIONS AND THE COMESA TREATY

This chapter will examine the local legislation with an impact on Sugar Importation pointing out both potential and actual conflicts between the provision of the COMESA Treaty and Kenyan legislation. Three such legislations are examined here namely; The Standards Act cap 489; The Customs and Excise Act cap 472; and The Sugar Act no 10 of 2001. The provisions of the COMESA Treaty to be examined are Articles 61, 49, and 55.

(1)The Standard Act CAP 489

This is an Act of Parliament to provide for standardization of specific commodities and to provide for the standardization of the commodities and codes of practice; to establish the Kenya Bureau of Standards; to define its functions and to provide for its management and controls; and for matters incidental to, and connected with the foregoing.

The Bureaus functions amongst others are to provide facilities for testing standards, provide testing for the locally manufactured and imported commodities with a view to determining whether such commodities

comply with the provisions of the Act or any other law dealing with standards of quality or descriptions[58].

The National Standards Council sets out standards of conditions to be met by commodities to be manufactured or imported including sugar. [59]

Any sugar imported must therefore meet the set standards by the bureau and must undergo a sample testing to be allowed into the country. Failure to pass the standards test of quality would not allow the sugar to be imported.

(2) The Customs and Excise Act[60]

This is an Act of Parliament to provide for the management and administration of the customs, for the assessment, charge and collection of customs and excise duties and for matters relating thereto and connected therewith.

The Act of Parliament empowers the Minister for Finance to issue an official gazette notice showing the percentage reduction of duty to member states. Section 118 of the Act provides for mutual tariff concessions:

"The minister may from time to time by notice in the gazette declare the arrangements specified in the notice, being arrangements that have been made between the Government if Kenya and another Government with a view to the mutual relief of duty, shall, notwithstanding section 117, have

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[58] *The Standards Act section 4*
[59] *Ibid Section 9*
[60] *Chapter 472 Of the Laws of Kenya*

effect in relation to duty and the notice shall, have effect according to its terms.

It is by the above provision that Legal Notice No. 29 of 2002 was issued by the Minister for Finance[61] showing duties payable on all goods imported from COMESA member states and showing the percentage reductions. The member states and the percentage reductions were given as follows:-

Angola	Nil
Burundi	80%
Comoros	80%
DRC	80%
Djibouti	100%
Egypt	100%
Ethiopia	10%
Madagascar	100%
Malawi	100%
Mauritius	100%
Namibia	90%
Seychelles	Nil
Rwanda	90%
Sudan	100%

[61] *See Appendix 8*

Swaziland	90%
Uganda	80%
Zambia	100%
Zimbabwe	100%

The Legal Notice was in force till 28th February 2003. It was revoked and replaced with Legal Notice 156 of 2003[62] This Legal Notice specifically provided that if the goods imported consists of refined raw and mill white sugar, the notice shall, pursuant to Article 61 of the COMESA Treaty, apply in respect of a maximum of 111,000 metric tones of white refined sugar and 89,000 metric tones of other sugar, being the total amount of sugar imported into Kenya from any or all of the member states and any quantities imported in excess of that amount shall be subject to 100% import duty and other levies of equivalent effect. It was to run till 2nd March 2004. Legal Notice No. 156 was also revoked on 1st March 2004 and replaced with Legal Notice No. 12 of 2004[63] of the same date with almost similar provisions save for some changes in the percentage reductions as shown below:-

Angola	Nil
Burundi	100% (previously 80%)
Comoros	80%

[62] *See Appendix 9*
[63] *See Appendix 10*

DRC	80%
Djibouti	100%
Egypt	100%
Ethiopia	10%
Madagascar	100%
Malawi	100%
Mauritius	100%
Namibia	Nil (previously 90%)
Seychelles	Nil
Rwanda	100 (previously 90%)
Sudan	100%
Swaziland	90%
Uganda	80%
Zambia	100%
Zimbabwe	100%

Legal Notice No.12 of 1st March 2004 remains in force till 28th February 2008. Member States that have joined the FTA have a duty percentage reduction of 100% while the rest trade on preferential terms. Therefore other factors aside, it is a major contributory factor to making sugar importation into Kenya attractive. One will notice that the Mutual Tariffs Concession was only based on Article 61 of the COMESA Treaty and do not refer to the Regulations on Trade Remedy

Measures. Reference thereof would however not have changed the mutual tariffs concessions. Imports of the commodity into Kenya or the exporting countries therefore will rely on Article 61 of the COMESA Treaty and any other provision shall be termed not to be in tandem with the terms under which the safeguards was given and extended[64]. The Legal Notice did not refer to any other Act of Parliament; thus creating a legal question as to the legality of a reference to any other Act of Parliament. The resulting effect was to side step The Sugar Act[65]

(3)The Sugar Act

> This is an Act of Parliament to provide for the development, regulation and promotion of the sugar industry; to provide for the establishment, powers and functions of the Kenya Sugar Board, and for connected purposes.

This Act came into operation in April 2002 and creates an apex body that is the ultimate regulator of all aspects of sugar in the country including imports. Section 3 creates the Kenya Sugar Board with ranging powers set out in section 4 which provides for its objects and functions including licensing of any sugar dealers from small manual jaggery operators to the multimillion milling companies and issues of export of sugar.

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[64] *Only 200,000 metric tones to be imported into Kenya split into 111,000 metric tones of refined industrial sugar and 89,000 metric tones of domestic sugar .The importation to be on non discriminatory basis for a period of four years.*

[65] *Act no. 10 of 2001*

Section 27 provides for safeguard measures. It however implies that imports from member states of regional bodies where Kenya is a member are not subject to control by the board:

> *Sec.27(1) Subject to such regional and international trade agreements to which Kenya is a party; all sugar imports into the country shall be subject to the prevailing import duties, taxes and other tariffs and such imports shall be controlled by the board.*
>
> *(2)The Government shall introduce other safeguard measures as may be necessary to protect the industry from unfair trade practice.*

This may also imply that all sugar imports are subject to prevailing import duties save that the same shall vary depending on the regional and international trade agreement to which Kenya is a party.

Section 33 gives power to the Minister for the time being in charge of Agriculture to make regulations of the carrying out and giving effect to the provisions of the Act. Note that this section does not give the minister powers to regulate but to make the regulations that will be executed by another body. It is in pursuant to this Section that the Minister for Agriculture issued Legal Notice No. 39 of 2003 being The Sugar (Imports, Exports and by-products) Regulations of 2003. The purpose of this regulation is to control or moderate imports, exports and any sugar by products. The Regulations provides for Certificate of Registration of

Exports and Imports of Sugar[66] and anyone not registered cannot export or import sugar or it's by products[67]. The Certificate of Registration is issued subject to condition and may be withdrawn by the Board at any time.

The Board is required to determine annually the amount of refined sugar required by manufactures and other sugar intended for local consumption taking into account the shortfall in the domestic production[68].

The Board shall:

i) allocate quantities, or

ii) invite tenders, or

iii) offer for auction such quantities to be imported by registered importers [69] and every tender for auction shall be published in the Kenya Gazette and in at least two daily newspapers of national circulation and in any other manner as the Board may determine[70].

The regulation create an offence for importing or exporting sugar or its by products without a Certificate of Registration and failing to make returns of sugar

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[66] *Sugar (imports, exports and by products) Regulations. regulation 2*
[67] *Ibid regulation 3*
[68] *Ibid regulation 6(1)*
[69] *Ibid regulation 6(2)*
[70] *Ibid regulation 6(3)*

imported or exported[71]. Any conviction thereof may result in cancellation of the Certificate with a right of appeal to the Minister.

These regulations made under section 33 are in conflict with the provision of the COMESA Treaty and not in conformity with the COMESA Regulation on Trade Remedies measures.

Article 61 of the COMESA Treaty provides.

1) In the event of serious disturbance occurring in the economy of a member state following the application of the provisions of this chapter, the member state concerned shall, after informing the Secretary General and the other member states, take necessary safeguard measures.

2) Safeguard measures taken under the provisions of paragraph 1 of this Article shall remain in force for a period of one year and may be extended by the decision of the council provided that the member state concerned shall furnish to the council proof that it has taken the necessary and reasonable steps to overcome or correct imbalances for which safeguard measures are being applied and that the measures applied are on the basis of non-discrimination.

[71] *Ibid regulation 8*

3) The council shall examine the method and effect of the application of existing safeguard measures and take decision thereon.

Therefore, the safeguard measures to be applied must be on the basis of non-discrimination. The sugar (Imports, Exports and by products) Regulations on the other hand provide for discriminating criterion for sugar importation. One must be registered as an importer which registration has its own conditions to be met; and even upon approval; a fee must be paid to secure the registration certificate. Besides, there is no clear cut procedure as to how the quantities shall be allocated or what shall determine who gets what quantity to import. Likewise, where tenders are invited, there are conditions spelt out in the tender documents that must be met, and even, the tender for auction appears more discriminative as only those with capacity to bid the highest shall have an upper hand and can outbid everybody for the total quantity. There is no mechanism in place to prevent one bidder from participating in more than one bid. All these are restriction to free and fair trade and contrary to Article 49 and 55 of the COMESA Treaty.

Article 49 provides for elimination of non-tariff barriers on common market goods:

i) Except as may be provided for all permitted by this treaty, each of the member state undertakes to remove immediately upon the entry into

force of this treaty, all the then existing non-tariff barriers to the import into that member state of goods originating in the other member state and thereafter refrain from imposing any further restriction or prohibitions.

ii) For the purpose of protecting an infant industry, a member state may, provided that it has taken all reasonable steps to overcome the difficulties related to such infant industry, impose for the purposes only of protecting such industry for a specified period to be determined by council, quantitative or like restrictions or prohibitions on similar goods originating from other member states:
Provided that the measures are applied on a non-discriminatory basis and that the member shall furnish to council proof that it has taken all reasonable steps to overcome the difficulties faced by such an infant industry.

iii) The council shall adopt criteria for determining that an industry is an infant industry.

iv) The secretariat shall keep under constant review the operations of any qualitative or like restrictions or prohibitions imposed under the provisions of paragraph 2 of this article and deliver an opinion to the

member state concerned and report the matter to the council with its recommendations.

From the above Article 49, it is clear that the regulations under the Sugar Act introduce non-tariff barriers to trade that prohibit free and liberalized trade amongst member states. It is also not clear whether the Kenya Sugar industry can be described as an infant industry.

Article 55 of the COMESA Treaty provides for competition:

i) *Member States agree that any practice which negates the objective of free and liberalized trade shall be prohibited. To this end, member states agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the common market.*

ii) *The council may declare the provisions of paragraph 1 of this article inapplicable in the case of an agreement between any undertakings or associations or any concerted practice which improves production or distribution of goods or promoting technical or economic progress and has the effect of enabling consumers a fair share of the benefits:*

Provided that the agreement, decision or practice does not impose on the undertaking restrictions inconsistent with the attainment of the objective of the treaty or has the effect of eliminating competition.

The regulation made under the Sugar Act can in the strict sense be seen as a restriction to competition and restricting sugar importation contrary to section 27 of the Sugar Act that requires the minister to be mindful of regional and international trade agreements to which Kenya is a party. The restrictions provisions therefore are in contravention of the COMESA Treaty and in particular Articles3, 4(1) and (5), 49, 55 and 61.

The Regulations make it a criminal offence by importing sugar without a certificate of registration[72]. This may be criminalizing free trade. The safeguard was therefore granted on the understanding that Kenya would restructure its sugar industry[73]. However it is debatable whether one needs to regulate and restrict imports so as to restructure or if regulation and restriction must go hand in hand with restructuring.

Kenya was therefore granted a safeguard measure on 28th November 2003 in the sugar industry to be implemented under Articles 49, 55 and 61 and in

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[72] *Ibid regulation 8 (1)*

[73] *This was contained in the proposal by the Government of Kenya on the recovery of Kenya sugar industry to the COMESA council of Ministers meeting held in November 2003in Lusaka Zambia. See footnote 1.*

accordance with the terms of the original safeguards given in 2002 on the basis of which the extension was granted[74]. This was notwithstanding the fact that the COMESA Regulations on Trade Remedy Measures enacted under Article 10 of the COMESA Treaty which follow WTO Agreement on Safeguard had been adopted in November 2001. There has been no waiver on the application of COMESA Regulation on Trade Remedy Measures to Kenya, thus making Kenya be in breach of Article 10(2) of the COMESA Treaty.

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[74]. *See footnote 1.*

CHAPTER FOUR

COURT DECISIONS ON COMESA TREATY AND LOCAL LEGISLATION

After Kenya was granted a four years safeguard in the Sugar Industry, several interested importers were jostling to have control of the lucrative Sugar import business. During the first year of the safeguard imports regime, there were no local regulations to control how or when, and who could import Sugar in the country; it was a free market. Upon coming into force of the Sugar Act , some legislation was necessary to regulate the import of Sugar and this led to the gazetting of Legal Notice No. 39 of 2003, The Sugar (Imports, Exports and By-Products) Regulation of 2003. These regulations which have been examined in the previous chapter were first applied during the year 2004. As soon as the import period begun, did interested parties flock to court raising fundamental issues of Law in international trade. We shall now examine some of the cases to review the issues and the rulings that were given.

a) ***Miscellaneous, Civil Application No. 453 of 2003 at Nairobi (Judicial Review) Ex-parte Association of Sugar Importers vs Hon. Minister for Agriculture and Kenya Sugar Board (unreported)***

This case was filed immediately Legal Notice No. 39, The Sugar (Imports, Exports and by Products) Regulation 2003 was gazetted by the Minister for Agriculture and Livestock Development. Amongst what the applicants (Association of Sugar importers) were challenging is that Legal Notice No. 39 of 2003 was aimed at regulating and restricting Sugar imports contrary to section 27 of the Sugar Act that provides that the Minister be mindful of regional and international trade agreement to which Kenya is a party. That by restricting the importation of Sugar the Minister was in contravention of the COMESA Treaty and specifically Articles 3, 4(1) and 5; 49 and 55. That, the Kenya Sugar Board had no authority to regulate the importation of Sugar. The applicants also prayed that the leave granted to operate as a stay of implementation of Legal Notice No. 39 of 2003. That the Regulations are oppressive and an abuse of international law and the implementation of the regulations may result in fuelling trade wars between Kenya and other countries that are members of COMESA. They sought certiorari and prohibition against the Respondents.

Justice Ransley in his ruling delivered on 8th July 2003 dismissed the application on legal technicalities in that the applicants did not have sufficient number of members to institute a suit as required by the Societies Act. He however made findings that, the whole purport of the Act was to give powers to the Board to deal with matters relating to Sugar; that the Board was therefore the proper body to implement the Regulations made by the Minister and as such the exercise of those powers by the Board to regulate the import and export of Sugar was proper. In so far as the alleged contravention of the COMESA Treaty was concerned the judge found that from the evidence, it appeared that the agreement by the Kenya Government with its COMESA partners is that at least 200,000 metric tones of Sugar can be imported duty free into Kenya at preferential rates. There was therefore no breach of the terms of the Treaty as alleged by the applicants. Since Parliament was supreme, it has powers to enact the Act and control the Sugar industry and it chose to do so through the Board. The judge saw no contravention of the COMESA Treaty by the Kenyan legislation and dismissed the application.

b) In the *High Court of Kenya at Mombasa Misc. Civil Application No. 192 of 2004 (judicial Review) Ex-parte Mat International vs Kenya Sugar Board and the Minister for Agriculture (unreported)*

This case was filed immediately Legal Notice No. 39, on Import Regulation were being applied for the first time. The applicant Mat international, a sugar importer refused to comply with the condition set out by the regulator the Kenya Sugar Board (KSB) and went ahead to import Sugar. They then moved to court for a judicial review application for orders of certiorari and prohibition and leave to operate as a stay. The orders of certiorari was sought to quash the Regulations and the Notice issued by the KSB vide an advertisement in the East African Standard dated the 4th March 2004 imposing controls on importation of the allowed Sugar quantities contrary to COMESA Regulations and contrary to official Government position and also to bring to the High Court for quashing a letter dated 16th March 2004 from KSB purporting to revoke the Certificate of Registration of the applicant contrary to section 8 of the Sugar (import, Export and By Products) Regulation 2003 and contrary to the rules of natural justice. Orders of prohibition were sought to prohibit KSB from interfering with the allowed quota and from introducing non tariff barriers against the COMESA Treaty and the Sugar Act 2001. The order of stay was to prohibit any act on the part of KSB to impose controls

on importation of Sugar up to a maximum of 89,000 metric tones as allowed by the COMESA Treaty; to prohibit any acts on the part of KSB to cancel and/or revoke the applicants certificate of registration; to prohibit any act by KSB from prohibiting the applicant from importing Sugar as long as it is within the quota pending the determination of the judicial review; to prohibit any acts by the KSB that contravenes the COMESA Treaty. The grounds offered were that the restriction of importation of Sugar by KSB was in contravention of the COMESA Treaty; that the action of KSB was not the official Government position. The substantive application was however never argued as this application was stayed by the Court of Appeal pending the hearing of another similar application in Nairobi. Once the Sugar was released the interest in the case fizzled out thus leaving the substantive issues unresolved.

c) ***In the High Court of Kenya at Nairobi - Misc. Civil Application No. 495 of 2004 (Judicial Review) Ex-parte Aberdares Freight Services Ltd vs Kenya Sugar Board (unreported)***

The facts of the case are that the applicant herein (Aberdares Freight Services) as a registered importer (though not allocated a quota) went ahead to imported sugar from the COMESA region. The applicant contended that they imported sugar following legal notice no.12 issued by

the Minister for Finance pursuant to section 118 of cap 472(Customs and Excise Act) which declared Kenyans at liberty to import sugar from COMESA regions. The respondent by putting up an advertisement calling for tenders and purporting to allocate quotas was acting contrary to the Ministers gazette notice. The applicant sought *certiorari* and *prohibition* against the respondent and leave to operate as a stay against the respondent purporting to apply the sugar imports regulations or allocating any quota to any importer. Justice Kihara gave a stay against the application of legal notice no.39 till the final determination of the substantive application. This application was incidentally filed the same day that a Mombasa court was lifting a similar stay order thus in effect maintaining the status quo. The stay order remained in force till February 2005 when it was withdrawn by the applicant as the 2004 quota had been exhausted and it really did not serve much.

It may also be interesting to note that two applicants who were registered importers and who were duly gazetted by KSB the regulator, to import Sugar had to go to court for release of their Sugar because they had complied with the conditions set out by the regulator in various gazetted notices and could not therefore understand why their consignment had to be locked out of 2004 quota. They wondered who consumed their quota.

d) In the High Court of Kenya at Mombasa Misc. C.A. No. 521 of 2004 (Judicial review) Ex-parte Commodity House Limited vs Kenya Sugar Board and Kenya Revenue Authority

This was an application by way of judicial review. The applicant (Commodity house limited) sought *certiorari* against KRA's decision declaring that the applicants are not entitled to process 5000 metric tones of Sugar imported under COMESA preferential terms on the basis that the available quota was exhausted; they also sought *mandamus* to compel KRA to process and release the applicants 5000 metric tones of Sugar on COMESA preferential terms. The first Respondent, KSB supported the application mainly on the ground that being the regulator, they indeed recognized the applicant as a duly authorized importer who was allocated 5000 metric tones and was gazetted so to import. The first Respondent could not therefore divorce itself from the applicant's cause and had a duty to ensure their Sugar was released on preferential terms. The second Respondent, KRA opposed the application on the grounds that the quota was exhausted and was joined by the other interested parties in opposing the application namely Mat International limited, Reeswoods Enterprises and Aberdare Freight Services.

The applicant argued that section 4, 27 and 33 of the Sugar Act rests all legal authority and matters relating to the Sugar industry on the KSB. On that authority, the applicant was granted permission to import 5000 metric tones of Sugar from the COMESA region. The applicant was of course supported by KSB. The second Respondent KRA opposed the application on grounds that KSB had no authority to regulate the Sugar importation into the country. KRA further argued that after the Minister for Finance published Legal Notice No. 12 on 1st March 2004 on mutual tariff concession allowing the importation of a total of 200,000 metric tones of Sugar from COMESA region on preferential terms, there was no legal framework regulating the imports and KRA freely allowed into the market importation of Sugar; KRA further argued that all the legal notices published by KSB inviting tenders for the registered importers and the list that allocated quota to registered importers were all null and void and illegal; for that reason, KRA had a duty to demand extra taxes from any importer over and above the 89,000 metric tones including the applicants imports.

Justice Maraga in his ruling found the argument by KRA dishonest in that KRA are aware of the Sugar Act and its regulations, the Act establishes KSB and mandates it to *inter alia*, regulate, develop, and promote the Sugar industry in the country. Under Section 27(1) part of its regulatory

role is to control Sugar imports in the country. The judge dismissed KRA's contention that there was no legal framework providing for the importation of Sugar from COMESA member states, yet the Sugar (Imports, Exports and By Products) Regulation 2003 is there. The judge also found that according to the Sugar Act, it is KSB that is authorized to regulate and control the affairs of the Sugar industry including importation, that KRA notwithstanding being aware of the regulatory role of KSB, completely ignored KSB and allowed unauthorized importation of COMESA Sugar thus exhausting the quota before the applicant could clear its consignment. The application was allowed and the 5000 metric tones allowed into the market at COMESA tariff rates.

e) In the High Court of Kenya at Mombasa MISC. C.A. No. 619 of 2004 (Judicial Review) - Ex-parte African Synergy Ltd vs Kenya Revenue Authority and Kenya Sugar Board

The facts of this case were similar to the one of Commodity House Ltd (HCCC MS CA. 521/2004). The applicant herein (African Synergy limited) was a registered importer who played by the rules as set out by KSB and imported Sugar just to be locked out by KRA on grounds that the quota was exhausted. The applicant sought order of *certiorari* and *prohibition* against KRA's decision to levy full duty when the applicant had duly been

authorized and gazetted by KSB to import 5000 metric tones of Sugar. That the action of KRA was *ultra vires* the Customs and Excise Act CAP 472 and the Sugar Act 2001 by usurping the role of KSB in regulating the importation of COMESA Sugar and safeguarding the local sugar industry thus purporting to expand and exercise powers that they did not have but were vested in KSB; that KRA acted *ultra vires* by ignoring the allocation of quotas made by KSB to gazetted and duly registered importers; by appointing its own unpublished importers of sugar; awarding and varying the quotas to such other importers as it deemed fit so that the applicant who had been awarded a specific quota of COMESA Sugar to import found itself without any quota upon importation; acting contrary to provision of section 118 of the customs and Excise Act CAP 472 as read with section 27(1) and (2) of the Sugar Act. That KRA did reduce the import duties to other unpublished unregistered importers so as to cause the quota to be exhausted; that CAP 472 has no powers permitting KRA to regulate, monitor or control Sugar Imports into the country. The decision of KRA to allow other parties who were neither gazetted nor registered to import Sugar and who were not allocated a quota by KSB was against the rules of natural justice.

KSB in its response, supported the applicant as, having registered the applicant as a Sugar importer, allocated them a quota and gazetted them

to import, they could not divorce themselves from their cause. This left KRA on its own but with other interested parties (Reesewoods Ltd and Aberdare Freight Services) who imported without allocation) supporting them. However, this case coming closely after Misc. C.A No. 521/2004 (Commodity House), the Respondent entered into consent and had the Sugar released as the judge would have found it difficult to depart from his ruling in the Commodity House case.

f) ***In the High Court of Kenya at Nairobi - Misc Civil Application No. 946 of 2004 (Judicial Review) Ex-parte Aberdare Freight Services vs Kenya Sugar Board, Kenya Revenue Authority, Krish Commodities and Mumias Sugar Company as interested parties***

The facts of this case are that Aberdare Freight Services, being one of the importers had declined to follow the Sugar Imports Regulation set out under the Sugar Act. Taking advantage of a stay order issued in Misc. C.A. No. 192 of 2004 and 495 of 2004 (b and c above), against the Sugar Imports Regulations, they went ahead to import Sugar. But before their consignment arrived in the country, they lodged clearing documents with Kenya Revenue Authority and paid the necessary levies. Thereafter, the Commissioner for Customs and Excise under KRA made an announcement that the 89,000 metric tones quota for the year 2004 had been exhausted

and anyone importing Sugar shall be subjected to 100% duty. At the time of KRA issuing the statement, the applicants' Sugar had not arrived till early June 2004 yet the taxes and levies had been paid in early May. When the consignment from Egypt arrived, the applicant wanted it released on zero rated terms arguing that it had been cleared long before it arrived. Prior to the subject consignment arriving, other importers (Commodity House Ltd and African Synergy Ltd cases (d) and (e) above) whose sugar arrived before the subject consignment were denied duty free clearance on the grounds that the quota for 2004 had been exhausted. The applicant on being denied duty free clearance and the Sugar being detained moved to court under judicial review. Amongst the issues to be considered of interest to this case were the provisions of the Sugar Act, whether Local Acts and their objectives are inconsistent with the COMESA Treaty. The case attracted two interested parties, Krish Commodities limited and Mumias Sugar Company.

The applicant argued that the decision by the Respondents to detain their Sugar consignment was illegal and contrary to the Customs and Excise Act Cap 472, contrary to FTA rules, and the COMESA Treaty to which Kenya is a party; that having paid all lawful levies, taxes and charges in respect of the Sugar consignment, the Respondents refusal to release the

consignment was unlawful, oppressive malicious and an abuse of the Respondent statutory powers and authority.

The first Respondent, (KSB), contended that it was the regulator of the quota gazetted by the Minister for Finance and that the applicant was not gazetted as an importer and allocated any quota vide gazette notice published by the first Respondent; that the Respondents are entitled to retain the consignment for purpose of raising additional duties and also for the purpose of ensuring that all the Laws affecting the consignment and administered by other bodies such as the first Respondent as regulators were complied with; that duty was payable as per the Act and that the rate is as per the prevailing rate at the date of arrival, and lastly, there was no breach of the COMESA Treaty.

Amongst the issues to be determined was whether the first Respondent was entitled to regulate the quota in Law; whether there was a violation of the COMESA Treaty.

Justice Nyamu, in his judgment found that, when the Sugar consignment arrived, the COMESA quota had been exhausted and it was not disputed that the applicant had not been allocated any quota under COMESA for the year 2004. After considering the provisions of the Sugar Act and the

COMESA Treaty, the court found there was no contravention of the COMESA Treaty and the powers conferred in KSB by the Sugar Act and the Regulations for importation. On the contrary, the provisions to allocate the available quota and to license are clearly covered by the objectives of the Act and are aimed at achieving equity in importation and licensing. KSBs action was a fairer system in terms of equity and fairness. The court also found that the Respondents had not detained the goods at all although they had statutory powers to do so, both under the Customs and Excise Act and also pursuant to the attainment of the objectives by KSB under Section 27(1) and Section 33 of the Sugar Act, until compliance and payment of the correct rate of duty and compliance with the Sugar Act.

The judge also found that KSB was entitled to regulate importation in terms of section 4, 6, 27 and 33 and the regulations made hereunder; that the articulation of the natural interests in the allocation of quota and the safeguards aimed at protecting the local industry and the endeavour to achieve equity in allocation are not inconsistent with the COMESA Treaty. The application was dismissed with costs.

The applicants being dissatisfied with the judgement of Justice Nyamu moved to the Court of Appeal.

g) ***In the Court of Appeal of Kenya at Nairobi Civil Appeal no.263 of 2004 Aberdare Freight Services limited -v- Kenya Revenue Authority and Kenya Sugar Board(being an appeal from the decision of Justice Nyamu)***

The court of Appeal after evaluating the proceedings in the evidence in the High court found no merit in the appeal and upheld the findings of justice Nyamu. The court further ordered the release of the sugar but on payment of full duties. The appellants once again being dissatisfied with the decision of the Court of Appeal preferred an appeal to the COMESA Court of Justice being:-

h) ***COMESA Court of Justice Reference no.1 of 2005 Aberdare Freight Services –v- Kenya revenue Authority and Kenya Sugar Board.***

This appeal is still pending for hearing but its determination that is eagerly awaited shall put to rest many issues that the Kenyan courts had not been able to conclusively determine. The conclusion of the reference shall be expected to put to rest the turmoil experienced in sugar imports as it will be clear whether the local legislations are a contradiction of the COMESA Treaty and if the regulations are a non tariff barrier.

I) ***In the High Court at Mombasa - Misc. Civil Application No. 134 of 2005.(Judicial review) Ex-parte Transouth Conveyors vs Kenya Sugar Board, Kenya Revenue Authority, Minister for Agriculture, Minister for Finance, Minister for Trade and Industry***

The facts of the case were that the applicant, Transouth Conveyors Ltd a duly registered Sugar importer, moved to court by way of judicial review at the beginning of COMESA imports quota for the year 2005 and sought orders to prohibit Kenya Revenue Authority from processing, clearing or releasing any consignment of Sugar under COMESA Tariffs without the authority of Kenya Sugar Board in compliance with the statutory obligations conferred under the Sugar Act and the Sugar (Imports, Exports and By Products) Regulation 2003. The applicant also sought an order for Mandamus to compel Kenya Sugar Board and Kenya Revenue Authority to discharge in an equitable and judicious manner the statutory obligation of regulations and controls of the annual imports of Sugar quota for the year 2005 commencing 1st March 2005 from the COMESA region under the mutual tariff concession through fair and just allocation to registered importers. The court did order that leave shall operate as a stay against the Respondent Kenya Revenue Authority from processing, clearing or releasing any Sugar being part of 89,000 metric tones from

COMESA region for the year 2005 quota commencing on 1st March 2005 pending the determination of the judicial review.

What followed this order was an acute shortage of Sugar in the country as Sugar continued landing in Mombasa but could not be released due to this court order.

It is important here to mention that during the import quota for 2004, the Kenya Sugar Board invoked Regulation 6(2) of the Sugar (Imports, Exports and By Products) Regulations and invited tenders for importation upon which it allocated quotas to specific importers. During the 2005, importation period KSB allocated quantities whereby millers were to import 30% of the 89,000 metric tones while the registered importers were to import the balance of 70%. This was contained in Legal Notice No. 1405 of 2005.

However, there were some pending issues for the year 2004 where those who had complied with the import regulations imported their Sugar but the same could not be cleared on the grounds that the quota for 2004 had been exhausted. They filed suit and their cases were still pending with the consignment still lying at the Port of Mombasa. The applicant herein therefore sought an order to sort out 2004 import problems before 2005

quota could be allowed into the country. The applicant did not however seek for a stay of the implementation of Legal Notice No. 1405 of 2005 that spelt out how the import quota for 2005 was to be administered.

As pointed out earlier, Sugar kept arriving and piling at the Port of Mombasa but could not be let into the country, there was a serious biting shortage with consumer prices escalating. The Respondents, Kenya Sugar Board (KSB) and Kenya Revenue Authority (KRA) moved to court in a bid to vacate the orders as KRA was being stopped from performing its statutory duty. The applicant herein had in fact not imported any Sugar nor had they imported any quantities in 2005.

The Respondents in opposing the application argued that the stay order was granted on the basis of deliberate and wilful distortion and/or suppression of the relevant law in particular the Sugar Act, the Import Regulations and the COMESA Treaty. Justice Maraga sitting in Mombasa in his ruling stated that the Sugar Regulations limit KSB to exercise discretion to only three options:-

a) to allocate quantities,

b) to invite tenders,

c) to offer for auction such quantities to be imported by the registered importers.

Accordingly, KSB had not exercised any of these options, that all it had given in gazette Notice 1405 of 25th February 2005 were quantities to be imported from COMESA region by registered and operating millers and those to be imported by registered importers. The judge rejected the contention that KSB had allocated quantities to be imported by the registered importers, and that KSB had not performed its public duty required of it under Regulation 6 of the Imports Regulations. The judge went ahead to uphold the stay order thus throwing the country into a serious Sugar crisis.

The Respondents being aggrieved with the order applied to the Court of Appeal for the lifting of the stay order and/or stay against the High Court stay.

j) ***<u>In the Court of Appeal at Nairobi Civil Application No. NAI 101 of 2005 Kenya Sugar Board vs Transouth Conveyors.</u>***

Judges Tunoi, Waki and Deverell JJA in granting the stay of Justice Maraga orders observed that the learned judge's orders have caused an acute shortage of sugar in the country as a result of which prices have

rocketed to an unbearable level adversely affecting related industries. Moreover, the country was in danger of breaching its international obligation under the COMESA Treaty. The orders granted by Justice Maraga appeared not to have been in the best interest of the Sugar industry and the country at large but beneficial only to one or two players endlessly engaged in the "sugar wars". The court did not want to frustrate without sufficient cause treaties which had come into force. Upon granting the stay of Justice Maraga's orders, the Sugar held at the Port was ordered released. The substantive motion has never been set down for hearing as the steam seems to have run out once the Sugar was released into the market.

k) In the High Court of Kenya at Mombasa Misc. C.A. No. 532/2004 (Judicial Review) Ex-parte- Krish Commodities vs Kenya Sugar Board, Attorney General (Minister for Agriculture) and Kenya Revenue Authority

The facts of the case are that the *ex-parte* applicant, Krish Commodities who had not imported any Sugar (though gazetted to import) moved to court for leave to file judicial review orders in the nature of *certiorari, prohibition* and *mandamus,* to quash the decision of KRA in a press release dated 26th May 2004 (that the quota for 2004 is exhausted) as

being null and void, to prohibit the respondents from releasing any consignment of Sugar for 2004 COMESA quota to any importer other than the authorized importers listed under gazette Notice No. 3431 of 7th May 2005 as per the specific quotas permitted therein. The *ex-parte* applicant argued that following the law, KSB granted them a right to import 5,000 metric tones of Sugar as per gazette notice No. 3431 and in the manner scheduled in that notice, and that KRA sought to deny the rights so given by KSB to the applicant to import 5,000 metric tons by declaring that the COMESA Sugar quota was exhausted. The decision of KRA was said to be completely illegal, unwarranted and expressly violates the principals of natural justice and effectively purports to penalize and punish the applicant while the applicant had acted within the Law as it existed. The applicant was prohibited by KRA to land its quota of 5,000 metric tones of Sugar which is in contravention of the rights of the applicant. The applicant's concern was then when and by whom was his quota of 5,000 metric tones landed? If indeed the COMESA quota was exhausted, then the Respondent, KRA did unlawfully permit unauthorized importers to bring in Sugar on COMESA duty free terms. The authority of KRA is to collect revenue while the work of KSB is to regulate and control the importation. It therefore goes without saying that the KRA can only release Sugar imported in accordance with the authority given by KSB. Justice Khaminwa granted leave to apply as a stay of importation of all

COMESA duty free Sugar pending the hearing of the judicial review since KRA has declared the quota was exhausted. The ruling was delivered on 14th day of June 2004 when the quota had been announced exhausted. The Notice of motion was however stayed pending the hearing of Nairobi High Court Misc. C.A. No. 495 of 2004 where there were stay orders against implementation of sugar imports regulations.

The applicant herein was supporting the Regulations set out by KSB arguing that it was the most fair and equitable way to import sugar.

l) ***In the High Court of Kenya at Nairobi Misc. C.A. No. 421 of 2005 (Judicial Review) Ex-parte Krish Commodities vs Kenya Sugar Board, Kenya Revenue Authority, Minister for Finance, Minister for Agriculture and interested parties - Pink Investments, Transroads Kenya Ltd and Mat International ltd***

This case came shortly fallowing Mombasa HCC No. 134/2004 (Transouth Conveyors). The *ex-parte* applicant sought order for *certiorari, prohibition* and *Mandamus* against the Respondents which orders were to operate as a stay of any further implementation and/or proceedings contained in the first Respondents letter of 25th February 2005 and in gazette notice No. 1405 of 25th February 2005 including any processing of documents, clearings and releasing by the second Respondent of the Sugar quota of 89,000 metric tones subject to mutual tariff concession from COMESA for

the period commencing 1st March 2005 pending determination of the judicial review.

The Respondent in opposing the application moved the court to set aside the orders of stay on the grounds of non-disclosure of material facts to the judge in that the applicants failed to disclose the presence of another similar case filed in Mombasa that was at an advanced stage. By giving the orders the Government of Kenya was at risk of breaching the COMESA Treaty. The interested parties also prayed for the lifting of the orders as they had imported sugar that was piling at the Port of Mombasa and were incurring heavy costs.

Justice P.J. Kamau (now deceased) in his considered ruling made a finding that failure on the part of counsel for the *ex-parte* applicant in its search for justice to disclose the existence of another suit during the *ex-parte* proceedings as being material and fundamental in granting the stay. In his considered view, proceedings by way of judicial review, special as they are and especially at the *ex-parte* stage must also be founded on *uberimae fidei* so as to prevent order ensuing from visiting harm on innocent third parties. Courts are after all not in the business of making orders that may be injurious to bona fide third parties, that the stay orders granted were injurious to the interested parties herein as the said

orders have imperilled their contractual obligation with other parties. The judge also found that the stay orders may indirectly affect the spirit of COMESA with resultant retaliatory measures and by extension also affect the level of expected revenue realization by the Government. The orders of stay were set aside.

It is worth noting that the *ex-parte* applicant herein and his counsel are based in Mombasa and were well aware of the proceeding in Misc. C.A. No. 134/2004. The move by the *ex-parte* applicant to file the suit in Nairobi was deliberate so as to have multiple court orders to cause confusion and acute shortage of Sugar supply in the country.

From the foregoing, we can classify the cases as between those that were supporting the regulations and those that were not in favour of the regulations. The cases of The Association of Sugar Importers[75], Mat International[76], Aberdares Freight Services[77] were opposed to the regulations arguing that they were NTBs, while the rest of the cases were in favour of the regulations arguing that the regulations brought sanity in the industry. Arising from that, two groups of importers were created and as it turned out, the applicants in the year 2004 imports period turned out to be respondents in the year 2005 imports period when the Board

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[75] *Supra (a) page 54*
[76] *Supra (b) page 56*
[77] *Supra (c) page57 and (f) page 63*

adopted a free for all imports regime, in that those who were supporting regulations were opposed to the idea of a free for all imports regime. They infact argued that the Board was in breach of its own regulations by failing to regulate imports. All these should never have arisen had the import regulations been enacted in consultation with the COMESA secretariat.

It may be noted that of all the cases, only two cases went through the entire proceedings and were concluded on merit. These are the cases of Association of Sugar Importers and Aberdare Freight Services.[78]The later case proceeded to the Court of Appeal which upheld the high courts decision. The decisions in the two cases were that Kenya Sugar Board had powers within the Act to regulate imports and that the sugar imports regulations were not in contravention with the COMESA Treaty. These decisions failed to the international obligation of Kenya under the COMESA Treaty. The Judges failed to consider the principles of international law and in particular Article 27 of the Vienna Convention on the law of Treaties to which Kenya is a party to. If they had taken cognisance of international law the decisions would have been different.

Only Justice Kamau in the case of Krish Commodity house[79], while dismissing the application made a correct finding that granting the orders

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[78] *See footnotes 75 and 77*
[79] *Supra (l) page 74*

sought may directly affect the spirit of COMESA with resultant retaliatory measures. His ruling was based on correct principles of international law.

All the remaining cases never proceeded to their conclusions, thus the courts never had a chance to canvass on the issues that had been raised. Once the *ex-parte* orders were set aside the cases became moot as no further proceedings were taken

All this conflicting provisions of the local legislation and the COMESA Treaty have had a fair share of evaluation and interpretation by Kenyan Courts. A look at the various decisions of the Kenyan Courts show there is yet to be a definite decision on whether the local legislations take precedence over the COMESA Treaty. The next chapter shall set out the findings, and suggest recommendations how these conflicts could be avoided if not reduced and make conclusions.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSIONS

From what we have seen in the previous chapters we can now make our findings and recommendations.

The continued application of the local legislations in contravention of the COMESA Treaty only serves to risk Kenya having the safeguard revoked or other member states imposing restrictions or retaliatory measures on Kenya products entering their markets. Any local legislation of a member state on the administration of safeguards measures should advisedly be enacted after due consultation with the COMESA Secretariat. This would ensure that whatever legislations are enacted in the member state would have enjoyed support by COMESA secretariat. In the current situation, the COMESA Secretariat made its views known well before the regulations were gazetted by Kenya, yet the Government disregarded the COMESA Secretariat's views and went ahead to gazette the regulations which were not in conformity with COMESA rules. Applying the regulations as they exist has been a hindrance to free trade.

It is evident from the court cases that our courts have not been competent in handling cases touching on international treaties. Only one judger appreciated the provisions of international trade indicating lack of knowledge in the judiciary. The situation could be much improved if a special court division could be set up manned with competent personnel with a background in international trade to handle such cases within the shortest period.

With the expansion of COMESA to now 20 member states[80], trade is bound to expand, as the market is now larger. More member states are soon to join the FTA established under the COMESA Treaty thus increasing the intra-COMESA Trade. With the resulting increase in trade, some industries are bound to suffer and may find it necessary to invoke the safeguards provisions of the COMESA Treaty. There is no guarantee that in Kenya it is only sugar, rice and wheat that would experience a negative effect in intra-COMESA trade. Whereas only sugar and wheat have safeguards, it may very soon be necessary to invoke safeguards also in the rice industry. But it would be futile if Kenya were to seek safeguards on rice under the same procedure and terms as was obtained for sugar and wheat and administer the safeguards in the same way. The same problems of incompatibility with COMESA rules shall replicate.

This does not however mean that nothing can be done to avoid a repeat of the problems which we have verified in the sugar industry. One possible way of avoiding the conflict seen between the local legislation (Customs and Excise Act, The Sugar Act) and the COMESA rules can be found in the way the annual gazette notice on Mutual Tariff Concession under section 118 of the Custom and Excise Act is drafted. The notice must take cognizance if the Sugar Act by referring to it. In this context it should be noted that the Legal Notices issued from the year 2002, 2003 and 2004 did not refer to the Sugar Act. Some litigants as we saw argued that once the Minister for Finance published the Legal Notice under section 118 of the Custom and Excise Act, there was no other player who could regulate the importation of sugar. This view is incorrect because it allows side stepping the Sugar

[80] *Rwanda, Swaziland , Uganda, Sudan, Djibouti, Zambia, Kenya, Malawi, Mauritius, D.R.Congo, Egypt, Zimbabwe, Burundi, Ethiopia, Comoros, Eritrea, Libya, Madagascar, Seychelles, Namibia.*

Regulator established under the Sugar Act. This can be avoided if the Legal Notice as mentioned above refers to the Sugar Act.

The success in the implementation of the granted safeguards depends on the conditions of the domestic laws and regulations of various Acts of Parliament of the member state implementing in conformity with the COMESA Treaty and WTO Agreement. Therefore the Custom and Excise Act, the Standard Act, The Sugar Act and the Public Procurement and Disposals Act should all be streamlined so as to solve the mentioned problem. The streamlining shall result in the maintenance and expansion of the free trade system, rigorous management of safeguards and response to domestic political demand for protection in the Sugar Industry.

The COMESA Regulation on Trade Remedies Measures must be fully adhered to so as to be in compliance with Article 10(2) of the COMESA Treaty. Both the safeguards on sugar and wheat have not followed the Regulations and Kenya risks a backlash from other member states which can lead to the revoking of the safeguards earlier granted. Being the leading beneficiary in intra-COMESA it would not be in the interest of Kenya to loose all the gains from COMESA because of failure to follow the right procedure in its desire to protect a single industry: the sugar industry.

Lastly, the findings show that it is possible to administer the safeguard measures without infringing on the COMESA Treaty notwithstanding different local legislations so long as all are in conformity with the COMESA Treaty.

APPENDIX 1

wheat flour and that Kenya undertook to conduct a study for the wheat flour within the next 6 months with the support of the Secretariat.

55. Burundi and Rwanda informed Council that their undertaking to join the Free Trade Area was contingent upon the establishment of the COMESA Fund in order to compensate them for revenue and industry losses. In this respect, they sought to know when the COMESA Fund will be established.

56. Council was informed that the establishment of the Fund was awaiting ratification by member States. So far, only Kenya had ratified the Protocol.

Decisions

57. Council decided that:

(a) the Secretariat should explore trade opportunities in COMESA and inform the Private Sector organisations and business operators of these opportunities;

(b) the safeguard measures for Kenya be extended for a non-renewable period of four years for 200,000 tonnes annually of sugar to be apportioned as follows:

(i) 111, 000 tonnes of refined sugar for industrial use; and

(ii) 89, 000 tonnes of domestic sugar.

(c) safeguard measures be extended for wheat flour for a period of one year to enable Kenya to complete the study as decided by Council and Kenya to consult with the countries concerned with a view to finding a satisfactory solution and report back to Council at its next meeting.

Time frames for joining the Free Trade Area

58. Council noted that no non-FTA participating countries gave reports at th IC Meeting on their timeframes and tariff reduction schedules for joining th Free Trade Area.

59. Since the Authority decision in May 2002 that non-FTA countries should submit their time frames for joining the FTA, Council noted with concern that none had done so. Council assured non-FTA countries about the substantial benefits of the FTA as has been reflected in the growth rate of 48% among the FTA member States as compared to a growth of 22% of intra-COMESA trade in general in 2002.

60. Council agreed that the Secretariat should prepare a progress report o non-FTA member States' preparedness in joining the FTA for consideration b the next Council meeting. Council further agreed that the Bureau and the FT Ministerial Committee should visit non-FTA member States with the view

APPENDIX 2

COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA

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DE L'AFRIQUE AUSTRALE

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e.mail :secgen@comesa.int
Web site: http://www.comesa.int

MERCADO COMUM PARA
AFRICA ORIENTAL E
AUSTRALE

COMESA Centre
Ben Bella Road
P.O. Box 30051
Lusaka

OFFICE OF THE SECRETARY GENERAL

Ref: COM/SG/11/(18)mjm

Date: 18th November 2002

Hon. Dr Bonaya Godana, MP
Minister for Agriculture and Rural Development
Republic of Kenya
Kilimo House
Nairobi - Kenya

Fax: 254-2- 720 586

Honourable Minister

RE: THE SUGAR (IMPORTS AND EXPORTS OF SUGAR AND BY-PRODUCTS) REGULATIONS, 2002

We have received a copy of a submission addressed on the above *Regulations* from the Association of Sugar Importers in Kenya. The Association is appealing that your office does not pass the Regulations into law for the reasons set out therein.

I recall, Honourable Minister, that in 2001, Kenya engaged the COMESA Secretariat in very extensive but most enlightened and instructive discussions on the sugar industry in Kenya. These discussions led, in November 2001, to the COMESA Council of Ministers granting Kenya consent to invoke Safeguard measures under Article 61 of the COMESA Treaty. These Safeguard Measures were duly legislated effective 28th February 2002 through a Legal Notice signed by your counterpart, the Minister of Finance. As provided for under the COMESA Treaty, these Safeguard measures shall remain in force until 27th February 2003, after which they may lapse or be extended by Council on submission of a suitable justification by the Government of Kenya.

We were pleased to learn, when your Government reported at the Eleventh Meeting of the Committee on Trade and Customs held from 28th to 30th October 2002 at Lusaka, that these Safeguard measures were working well. A representative of your Government further pointed out only 60,000 metric tonnes of sugar had been imported by Kenya since the Safeguard was introduced, though the agreed duty-free quota was 200,000 metric tonnes.

We have also been sent a copy of the *Draft Sugar (Imports and Exports and By-Products) Regulations, 2002* which we have studied. On the basis of the foregoing, you may wish to consider the submission by the Association of Sugar Importers that the proposed draft Regulations would be in contravention of the COMESA Treaty as they would negate deeper integration that the region seeks to develop.

Honourable Minister, as a Secretariat, we are keen and are readily available to discuss or assist in any way possible when industry in the region is faced with difficulty. We would, therefore, be eager to discuss this matter further as the object of COMESA's integration agenda is to promote economic growth throughout the region and any operational or other problems that industry in any Member State faces is a major concern to us.

Please accept, Honourable Minister, the assurances of my highest consideration.

Yours sincerely

Erastus J O Mwencha, MBS
SECRETARY GENERAL

cc Honourable Nicholas N K Biwott, EGH, MP
Minister of Trade and Industry
Ministry of Trade and Industry
Teleposta Towers, Kenyatta Avenue
P O Box 30027, Nairobi
Kenya

Fax: 00 254-2-213508

cc H. E. Esther Mshai Tolle
High Commissioner
Kenyan High Commission to the Republic of Zambia
Lusaka – Zambia

Fax 260-1- 253 829

cc Mr T A M Hatayan
Chairman
Association of Sugar Importers
P O box 90302, Nairobi
Kenya

Fax 254-2-222920

APPENDIX 3

COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA

MARCHE COMMUN DE
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Lusaka

OFFICE OF THE SECRETARY GENERAL

Ref: COM/RIP/04/08 mjm

Date: 8th February 2004

Mr Alex Keter
Permanent Secretary
Ministry of Trade and Industry
Teleposta Towers, Kenyatta Avenue
P O Box 30430, Nairobi, Kenya

Fax: 00 254-2-213508

Dear Mr Keter

Implementation of the Extended Safeguard Measure on Sugar Imports

I refer to the extended safeguard measure on sugar imports granted to Kenya by Council under Article 61 of the COMESA Treaty. I wish, on behalf of the Secretariat, to express our continued appreciation of your Government's commitment to COMESA's rules-based system, a commitment you have demonstrated by adhering to Treaty provisions and continually seeking to operate within their ambit.

We have learned that a meeting to which we were invited by the Kenya Sugar Board to consider modalities for the implementation of the extended sugar safeguard took place on 5th February 2004. We have further learned that the meeting discussed a number of ways of administering the safeguard extension including the option of administratively allocating or rationing quotas to importers.

We would like to appeal that the extended Safeguard, especially of the 89,000 metric tonnes of brown sugar, be implemented in accordance with Treaty provisions including Articles 49, 55 and 61 and in accordance with the terms of the original Safeguard, on the basis of which the extension was granted. We hasten to point out that administrative allocation of quotas to importers would be in breach of these provisions and would be a recipe for rent-seeking behaviour among importers. We therefore request that the

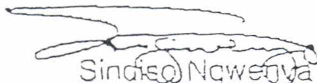
extended sugar import safeguard be implemented in the same manner as the original safeguard.

Once more, we applaud your Government's commitment to the COMESA's integration regime, a commitment which seeks to safeguard and build upon the gains that Kenya and other COMESA Member States have so far achieved in integrating the region's economies, and which also does a lot to preserve the sanctity of COMESA's rules-based system.

I am, therefore, confident that your government will implement the extended sugar safeguard in a manner consistent with enhancing competition, and staying away from non-tariff barriers whether quantitative or administrative, and indeed from any recommendations that may compromise Kenya's hitherto excellent record in adhering to Treaty provisions.

Please accept, Mr Permanent Secretary, the assurance of my highest consideration.

Yours sincerely,



Sindiso Ngwenya
ACTING SECRETARY GENERAL

cc H. E. Esther Tolle
High Commissioner
Kenyan High Commission to the Republic of Zambia
Lusaka – Zambia

Fax 260-1-253829

APPENDIX 4

General Agreement on Tariffs and Trade 1994

Article XIX: Emergency Action on Imports of Particular Products

1. *(a)* If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. *(a)* If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received

by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of subparagraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

APPENDIX 5

WTA /WTO and GATT Uruguay 1994

World Trade Agreement 1994 (establishing the WTO and including GATT Uruguay 1994)

14. Agreement on Safeguards

Members,
Having in mind the overall objective of the Members to improve and strengthen the international trading system based on the GATT 1994;

Recognizing the need to clarify and reinforce the disciplines of the GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control;

Recognizing the importance of structural adjustment and the need to enhance rather than limit competition in international markets; and

Recognizing further that, for these purposes, a comprehensive agreement, applicable to all Members and based on the basic principles of the GATT 1994, is called for;

Hereby *agree* as follows:

SECTION I – General

1. This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of the GATT 1994.

SECTION II – Conditions

2. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

3.

(a) A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of the GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

(b) Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non- confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities would be free to disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

4. In critical circumstances where delay would cause damage which it would be difficult to repair, a provisional safeguard measure may be taken pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed 200 days, during which period the pertinent requirements of this Section and Section VII shall be met. Such measures should take the form of tariff increases to be promptly refunded if the subsequent investigation referred to in paragraph 7 below does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry. The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 10, 11 and 12 below.

5. Safeguard measures shall be applied to a product being imported irrespective of its source.

6. For the purposes of this Agreement:

(a) serious injury shall be understood to mean a significant overall impairment in the position of a domestic industry;

(b) threat of serious injury shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 7 below. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; and

(c) in determining injury or threat thereof, a domestic industry shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

7.

(a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

(b) The determination referred to in sub-paragraph 7(a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

(c) The competent authorities shall publish promptly, in accordance with the provisions of paragraph 3 above, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

8. Safeguard measures shall be applied only to the extent as may be necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy

serious injury. Members should choose measures most suitable for the achievement of these objectives.

9.

(a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

(b) A Member may depart from the provisions in (a) above provided that consultations under paragraph 27 are conducted under the auspices of the Committee on Safeguards established in paragraph 36 of this Agreement and that clear demonstration is provided to the Committee that (i) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (ii) the reasons for the departure from the provisions in (a) above are justified, and (iii) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 10 below. The departure referred to above shall not be permitted in the case of threat of serious injury.

10. Safeguard measures shall be applied only for a period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 11 below.

11. The period mentioned in paragraph 10 above may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in this Section, that the safeguard measure continues to be necessary to prevent or remedy serious injury; that there is evidence that the industry is adjusting; and provided that the pertinent provisions of Sections III and VII below are observed.

12. The total period of application of a safeguard measure including the period of application of any provisional measure, the period of initial application and any extension thereof, shall not exceed eight years.

13. In order to facilitate adjustment, if the expected duration of a safeguard measure as notified under the provisions of paragraph 25 is over one year, it shall be progressively liberalized at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. A measure extended under paragraph 11 above shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized.

14. No safeguard measure shall be applied again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the Agreement Establishing the WTO, for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years.

15. Notwithstanding the provisions of paragraph 14 above, a safeguard measure with a duration of 180 days or less may be applied again to the import of a product if:

(a) at least one year has elapsed since the date of introduction of a safeguard measure on the import of that product; and

(b) such a safeguard measure has not been applied on the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.

SECTION III - Level of concessions and other obligations

16. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing between it and the exporting Members which would be affected by such a measure under the GATT 1994, in accordance with the provisions of paragraph 27 below. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

17. If no agreement is reached within 30 days in the consultations under paragraph 27 below, then the affected exporting Members are free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under the GATT 1994, to the trade of the

Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

18. The right of suspension referred to in paragraph 17 above shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

SECTION IV - Developing country members

19. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that, developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.

20. A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 12 above. Notwithstanding the provisions of paragraph 14 above, a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the Agreement Establishing the WTO, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years.

SECTION V - Pre-existing Article XIX measures

21. Members shall terminate all safeguard measures taken pursuant to Article XIX of the GATT 1947 that were in existence at the date of entry into force of the Agreement Establishing the WTO not later than eight years after the date on which they were first applied or five years after the date of entry into force of the Agreement Establishing the WTO, whichever comes later.

SECTION VI - Prohibition and elimination of certain measures

22.

(a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of the GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

(b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect at the time of entry into force of the Agreement Establishing the WTO shall be brought into conformity with this Agreement or phased out in accordance with paragraph 23 below

(c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of the GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of the GATT 1994.

23. The phasing out of measures referred to in paragraph 22(b) above shall be carried out according to timetables to be presented to the Committee on Safeguards by the Members concerned not later than 180 days after the date of entry into force of the Agreement Establishing the WTO. These timetables shall provide for all measures referred to in paragraph 22 above to be phased out or brought into conformity with this Agreement within a period not exceeding four years after the date of entry into force of the Agreement Establishing the WTO, subject to not more than one specific measure per importing Member, the duration of which shall not extend beyond December 31, 1999. Any such exception must be mutually agreed between the Members directly concerned and notified to the Committee on Safeguards for its review and acceptance within 90 days of the coming into force of the Agreement Establishing the WTO. The Annex to this Agreement indicates a measure which has been agreed as falling under this exception.

24. Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 22 above.

SECTION VII - Notification and consultation

25. A Member shall immediately notify the Committee on Safeguards upon:

(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;

(b) making a finding of serious injury or threat thereof caused by increased imports; and

(c) taking a decision to apply or extend a safeguard measure.

26. In making the notifications referred to in sub-paragraphs 25(b) and (c) above, the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.

27. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, inter alia, reviewing the information provided under paragraph 26 above, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in Paragraph 16 above.

28. A Member shall make a notification before taking a provisional safeguard measure referred to in paragraph 4 above. Consultations shall be initiated immediately after the measure is taken.

29. The results of the consultations referred to in this Section, as well as the results of mid-term reviews referred to in paragraph 13, any form of compensation referred to in paragraph 16, and proposed suspensions of concessions and other obligations referred to in paragraph 17, shall be notified immediately to the Council for Trade in Goods by the Members concerned.

30. Members shall notify promptly the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them.

31. Members maintaining measures described in paragraphs 21 and 22 above which exist at the date on which the Agreement Establishing the WTO enters into force shall notify such measures to the Committee on Safeguards, not later than 60 days after the entry into force of the Agreement Establishing the WTO.

32. Any Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions dealt with in this Agreement that have not been notified by other Members that are required by this Agreement to make such notifications.

33. Any Member may notify the Committee on Safeguards of any non-governmental measures referred to in paragraph 24 above.

34. All notifications to the Council for Trade in Goods referred to in this Agreement shall normally be made through the Committee on Safeguards.

35. The provisions on notification in this Agreement shall not require any Member to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

SECTION VIII – Surveillance

36. There shall be a Committee on Safeguards under the authority of the Council for Trade in Goods, which shall be open to the participation of any Member indicating its wish to serve on it. The Committee will have the following functions:

(a) to monitor, and report annually to the Council for Trade in Goods on, the general implementation of this Agreement and make recommendations towards its improvement;

(b) to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods;

(c) to assist Members, if they so request, in their consultations under the provisions of this Agreement;

(d) to examine measures covered by paragraphs 21 and 22, monitor the phase-out of such measures and report as appropriate to the Council for Trade in Goods;

(e) to review, at the request of the Member taking a safeguard measure, whether proposals to suspend concessions or other obligations are "substantially equivalent", and report as appropriate to the Council for Trade in Goods;

(f) to receive and review all notifications provided for in this Agreement and report as appropriate to the Council for Trade in Goods; and

(g) to perform any other function connected with this Agreement that the Council for Trade in Goods may determine.

37. To assist the Committee in carrying out its surveillance function, the WTO Secretariat shall prepare annually a factual report on the operation of the Agreement based on notifications and other reliable information available to it.

SECTION IX - Dispute settlement

38. The provisions of Articles XXII and XXIII of the GATT 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes shall apply to consultations and the settlement of disputes arising under this Agreement.

APPENDIX 6

REGULATIONS ON TRADE REMEDY MEASURES

November 2001

TITLE: REGULATIONS ON TRADE REMEDY MEASURES

PREAMBLE

REGULATIONS

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3. Application
4. Interim Provisions
5. Interpretation
6. Principles

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8. Investigation
9. Serious Injury or Threat Thereof
10. Application of Safeguard Measures
11. Provisional Safeguard Measures
12. Duration and Review of Safeguard Measures
13. Level of Concessions and other Obligations
14. Prohibition and Elimination of Certain Measures
15. Notification and Consultation

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17. Determination of Injury
18. Initiation and Subsequent Investigation
19. Evidence
20. Provisional Measures
21. Price Undertakings
22. Imposition and Collection of Anti-Dumping Duties
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24. Duration and Review of Anti-Dumping Duties and Price Undertakings
25. Public Notice and Explanation of Determinations

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27. Specific Subsidy
28. Application of Article VI of GATT 1994
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40. Public Notice and Explanation of Determinations

PART V : DISPUTE SETTLEMENT

41. Scope and application
42. Consultations
43. Composition of the Dispute Panel of Trade Experts
44. Panel Procedure
45. Appeals against findings and recommendations for the panel
46. Services of documents
47. Third Party Rights
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PART VI : GENERAL

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50. Judicial Review
51. Existing Trade Remedy Measures
52. Other Final Provisions
53. Entry into Force

ANNEXES

I. Procedures for on-the-spot Investigations Pursuant to Paragraph 7 of Regulation 19
II. Best Information available in Terms of Paragraph 8 of Regulation 19
III. Assessment of Anti-Dumping Duties Pursuant to Paragraph 3 of Regulation 22
IV. Semi-Annual Report under Regulation 24.4 of the Regulation
V. Calculation of the Total Ad Valorem Subsidization
VI. Procedures for on-the-spot Investigations Pursuant to Paragraph 6 of Regulation 30

PREAMBLE

ADOPTED by the COMESA Council of Ministers under Article 10(1) of the COMESA Treaty:

PART I : INTRODUCTION

Regulation 1

Short Title

1. These Regulations may be cited as the COMESA Regulations on Trade Remedy measures under the COMESA Treaty.

Regulation 2

Purpose

1. These Regulations are a binding instrument on COMESA Member states in their conduct of trade remedy investigations. Its purpose is to ensure that there is uniformity among COMESA member States in the conduct of trade remedy investigations and to ensure, to the extent possible, that such investigations are undertaken in harmony and within the framework of WTO Safeguard Agreement.

2. These Regulations establish rules for the conduct of trade remedy investigations and the application of trade remedy measures.

Regulation 3

Application

1. These Regulations shall apply to investigations or reviews initiated under national legislation of COMESA Member states on or after the day of entry into force of this Regulation.

2. These Regulations are to be applied in conjunction with the existing national legislation for conducting trade remedy investigations and reviews in the individual COMESA Member states. The Member states of COMESA recognize that most of them are also Signatories in the WTO and may have national legislation, which is consistent with the WTO Agreement. All COMESA Member states recognize that these Member states have the right to apply their national legislation, without amendment, in conducting all trade remedy investigations from the date that this Regulation comes into force, as their national legislation complies with both the WTO Agreement and this Regulation.

3. If an investigation is initiated by a COMESA member State finds that the industry under investigation includes imported products only from COMESA countries, the provisions to be applied are the COMESA trade remedy regulations.

4. If an investigation is initiated by a COMESA member State finds that the industry under investigation includes imported products only from non-COMESA WTO member countries, the provisions to be applied is the WTO Agreement on Safeguards.

5. If an investigation is initiated by a COMESA member State finds that industry under investigation includes imported products from both COMESA and non-COMESA WTO member countries, the provisions to be applied are the WTO Agreement, and where not otherwise provided for by WTO, the provisions of the COMESA trade remedy regulations.

6. In the case of Part III on Anti-Dumping only if an investigation is initiated by a COMESA member State against fellow COMESA members, the provisions of Part III of this Regulation shall apply. If an investigation is initiated by a COMESA member State against non-COMESA WTO member countries, the provisions of the WTO Agreement shall apply. In cases where an investigation under Part III has been initiated by a COMESA member State against fellow COMESA members and non-COMESA WTO member States, both this Regulation and the WTO Agreement will be applied in this investigation.

Regulation 4

Interim Provisions

COMESA Member states without existing national legislation for the conducting of safeguard investigations, undertake to enact empowering national legislation leading to formation of an investigating authority for the conduct of such investigations which reflects the provisions of this Regulation, as soon as practicable. In the interim, they may take trade remedy Measures in accordance to and in compliance with the provisions of these Regulations.

Regulation 5

Interpretation

In these Regulations, unless the context otherwise requires:

“Anti-dumping Regulation” means, the Regulation regulating the imposition of anti-dumping duties against dumped imports causing material injury to the domestic industry or threat thereof;

“Committee” means, the COMESA Committee on Trade Remedies;

“Domestic industry", this definition is applicable to both industrial and agricultural production and to industry that is either in the ‘start-up’ phase or is ‘established’. It means, the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that;

(i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers. Producers are deemed to be related to exporters or importers only if:

(a) one of them directly or indirectly controls the other; or

(b) both of them are directly or indirectly controlled by a third person; or

(c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.

For the purpose of this definition one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter;

"Injury" means, unless otherwise specified in this Regulation, material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry;

"Investigating Authority" means the governmental authority charged with the responsibility of conducting anti-dumping investigations in the COMESA member State;

"Interested parties" shall include:

(i) an exporter or producer in the exporting country, or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

(ii) the government of the exporting Member; and

(iii) a producer of the like product in the territory of the importing COMESA Member country or a trade or business association, a majority of the members of which, produce the like product in the territory of the importing COMESA Member.

The Investigating Authority shall allow, upon request, domestic or foreign parties other than those mentioned above to be included as interested parties in the investigation;

"Independent buyer" means Individual or company that have no relationship with either the importer or the exporter of the product under investigation;

"Like product" means a product, which is identical, i.e. alike in all respects to the product under consideration or in the absence of such a product, another product, which, although not alike in all respects, has characteristics closely resembling those of the product under consideration;

"National legislation" means the legislation of a COMESA member State which empowers the Investigating Authority to conduct anti-dumping investigation;

"Regulation" means the COMESA Regulation on Anti-Dumping;

"Safeguard Measures" means Temporary imposition of Tariff or quantitative restrictions; it can also be defined as necessary measures to prevent or remedy serious injury and to facilitate adjustments and shall include an increase in tariff or quantitative restriction;

"Safeguard Regulation" means the Regulation regulating the imposition of safeguard measures against increased imports causing serious injury to the domestic industry or threat thereof;

"Secretary General" means the Secretary General of COMESA;

"Serious Injury" means a significant overall impairment in the position of a domestic industry.

"Subsidies and countervailing Regulation" means the Regulation regulating the imposition of countervailing duties against subsidised imports causing material injury to the domestic industry or threat thereof;
"Specific subsidies" means subsidies available only to a defined enterprise or industry, or a group of enterprises or industries, within the jurisdiction of a granting authority:

"Subsidized goods" means goods in respect of the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export, or import of which a specific subsidy has been or will be paid, granted, authorized, or otherwise provided, directly or indirectly, by a foreign government:

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

"Threat of serious injury" shall be understood to mean serious injury that is clearly imminent. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility;

"trade remedy measure" means a safeguard measure, subsidies and countervailing measure or anti-dumping duty as the case may be;

"WTO Agreement" means the agreement establishing the World Trade Organization adopted at Marrakech on the 15th day of April 1994.

Regulation 6

Principles

A trade remedy measure shall be applied only under the circumstances provided for in these Regulations and pursuant to investigations initiated and conducted in accordance with the provisions of these Regulations. Any trade remedy Measure taken in accordance with the COMESA Treaty before the entry into force of these regulations shall remain in place for one year from the date the Measure was imposed and shall thereafter be reviewed with a view to conforming to the provisions of these Regulations.

PART II : SAFEGUARD MEASURES

Regulation 7

Conditions

1. A Member may apply a safeguard Measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

2. Safeguard measures shall be applied to a product being imported irrespective of its source within COMESA.

Regulation 8

Investigation

1. A Member may apply a safeguard measure only following an Investigation by the Investigating Authority of that Member pursuant to the procedures established under the provisions of this Regulation. This investigation shall include reasonable public notice to all interested parties and public hearing or other appropriate means in which importers, exporters and other interested parties, could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The Investigating Authority shall publish a report setting forth its findings and reasoned conclusions reached on all pertinent issues of fact and law.

2. Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because of its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person whom that person acquired the information), or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the Investigating Authority. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. If such parties indicate that such information cannot be summarized, the reasons why a summarization is not possible must be provided. However, if the Investigating Authority finds that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary from, the Investigating Authority may disregard such information unless it can be demonstrated to its satisfaction from appropriate sources that the information is correct.

Regulation 9

Serious Injury or Threat Thereof

1. In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Regulation, the Investigating Authority shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation and level of development of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

2. The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof.

3. The demonstration of a causal relationship between the increased volume of imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the Investigating Authority. Where appropriate, the Investigating Authority should also examine any known factors other than the increased imports of the product concerned which at the same time are injuring the domestic industry, and the injury caused by these other factors must not be attributed to the increased volume of imports. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

4. The Investigating Authority shall publish immediately, in accordance with the provisions of Regulation 8, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. The publication shall also include information required in paragraph 1 of Regulation 15.

Regulation 10

Application of Safeguard Measures

1. A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

2. (a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

A Member may depart from the provision in subparagraph (a) provided that consultations under paragraph 3 of Regulation 15 are conducted under the auspices of the Committee on Trade Remedies provided for in paragraph 1 of Regulation 15 and that clear demonstration is provided to the Committee that:

(i) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period,

(ii) the reasons for the departure from the provisions in subparagraph (a) are justified, and

(iii) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 1 of Regulation 12. The departure referred to above shall not be permitted in the case of threat of serious injury.

Regulation 11

Provisional Safeguard Measures

In critical circumstances where delay would cause damage, which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed 200 days, during which period the pertinent requirements of Regulations 2 through 12 and 15 shall be met. Such measures should take the form of tariff increases to be promptly refunded if the subsequent investigation referred to in paragraph 1 of Regulation 4 does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry. The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 1, 2 and 3 of Regulation 12.

Regulation 12

Duration and Review of Safeguard Measures

1. A Member shall apply safeguard measures only as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.

2. The period mentioned in paragraph 1 may be extended provided that the Investigating Authority of the importing Member has determined, in conformity with the procedures set out in Regulations 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Regulations 13 and 15 are observed. A member in consultation with the private sector should agree to a sequence of actions that it will take to adjust to the situation.

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

4. In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Regulation 15 is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. A measure extended under paragraph 2 shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized.

5. No safeguard measure shall be applied again to the import of a product which has been subject to such a measure, taken after the date of entry into force of this Safeguard Regulation, for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years.

Regulation 13

Level of Concessions and Other Obligations

1. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavor to maintain a substantially equivalent level of concessions and other obligations to that existing between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Regulation 15. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Regulation 15, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Secretary General, the application of substantially equivalent concessions or other obligations, to the trade of the Member applying the safeguard measure, the suspension of which the Secretary General does not disapprove.

3. The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Regulation.

Regulation 14

Prohibition and Elimination of Certain Measures

1. A Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side[1]. An import quota applied as a safeguard measure in conformity with the relevant provisions of this Regulation may, by mutual agreement, be administered by the exporting Member. These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of this Regulation shall be brought into conformity with this Regulation or phased out in accordance with paragraph 2.

2. The phasing out of measures referred to in paragraph I shall be carried out according to timetables to be presented to the Committee on Trade Remedies by the Members concerned not later than 180 days after the date of entry into force of this Regulation. These timetables shall provide for all measures referred to in paragraph 1 be phased out or brought into conformity with this Regulation within a period not exceeding one year after the date of entry into force of this Regulation. Any such exception must be mutually agreed between the Members directly concerned and notified to the Committee on Trade Remedies for its review and acceptance within 90 days of the entry into force of this Regulation.

3. Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1.

Regulation 15

Notification and Consultation

1. A Member shall immediately notify the Committee on Trade Remedies upon:

(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;

(b) making a finding of serious injury or threat thereof caused by increased imports; and

(c) taking a decision to apply or extend a safeguard measure.

2. In making the notifications referred to in paragraph 1 (b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the COMESA Committee on Trade Remedies with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise

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[1] Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.

description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Committee on Trade Remedies may request such additional information, as they may consider necessary from the Member proposing to apply or extend the measure.

3. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, inter *alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Regulation 8.

4. A Member shall make a notification to the Committee on Trade Remedies before taking a provisional safeguard measure referred to in Regulation 6. Consultations shall be initiated immediately after the measure is taken.

5. The result of the consultations referred to in this Regulation, as well as the results of mid-term reviews referred to in paragraph 4 of Regulation 7, any form of compensation referred to in paragraph 1 of Regulation 8, and proposed suspensions of concessions and other obligations referred to in paragraph 2 of Regulation 8, shall be notified immediately to the Committee by the Members concerned.

6. Members shall notify promptly the Committee on Trade Remedies of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them.

7. Any Member may notify the Committee on Trade Remedies of all laws, regulations, administrative procedures and any measures or actions dealt with in this Regulation that have not been notified by other Members that are required by this Regulation to make such notifications.

8. Any Member may notify the Committee on Trade Remedies of any non-governmental measures referred to in paragraph 3 of Regulation 9.

9. All notifications on Safeguards shall be made through the Committee on Trade Remedies.

10. The provisions on notification in this Regulation shall not require any Member to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

APPENDIX 7

THE SUGAR ACT

(*No.* 10 *of* 2001)

IN EXERCISE of the powers conferred by section 33 of the Sugar Act, 2001, the Minister for Agriculture and Livestock Development, in consultation with the Board, makes the following Regulations:-

THE SUGAR (IMPORTS, EXPORTS AND BY-PRODUCTS) REGULATIONS, 2003

Citation.

1. These Regulations may be cited as the Sugar (Imports, Exports and By-Products) Regulations, 2003.

Interpretation.

2. In these Regulations, unless the context otherwise requires—

"certificate of registration" means a certificate issued by the Board in accordance with regulation 4;

"registered exporter" means a person who holds a certificate of registration issued by the Board to take or cause to be taken out of Kenya sugar and its by-products;

"registered importer" means a person who holds a certificate of registration issued by the Board to bring or cause to be brought into Kenya sugar and its by-products.

Application for registration.

3. (1) Every person who imports or exports sugar or its by-products shall apply for a certificate of registration from the Board.

(2) An application for a certificate of registration for imports shall be in Form A as set out in the Schedule.

(3) An application for a certificate of registration for exports shall be in Form C as set out in the Schedule.

Certificate of registration.

4. (1) Where the Board approves an application for registration under these Regulations, it shall on payment of a registration fee of ten thousand shillings register the applicant by entering the name and such other particulars as it may determine in the register maintained under regulation 5.

(2) The Board shall, upon registering an applicant under paragraph (1) issue to the applicant a certificate of registration in Form B or D as the case requires, in the Schedule to these Regulations.

(3) A certificate issued under these Regulations shall be subject to such conditions as the Board may, with the written approval of the Minister, impose.

(4) The certificate of registration shall last for one year and shall be renewable on payment of the fee prescribed in paragraph (1).

Register.

5. The Board shall maintain a register of all importers and exporters registered in accordance with these Regulations.

Estimates and allocations.

6. (1) The Board shall determine annually the amount of refined sugar required by manufacturers and other sugar intended for local consumption taking into account the shortfall in the domestic production.

(2) Pursuant to paragraph (1), the Board shall allocate quantities or invite tenders or offer for auction such quantities to be imported by registered importers.

(3) Every tender or auction under paragraph (2) shall be published in the Gazette and at least in two daily newspapers of national circulation and in any other manner as the Board may determine.

(4) Notwithstanding the provisions of paragraph (2), the Board may demand the quantities intended for tenders or auction be specified for the entire or part of the year in relation to Kenya's need.

Returns.

7. Every registered importer or exporter shall make returns to the Board in the manner prescribed in Forms E and F as the case may require, in the Schedule.

Offences.

8. (1) Any person who –

(*a*) imports or exports sugar or its by-products without a certificate of registration; or

(*b*) fails to make returns to the Board as required by these Regulations,

commits an offence and shall be liable on conviction to a fine not exceeding six thousand shillings, or to imprisonment for a term not exceeding six months, or to both.

(2) The Board may cancel the certificate of registration of a person convicted of an offence under this regulation.

(3) A person whose certificate of registration has been cancelled may appeal against the decision to the Minister.

APPENDIX 8

LEGAL NOTICE NO. 29

THE CUSTOMS AND EXCISE ACT

(*Cap.* 472)

MUTUAL TARRIF CONCESSIONS—COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA)

IN EXERCISE of the powers conferred by section 118 of the Customs and Excise Act, the Minister for Finance declares that the duty payable on all goods imported from the Member States of the Common Market for Eastern and Southern Africa specified in the first column of the Schedule hereto, shall be reduced by the percentage respectively specified in the second column of the schedule on condition that such goods meet the Rules of Origin of the Common Market for Eastern Africa, as contained in the COMESA Treaty:

Provided that—

(*a*) this notice shall not apply to wheat flour of Tariff No. 1101.00.10 and meslin flour of Tariff No. 1101.00.20; and

(*b*) where the goods imported consist of refined, raw and mill white sugar, this notice shall, pursuant to Article 61 of the COMESA Treaty, apply only in respect of a maximum of 200,000 metric tonnes, being the total amount imported into Kenya from any or all of the said members states, and any quantities imported in excess of that amount shall be subject to 100% import duty and other levies of equivalent effect.

SCHEDULE

Member State	*Reduction (per cent)*
Angola	Nil
Burundi	60%
Comoros	80%
Democratic Republic of Congo	70%
Djibouti	100%
Egypt	100%
Eritrea	80%
Ethiopia	Nil
Madagascar	100%
Malawi	100%
Mauritius	100%
Namibia	90%
Seychelles	Nil
Rwanda	60%
Sudan	100%
Swaziland	90%
Uganda	90%
Zambia	100%
Zimbabwe	100%

Legal Notice No. 54 of 2001 is revoked.

Made on the 28th February, 2002.

C. M. OBURE,
Minister for Finance.

APPENDIX 9

LEGAL NOTICE NO. 156

THE CUSTOMS AND EXCISE ACT

(*Cap.* 472)

MUTUAL TARIFF CONCESSIONS—COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA)

IN EXERCISE of the powers conferred by section 118 of the Customs and Excise Act, the Minister for Finance declares that the duty payable on all goods imported from the member States of the Common Market for Eastern and Southern Africa specified in the first column of the Schedule hereto, shall be reduced by the percentage respectively specified in the second column of the Schedule on condition that such goods meet the Rules of Origin of the Common Market for Eastern and Southern Africa, as contained in the COMESA Treaty:

Provided that—

(*a*) this Notice shall not apply to wheat flour of Tariff No. 1100:00.10 and meslin flour of Tariff No. 1101.00.20;

(*b*) where the goods imported consist of refined, raw and mill white sugar, this Notice shall, pursuant to article 61 of the COMESA Treaty, apply only in respect of a maximum of 111,000 metric tonnes of white refined sugar and 89,000 metric tonnes of other sugar, being the total amount imported into Kenya from any or all of the said member States, and any quantities imported in excess of that amount shall be subject to 100% import duty and other levies of equivalent effect; and

(*c*) the provisions of this Notice shall run from 1st March, 2003, to 2nd March, 2004.

SCHEDULE

Member State	*Reduction (per cent)*
Angola	Nil
Burundi	80%
Comoros	80%
Democratic Republic of Congo	80%
Djibouti	100%
Egypt	100%
Eritrea	80%
Ethiopia	10%
Madagascar	100%
Malawi	100%
Mauritius	100%
Namibia	90%
Seychelles	Nil
Rwanda	90%
Sudan	100%
Swaziland	90%
Uganda	80%
Zambia	100
Zimbabwe	100%

Legal Notice No. 29 of 2002, is revoked.

Dated the 10th September, 2003.

DAVID MWIRARIA,
Minister for Finance.

APPENDIX 10

LEGAL NOTICE NO. 12

THE CUSTOMS AND EXCISE ACT

(Cap. 472)

JUDICIAL COURT LIBRARY

MUTUAL TARIFF CONCESSIONS—COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA)

IN EXERCISE of the powers conferred by section 118 of the Customs and Excise Act, the Minister for Finance declares that the duty payable on all goods imported from the Member States of the Common Market for Eastern and Southern Africa specified in the first column ot the Schedule hereto, shall be reduced by the percentage respectively specified in the second column of the Schedule, on condition that such goods meet the Rules of Origin of the Common Market for Eastern Africa, as contained in the COMESA Treaty:

Provided that —

(*a*) this notice shall not apply to wheat flour of Tariff No. 1101.00.10 and meslin flour of Tariff No. 1101.00.20;

(*b*) where the goods imported consist of refined, raw and mill white sugar, this notice shall, pursuant to Article 61 of the COMESA Treaty, apply only in respect of a maximum of 111,000 metric tonnes of white refined sugar per annum and 89,000 metric tonnes of other sugar per annum, being the total amount imported into Kenya from any or all of the member states, and any quantities imported in excess of that amount shall be subject to 100% import duty and other levies of equivalent effect; and

(*c*) unless advised otherwise, the provisions of this legal notice shall expire—

(i) by the end of February, 2005, in the case of item (*a*) above; and

(ii) by the end of February, 2008, in the case of item (*b*) above.

SCHEDULE

Member State	*Reduction (per cent)*
Angola	Nil
Burundi	100%
Comoros	80%
Democratic Republic of Congo	80%
Djibouti	100%
Egypt	100%

SCHEDULE—(*Contd.*)

Eritrea	80%
Ethiopia	10%
Madagascar	100%
Malawi	100%
Mauritius	100%
Namibia	Nil
Seychelles	Nil
Rwanda	100%
Sudan	100%
Swaziland	90%
Uganda	80%
Zambia	100%
Zimbabwe	100%

Legal Notice No. 156 of 2003, is revoked.

Made on the 28th February, 2004.

DAVID MWIRARIA,
Minister for Finance.

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UNIVERSITY OF NAIROBI
LIBRARY

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