COUR DE JUSTICE

محكمة العدل

COMESA

COURT OF JUSTICE

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IN THE COURT OF JUSTICE OF THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA – FIRST INSTANCE DIVISION

(SITTING IN PORT LOUIS, MAURITIUS)

REFERENCE NO. 1 OF 2019

AGILISS LTD---------- APPLICANT

VERSUS

THE REPUBLIC OF MAURITIUS ---------- RESPONDENT

COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA---------- CO-RESPONDENT NO.1

SECRETARY-GENERAL OF THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA ---------- CO-RESPONDENT NO.2

MINISTER OF FOREIGN AFFAIRS, REGIONAL INTEGRATION AND INTERNATIONAL TRADE OF THE REPUBLIC MAURITIUS ---------- CO-RESPONDENT NO.3

MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT OF THE REPUBLIC OF MAURITIUS-----CO-RESPONDENT NO.4

CORAM:

Hon. Lady Justice Qinisile Mabuza (Presiding Judge)
Hon. Mr. Justice Ali Sulaiman Mohammed
Hon. Lady Justice Mary N. Kasango
Hon. Mr. Justice Bernard Georges
Hon. Dr. Justice Léonard Gacuko
Hon. Lady Justice Clotilde Mukamurera
Hon. Mr. Justice Chinembiri Bhunu

REGISTRY

Hon. Nyambura L. Mbatia -	Registrar
Hon. Asiimwe Anthony -	Assistant Registrar
Mrs Mutinta Chinganya-Mulenga -	Legal Officer

COUNSEL

Mr. Rashad Daureeawo -	For the Applicant
Mr. Yves Jean - Louis -	For Respondent and Co-Respondents No. 3 and 4
Dr. Suzgo Lungu -	For Co-Respondents No. 1 and 2

COURT REPORTERS

Mr. Mutale Mpemba
Mr. Kambole Ng'andu

JUDGMENT

A. THE PARTIES

1. The Applicant, Agiliss Limited, is a private company duly incorporated under the laws of the Republic of Mauritius. It is a legal person and resident of the Republic of Mauritius.

2. The Respondent, the Republic Mauritius (hereafter the Respondent, or Mauritius), is a member of the Common Market for Eastern and Southern Africa (COMESA) as specified under Article 1(2) of the Treaty (hereafter the Treaty) establishing COMESA.

3. Co-Respondent No. 1 is the COMESA, established under Article 1 of the Treaty.

4. Co-Respondent No. 2 is the Secretary General of COMESA and its Chief Executive Officer. In that capacity the Secretary General is the embodiment of its legal personality as provided under Article 17(2) of the Treaty.

5. Co-Respondent No. 3 is the Minister of Foreign Affairs, Regional Integration, and International Trade of The Republic of Mauritius.

6. Co-Respondent No. 4 is the Minister of Finance and Economic Development of The Republic of Mauritius.

7. Co-Respondents No. 3 and 4 are ministries of the Government of Mauritius and, unless otherwise indicated, constitute the same entity as the Respondent for the purposes of this matter.

B. INTRODUCTION

8. This is a Reference filed by the Applicant who is a resident of the Republic Mauritius within the meaning of Article 26 of the Treaty. The Applicant was represented by Counsel Mr. Rashad Daureeawo SC, who took over from Counsel Razi Daureeawo, who was on record as the Counsel for the Applicant before his unfortunate demise. The Applicant is seeking, primarily, an order prohibiting the Respondent from imposing any customs duty and other non-tariff barriers on the imports of edible oils into the Republic of Mauritius from COMESA, and other ancillary relief. The Applicant joined Co-Respondents No. 1 and 2, who were represented by Dr. Suzgo Lungu. The Respondent and Co-Respondents No. 3 and 4 were represented by Counsel Mr. Yvan

Jean-Louis SC. By their defence they opposed the Reference, and therein raised a preliminary issue challenging the Court's jurisdiction, coupled with one procedural objection. That preliminary issue and procedural objection were heard and concluded by the Appellate Division of this Court.

C. BACKGROUND

9. On 5th November 1993, Mauritius, the Respondent, signed the COMESA Treaty and ratified it on 8th December 1994. By the year 2000, all Member States of COMESA were required, under Article 46 of the Treaty, to eliminate customs duties and other charges of equivalent effect imposed on goods eligible for Common Market tariff treatment.

10. On 29th October 2000, the COMESA Council of Ministers issued a Legal Notice requiring Member States to issue legal or statutory instruments by 31st October 2000 putting into effect the elimination of customs duties and other charges as required by Article 46 of the Treaty. After the afore-stated date, no duties should have been levied by a Member State on products originating from other Member States of COMESA, unless safeguard measures under Article 61 of the Treaty were in force.

11. In this Reference the Applicant alleges that it is principally an importer and distributor of staple food in the Republic of Mauritius with the edible oil segment representing some 30% of its business. The Applicant further pleaded that since March 2012 it imported pure refined edible oil, namely pure soya bean oil under H.S. Code 1507.90.00, pure sunflower oil under H.S. Code 1512.19.00, and blended vegetable oil under H.S. Code 1517.90.10 originating from the Republic of Egypt, another COMESA Member State. This importation was covered by a valid Certificate of Origin issued in accordance with Article 48 of the Treaty and Rule 10 of the COMESA Protocol on Rules of Origin.

12. By letter dated 14 November 2018, the Respondent notified the Secretary General of COMESA, Co-Respondent No. 2, of its intention to impose a safeguard measure of

10% on imports of edible oils originating from the COMESA region, pursuant to the provisions of Article 61 of the Treaty.

13. On 28th January 2019, the Applicant initiated a meeting with the representatives of the Respondent, Co-Respondents No. 3 and 4, whereby the Applicant was given notice of the fact that:

    (a) the Respondent had taken the decision to impose customs duty subject to a quota on the import of edible oil from COMESA countries;

    (b) the Respondent had taken the decision to invoke Article 61 of the Treaty for the imposition of customs duty on the import of edible oil from COMESA; and

    (c) on or about 15th November 2018 notice had been given by the Respondent to 1st Co-Respondent and 2nd Co- Respondent under Article 61 for the imposition of customs duty on the import of edible oil from COMESA.

14. Being aggrieved by the decision of the Respondent to apply the safeguard measure, the Applicant engaged the Respondent by correspondence protesting the said decision and ultimately filed in this Court the present Reference seeking relief against the safeguard measure sought to be imposed by the Respondent.

15. The Applicant contends in the Reference that the decision by the Respondent falls short of the requirements of the COMESA law and cites provisions of the Treaty and COMESA Regulations on Trade Remedy Measures (hereafter the Regulations) which it alleges have been infringed by the decision of the Respondent.

16. The Applicant's prayers in the Reference are for:

    (a) "A declaration that (a) the decision of the Respondent to impose customs duty on the import of edible oil from COMESA into the Republic of Mauritius, (b) the decision of the Respondent to notify 1st Co-Respondent and 2nd Co-

Respondent of the imposition of customs duty on the import of edible oil from COMESA into the Republic of Mauritius as an alleged safeguard measure under Article 61 of the Treaty and (c) the act of the Respondent of notifying 1st Co-Respondent and 2nd Co-Respondent of the imposition of customs duty on the import of edible oil from COMESA into the Republic of Mauritius as an alleged safeguard measure under Article 61 of the Treaty are in breach of the Treaty and regulations made thereunder and in particular Articles 46, 48, 56, 57 and 61 of the Treaty and the COMESA Regulations on Trade Remedy;

(b) An order prohibiting the Respondent from imposing any customs duty and other non-tariff barriers on the import of edible oil into the Republic of Mauritius from the COMESA;

(c) An order awarding the Applicant costs of and incidental to this reference;

(d) Such other orders as this Honorable Court deems just, fit and proper in the circumstances."

D. APPLICANT'S PLEADINGS AND EVIDENCE

17. As stated above, the Applicant's Reference before the Court reveals that the Applicant's business is principally in the importation and distribution of staple food in the Republic of Mauritius with the edible oil component representing about 30% of its business turnover.

18. That from 2017 there had been speculation in the Mauritian market on the likelihood of the Government imposing 10% customs duty on the import of edible oil products from COMESA. That possible imposition of customs duty and non-tariff barriers was objected to by the Applicant on the ground that it would be in breach of the Treaty. That, although further objections to the imposition of the duty were made by the Applicant to the Prime Minister of the Republic of Mauritius, this proved to be in vain. In December 2018 newspapers, *Le Defi*, *L'Express* and *Le Mauricien* reported on the

impending imposition of customs duty of 10% on imported edible oil from COMESA through the application of the safeguard clause of the Treaty.

19. By letter dated 28th December 2018 addressed to Co-Respondent No.1 and the Co-Respondent No. 2, the Applicant challenged the Mauritian Government's decision to impose customs duty on edible oil products from COMESA into Mauritius, but the said representation was rejected, and the Applicant was requested to engage the Government of Mauritius on the matter.

20. At a meeting on 28th January 2019 between the Applicant, the Respondent and Co-Respondents 3 and 4 on the issue of imposition of the duty on edible oil imported from COMESA, the Applicant was informed that the Respondent had made a decision to impose customs duty on the import of edible oil from COMESA countries. Further, that the Respondent had taken the decision to inform Co-Respondents No.1 and 2; and that the Respondent had on 15th November 2018 given Notice (described by the Applicant as the act) to COMESA and Co-Respondent No. 2 of the imposition of the customs duty.

21. In that meeting the Applicant was advised by the Respondent to challenge the decisions and the act before this Court.

22. The Applicant's request to the Respondent for the letter it had written to Co-Respondent No. 2 giving notice of its intention to apply safeguard measures on imports of edible oil was rejected with a rider that such disclosure would be made when the Applicant filed legal proceedings on the matter.

23. The Applicant's first witness, Ms. Sharon Ramdenee, who is the Chief Executive Officer (CEO) and director of the Applicant company, gave evidence on behalf of the Applicant. She asserted that the Respondent's decisions and act were in breach of Articles 46, 48, 49, 56, 57, and 61 of the Treaty. That the Applicant would suffer prejudice if the customs duty and non-tariff barriers were imposed on imports of COMESA edible oil products. This is because it had invested heavily in supporting

infrastructure in its business of importation and distribution of the edible oil products, and the imposition of the customs duty would erase the profit margin on sale of the products, thereby making that segment of the Applicant's business unprofitable. Additionally, the Applicant had entered into contracts worth USD 10,403,793 with its supplier in Egypt for import of edible oil products.

24. Ms. Ramdenee stated that the Applicant company is a family business which was started by her great-grandfather and grandfather. The Applicant deals in all basic commodities amongst which are rice, pulses, edible oil and milk. The edible oil segment comprises about 30% to 35% of the overall business. The witness made reference to Article 46 of the Treaty which, amongst other things, forbade COMESA Member States from imposing new duties on imported goods from the COMESA region. The witness therefore stated that no duty ought to be levied on products originating from Egypt, a fellow COMESA Member State, unless safeguard measures as provided under Article 61 of the Treaty were applicable.

25. Further, the witness referred to the First Schedule of the Mauritius Customs Tariff Act, 1969. She stated that the said Schedule provided no customs duty would be imposed on imports of edible oil products from Member States of COMESA.

26. The witness said that, since 2012, the Applicant had been importing edible oil, namely pure soya bean oil and blended vegetable oil originating from Egypt, which importation was under a valid Certificate of Origin issued to the Applicant as provided for in Article 48 of the Treaty as read with Rule 10 of the COMESA Protocol on Rules of Origin.

27. That it was in 2017 that the Applicant became concerned of a potential imposition of 10% customs duty on edible oil from COMESA. The concern was caused by speculation of an impending imposition of customs duty on imported edible oil from COMESA. The Applicant objected to that imposition of customs duty.

28. The witness took the Court through a letter dated 10th April 2017 in which the Applicant informed the Government of Mauritius that the imposition of 10% customs duty on imported edible oil from the COMESA region would adversely affect the Applicant's

business, its employees and Mauritian consumers. The Applicant, by that letter, sought to be part of any consultation or discussions that were ongoing in the matter. That letter concluded with the following remarks:

"As such, as a key contributor in the staple foods industry and the party to be the most affected, we would be grateful for the opportunity of making all relevant representations and be part of any consultation opened and share our concerns about the impact of such levy on the consumer basket and on our livelihood."

29. The Applicant did not receive a reply to that letter and yet the speculation persisted and the probable imposition of customs duty by the Mauritian Government was still a threat. The Applicant therefore wrote another very detailed letter dated 17th August 2018 and reiterated its earlier position.

30. This subsequent letter did not receive a response from the relevant Mauritian Ministry. The Applicant wrote a follow up letter dated 28th December 2018 to Co-Respondent No. 2. By that letter the Applicant appealed for the intervention of the COMESA Council of Ministers to restrain the Respondent from applying any customs duty on imports of edible oil into Mauritius from COMESA Member States. If that appeal was not acceded to, the Applicant requested Co-Respondent No. 1 to seek an advisory opinion of the COMESA Court of Justice on "*whether there is such "serious disturbances occurring in the economy" of the Republic of Mauritius to justify the imposition of a safeguard measure under Article 61 (Safeguard Measure) of the Treaty; whether the application of a safeguard measure under Article 61 is time-barred in as much as the Republic of Mauritius has had sufficient time since the entry into force of the Treaty in 2000 to take "the necessary and reasonable steps to overcome or correct imbalances for which safeguard measures are being applied"; and whether the position of a market player with around 20% of market share is to be taken into account in the determination of the application of any safeguard measure under Article 61 (Safeguard Measure) of the Treaty.*"

31. Co-Respondent No. 2 replied to that letter asking the Applicant to consult with the Government of Mauritius on the issue of imposition of the customs duty. That letter was copied to the Ministry of Foreign Affairs and Ministry of Finance, Co-Respondents No. 3 and 4 respectively.

32. On 28th January 2019, a meeting was held between the Applicant and the representatives of Co-Respondents No. 3 and 4. Another importer of edible oil was also present. The witness stated that the meeting was at the initiative of the Applicant's former Counsel. At the meeting, the Applicant was informed that the Respondent had given notice to COMESA seeking to trigger Article 61 of the Treaty. The Applicant's request for a copy of that notice was declined and the Applicant was informed that a copy of the notice would only be provided if the Respondent was ordered to do so by the Court.

33. By letter from the Mauritius Ministry of Foreign Affairs, Regional Integration and International Trade, Co-Respondent No. 3, dated 8th February 2019, the Applicant was informed that a copy of the notice would be given in accordance with the law if the Applicant took legal action.

34. The Applicant's first witness stated that the Applicant was aggrieved by the decisions and act of the Respondent because they did not comply with the Treaty and the provisions of the Regulations. This is because there was a failure of due process since there was no public notice of the imposition of customs duty. As a consequence of that failure, the Applicant filed the present Reference before this Court.

35. The witness said that if the customs duty had been imposed it would have wiped out the profit margin of the Applicant. This is because the profit margin of the edible oil sector of the Applicant's business was very slim at 6% to 7%. With the imposition of the proposed tax, the Applicant's edible oil business would not be competitive. The witness said "*this would have killed that portion of my business. I had forward contracts to the tune of $10 million and also, I had invested heavily in infrastructure…*"

36. The witness, in giving the background to this dispute, stated that the dispute arose as a result of the Applicant's entry into the edible oil business, which entry challenged the monopoly of a Mauritian company MOROIL. She stated that MOROIL enjoyed a monopolistic position in the edible oil trade for 60 years. MOROIL had tanks at the port for imported crude oil and was not only refining and marketing that oil but was also selling some of it to other players in the sector, such as a Mauritian company known as REOP. That, therefore, MOROIL was controlling the prices of edible oil in Mauritius.

37. The Applicant entering the market in 2012 worked on building its market share incrementally. It tapped into COMESA advantages by partnering with an Egyptian supplier, Oiltec, on entering the edible oil market in Mauritius, it improved the way edible oil was being marketed by introducing packaging in bottles instead of the MOROIL packaging in sachets.

38. Furthermore, because the Applicant imported pure soya bean and sunflower oil, the Applicant's edible oil entered into the market with a better-quality product from which consumers benefited. As a result, the Applicant built a 16% market share. Applicant's entry into the Mauritian market was the first time there was another major player in the edible oil market that was not controlled by MOROIL. Hence the edible oil market shifted, and consumers appreciated the bottled oil. The witness stated that "*this is where it all started.*"

39. It was her assertion that because MOROIL's monopolistic situation was challenged after 60 years and because MOROIL did not know how to compete, it then began to lobby the Government, at first through the Mauritius Chamber of Commerce and Industry in 2016 then through the Association of Mauritius Manufacturers in 2017. The latter produced a report stating that there was a surge in import of edible oil from COMESA and recommended a 10% customs duty, through safeguard measures, on pre-packaged oil in order to give MOROIL breathing space.

40. She said that the Mauritius Government gave Notice to COMESA of its intention to apply a safeguard measure behind the Applicant's back.

41. The witness stated that, for Article 61 of the Treaty to be activated, one needs to meet the criteria of eligibility and applicability. That Mauritius was not eligible to impose a safeguard measure because it does not have a domestic production of edible oil. That it is necessary under COMESA for a Member State to have 35% value addition to a product in order to obtain certificate of origin status. That Mauritius did not qualify for such a certificate in the refining of edible oil as was determined in April 2015 report on Tripartite FTA Negotiations on Rules of Origin. In that report Mauritius unsuccessfully sought to have COMESA Rules of Origin amended to include refining of soya bean and sunflower seed oil.

42. It was the witness' testimony that all the edible oil marketers are importers of edible oil and not producers. This means that their products do not qualify under the Rules of Origin because they are not domestic producers of edible oil.

43. The witness asserted that Article 61 of the Treaty is not applicable to Mauritius because there was no surge in imports so as to cause serious disturbance in the economy, nor could injury to the economy be proved. That edible oil does not have the ability to cause disturbance in the economy. This is because the edible oil sector in Mauritius contributes to less than 1% of the GDP of the country. There was also no serious injury to the sector for Article 61 to be triggered.

44. The witness said that, at the instigation of MOROIL, the Certificate of Origin of Oiltec, its Egyptian supplier, was subjected to an on-the-spot joint investigation by the Mauritian Government and COMESA. The finding was that Oiltec fully complied with Certificate of Origin and the Rules of Origins criteria in COMESA because the company is a domestic producer in Egypt.

45. The witness said that, in making the decisions to impose the duty and taking the act of notifying COMESA of its intention to apply safeguard measures, the Mauritius Government had failed to follow due process. There was lack of consultation despite the requirement of such consultation under the Regulations before Article 61 of the Treaty is triggered. That the Applicant, even though it was the third most important

player in the Mauritian sector of edible oil, was not consulted. That the Respondent giving COMESA notice to apply Article 61 of the Treaty safeguard measures used a two-page, inaccurate report of an investigation into the market.

46. The witness stated that the Applicant requested the Competition Commission of Mauritius to prepare a report on the imposition of the customs duty but, because of interference by the Government, the Commission refused to release the report to the Applicant. The witness further said that she however sighted the report where she noted that it concluded that, since the Applicant entered the market, the Mauritian consumer and the population had saved MUR100m. She therefore concluded that the Applicant had brought competition into the edible oil market and had thereby put pressure on prices. The witness in her evidence surmised that the competition it brought to the market was the reason why there were complaints about a surge in imports of edible oil. This is because the other players were constrained to review their prices of edible oil downwards. She said the Applicant's competition brought more choices for the consumer and the monopoly of over 60 years was broken.

47. She said that what stopped the implementation of the imposition of the customs duty on edible oil imports from COMESA was the injunction filed before this Court. After that injunction was filed, the Mauritian Government, on 20th July 2019, gave the Applicant an undertaking not to impose the duty pending the hearing of the Reference. However, in 2021, '*out of the blue*' the witness heard on the radio that the Cabinet had, after all, made a decision to impose the 10% customs duty on the importation of edible oil from COMESA.

48. The witness tried to engage the Government on the issue, but she was not listened to. She summed up her case by saying that the reason the matter is before Court was because "*it's about a monopolist not accepting competition*".

49. On being cross-examined the witness confirmed that there was a Government undertaking not to impose the tax and that to date the tax had not been imposed.

50. In furtherance of its case, the Applicant sought to rely on the evidence of an expert witness, Mr. Paul Baker. He is an economist by training with a master's degree in economics. He has extensive experience in the field of international trade spanning over 30 years.

51. In his long career, he started work with the European Commission as a macroeconomist analysing international trade relationships. Thereafter, he moved on to work for various other organs of the United Nations, the World Bank, the World Trade Organisation and others. He is a specialist in the economic modelling of related trade policies. He provides advisory services to governments on how to craft trade policies. Some of the governments that have benefited from his knowledge and advice are Cambodia, Vietnam and Indonesia.

52. More importantly, the witness has carried out research and advised private organisations on trade remedies which are the subject of the contest in this case. He is a lecturer at the University of Mauritius, teaching a COMESA-funded Masters' degree programme on International Political Economy of Regional Integration. To cap it all, he is a visiting professor at the College of Europe on supply chain risk management.

53. Apart from his formal work, Mr. Paul Baker has published intellectual literature in the field of economic trade. Owing to his career, knowledge and industry, he has been named a Global Leader in Trade & Customs by Who's Who Legal.

54. The expert witness is familiar with the COMESA Treaty as he worked for the COMESA Secretariat on several occasions. In this regard, he has helped it to negotiate economic partnership agreements with the European Union. He also doubled up as a trainer of COMESA staff.

55. The witness commenced his evidence by stating that he had looked at and considered the numerous documents pertaining to this case. He enumerated the following documents as some of the critical documents he had read and considered:

(a) The letter dated 14th November 2018 from the Ministry of Foreign Affairs notifying COMESA of the Respondent's intention to apply the safeguard measure, with an annexed report of an investigation.

(b) The Association of Mauritius Manufacturers' petition to the government of Mauritius canvassing for the imposition of safeguards.

(c) International data bases to appreciate wider changes that are occurring in international trade with respect to refined oil.

(d) Correspondence between the Applicant and the COMESA Secretariat.

(e) The International Monetary Fund data prices on refined oil.

56. Using the above documents and data collected, the witness proceeded to analyse and assess the validity and legitimacy of the safeguard measure intended to be imposed by the Respondent.

Due Process

57. The expert witness zeroed in on whether the Respondent had followed due process in its endeavors to impose the safeguard measure. It was his testimony that the COMESA Treaty has Regulations on Trade Remedies. These Regulations govern and direct the procedure to be followed by Member States when imposing safeguard measures to protect their domestic industries.

58. In this regard, the Regulations provide a system of elaborate steps to be followed by Member States before imposing any safeguard measure.

Notification and Consultation

59. On notification and consultation, the expert witness referred to Regulation 8 which provides that a Member State wishing to impose a safeguard measure must give reasonable public notice to all potentially interested persons. The Member State concerned is obliged to conduct public hearings or provide importers, exporters and other interested persons the means to present evidence and to express their views on the intended safeguard measure. The notified persons are entitled to respond to the views and comments of other persons consulted.

60. A parallel process of notifications and consultations is also conducted among COMESA Member States whereby they can express their views on the proposed safeguard. They are also entitled to consider and comment on the views of other people consulted. It was the witness's testimony that Regulation 15 requires *inter alia* a Member State wishing to impose a safeguard measure to immediately notify the Committee on Trade Remedies upon initiating an investigation. The Regulation affords Members States a window of opportunity to be heard to air their views since they can retaliate by suspending some of their obligations to the Member State imposing the safeguard measure.

61. The public interest test is a common and almost universal procedure emanating from the World Trade Organisation (WTO).

62. The expert witness further clarified that whenever a safeguard measure is imposed, every Member State is affected one way or the other. It was therefore crucial that all Member States be notified and consulted to enable them to prepare for any eventuality arising from the imposition of the safeguard measure.

63. In this case, he said that Egypt would be injured by the imposition of the safeguard measure. It therefore had a right to be notified and consulted so that it could prepare and take appropriate remedial measures. There is however no evidence that it was notified or consulted about the impending safeguard measure by Mauritius.

Public interest test

64. The process of notification and consultation is intended to establish whether the proposed safeguard is in the public interest. This is important because at national level there might be a host of other downstream players, including members of the public and traders, not just manufacturers, that could be affected by a safeguard measure,

65. The expert witness explained and defined the public interest test as a much wider concept encompassing consideration of the likely effects of the proposed safeguard on the economy and society at large. To this end, the test considers the possible adverse disturbances in the economy and to members of the public.

66. Mr. Paul Baker testified that, while there was a drop in domestic sales of edible oil from 22,975 tons in 2014 to 19,748 tons in 2017, a decline of 18%, domestic consumption of oils fell by 8% over that same period, presumably due to demand-side factors, and not supply-side factors (such as imported competition). The fall in domestic production should have been contextualised against a general decline in domestic demand. A reduction in the domestic market share of 9.3% over 4 years would not in his view represent a serious injury or a serious threat of injury to the domestic industry.

67. He noted that the report from the Association of Mauritius Manufacturers showed that '*between 2014 and 2016 MOROIL actually increased its production of pre-packed oils of sunflower, from 960 tons in 2014 to 1,153 tons in 2016 (+20%), and increased production of pre-packed oils of soya bean, from 921 tons in 2014 to 1,058 tons in 2016 (+15%).*'

68. According to him, the argument that soyabean and sunflower oil needed to be protected when domestic production increased in these types of oils runs counter to a safeguard argument.

69. The expert witness was not satisfied that enough in-depth investigation had been carried out by the Respondent prior to the decision being taken to apply the safeguard

measure. He was, in consequence, not of the view that the prevailing conditions in the market and in the country required the application of the safeguard measure proposed.

E. DEFENCES

70. We have come to the end of our consideration of the Applicant's evidence. We are now proceeding to discuss the evidence in the defences of the Respondent and all Co-Respondents.

71. At the trial of this matter the Respondent and the Co-Respondents did not offer evidence in support of their defences. It therefore follows that their defences were not substantiated by evidence. Rules of evidence provide that pleadings alone are not evidence. In this regard we wish to cite an authority which supports that contention, that is the case of ***CMC AVIATION LTD VS. CRUSAIR LTD (NO.1) (1987) KLR 103*** which held as follows:

> *"The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents." (Emphasis provided)*

72. Although the defences were not substantiated with evidence at the trial, we are of the opinion that for complete consideration of this matter we should set out those defences. We shall therefore proceed to consider the same hereunder and shall also consider the submissions of the Respondent and the Co-Respondents.

F. CASE OF CO-RESPONDENT NO. 1 AND CO-RESPONDENT NO. 2

73. The defence of Co-Respondents No. 1 and 2, that is COMESA and the Secretary General of COMESA respectively, is set out in their Statement of Defence filed on 14th May 2019.

74. Co-Respondents No. 1 and 2 raised two preliminary objections grounded on the fact that COMESA has been wrongly cited as a party.

75. Additionally, in the defence, the Co-Respondents pleaded that the Applicant had not exhausted the local remedies as required by Article 26 of the COMESA Treaty. This plea was subjected to hearing and an appeal. The Appellate Division of this Court ruled that the Applicant had exhausted local remedies as required under Article 26 of the Treaty and was therefore properly before this Court.

76. To buttress their stand with regard to COMESA being joined as a party, the Co-Respondents rely on Article 17(2) of the Treaty and stated in their defence "*it is sufficient citing only the Secretary General in litigation as she exercises the legal personality of the entire Common Market.*"

77. In support, the Co-Respondents referred to the Ruling of this Court, in the case of **Malawi Mobile Limited v Common Market for Eastern and Southern Africa, Reference No. 1 of 2017** where this Court stated:

> "*We understand the arguments for the Council to have been cited as a party, although it is clear that effectively the interests of that body will be represented for all intents and purposes before the FID by the Secretary General. It may have been more appropriate, on the basis of the Articles mentioned in the previous paragraph which clothe COMESA with legal personality, for the pleadings of MML in these two matters to have cited COMESA, represented by the Secretary General, rather than to have cited one of its organs. Mindful of the fact that the outcome of this case may concern the Council, and alive to the principle of natural justice that any party having a direct or substantial interest in a matter should properly be before the Court, we are of the opinion that COMESA, and not necessarily Council, should be Respondent to the Reference and Notice of Motion. We say this because the Secretary General is cited simply as the representative of the body.*

64. We thus direct MML, in accordance with the powers vested in us by Rule 3 of the CCJ Rules of Procedure 2016 (the Court Rules), to amend its pleadings to reflect the fact that the Reference and Notice of Motion are brought against COMESA represented by the Secretary General, and not against the Council and the Secretary General." (see Pages 17 and18 of the Ruling).

78. In response to the Applicant's inquiry to the Secretary General of COMESA by letter dated 28th December 2018, the Co-Respondents denied having refused to entertain the representations made by the Applicant. The Secretary General of COMESA by letter dated 7th January 2019 discharged her responsibility by explaining the relevant Treaty provisions and indicating the procedure to be followed by the Applicant in terms of Article 61(1) of the Treaty.

79. It is the Co-Respondents' stand that COMESA discharged its mandate properly as evidenced by the correspondence exchanged with the Applicant.

80. Learned Counsel for Co-Respondents No. 1 and 2, in submissions contended that, as COMESA was cited in these proceedings without any direct or material interest in the outcome thereof, it should be exempted from incurring any liability for costs in the suit. The Co-Respondents prayed that this Court grants them costs of suit incurred in litigating the matter and any further and/or alternative relief. The Applicant's Counsel conceded that the Applicant was not seeking any relief from these Co-Respondents. In consequence Counsel for the Co-Respondents sought the dismissal of the Reference, with costs.

G. CASE OF RESPONDENT AND CO-RESPONDENTS NO. 3 AND 4

81. Replying to the Applicant's allegations, the Respondent and Co-Respondents No. 3 and 4 stated in their defence that Article 61 of the COMESA Treaty remains applicable as of date in spite of Article 46 of the Treaty.

82. The Applicant's objection to the imposition of any customs duty and non-tariff barrier by the Respondent on the import of the edible oil principally was on the ground that such a measure would be in breach of the Treaty. In their defence the Respondent and Co-Respondents No. 3 and 4 deny having imposed any customs duty and non-tariff barrier in contravention of the COMESA Treaty.

83. It is therefore the Respondent and Co-Respondents No. 3 and 4's submission that the Applicant has no cause of action in as much as the Respondent and Co-Respondents No. 3 and 4 have not taken any step to formally implement the application of any customs duty on imports of edible oil into Mauritius and have not notified importers of edible oil of any intention to impose any customs duty. In their written submissions as well as in their oral highlights, the Respondent and Co-Respondents No. 3 and 4 maintained their position.

84. At the outset, Counsel for Respondent and Co-Respondents No. 3 and 4 opposed the grant of prayers as detailed by the Applicant at paragraphs 41(a) and 41(b) of the Reference.

85. According to Counsel Yvan Jean Louis, the prayer sought in paragraph (a) is vague. Counsel argues that "*The inherent vagueness of the prayer was highlighted in that it did not identify with precision which parts of the Treaty were breached.*"

86. It is Counsel's stand that the only provision which was substantially elaborated upon by Applicant was Article 46 of the Treaty, and in his opinion, this did not find its application for two reasons. He said Article 46 of the COMESA Treaty is not applicable because, on the one hand "*a reading of paragraphs 1 and 3 of that Article indicates that the imposition of new duties or increasing existing ones was limited in time (up to the year 2000)*" and on the other hand because, "*the actual market liberalisation practice that obtained in the COMESA region did not show strict adherence to Article 46(1) of the Treaty as illustrated by the application of the Kenya Sugar Safeguard well after the year 2000*".

87. To fortify his view, Counsel referred to an article titled *Administration of the Kenya Sugar Safeguard in Focus* and invited the Court to take judicial notice of the lack of strict adherence in that Member State to the provisions of Article 46 of the Treaty.

88. As regards prayer (b) of the Reference, Counsel asserted that such relief could not be granted as there could not be a permanent injunction against the Government of the Republic of Mauritius prohibiting it in perpetuity from imposing any customs duty and other non-tariff barriers on the importation of edible oil into the Republic of Mauritius from COMESA.

89. In his opinion, it would be against the spirit of Chapter Six of the COMESA Treaty, and more specifically of Article 61, which provides for the possibility for a Member State to impose a safeguard measure when there are serious disturbances in the economy of the Member State following trade liberalisation under Chapter Six.

90. Counsel for Respondent and Co-Respondents No. 3 and 4 maintained that granting the prayer as sought in paragraph 41(b) of the Reference would be tantamount to nullifying the rights of the State of Mauritius under Article 61 to impose a safeguard.

91. Reacting to the allegation by the Applicant that due process was not followed, Learned Counsel opined that Mauritius followed due process under Article 61(1) by informing the Secretary-General of its intention to impose a safeguard measure.

92. Counsel Jean Louis submitted that the decision to impose a safeguard duty remained a mere intention and was never executed up to date, as was confirmed by Ms. Ramdenee in cross-examination.

93. Thus, Counsel for the Respondent and Co-Respondents No. 3 and 4 maintained that the Government of Mauritius cannot be said to have breached the Treaty when it merely considered imposing a safeguard measure and notified the Secretary-General accordingly, but then did not go ahead with the measure. Consequently, Counsel submitted that the prayers sought by Applicant were misconceived.

94. Elaborating on the concept of "*serious disturbances occurring in the economy of a Member State*" Counsel pointed out that this is not standard WTO language but that it was a term borrowed from the legislative instruments of the European Union.

95. Regarding the testimony offered by the Applicant, Counsel was of the view that the witnesses for the Applicant did not come up to proof.

96. Counsel stated that, by 'pitching' the issue of due process at compliance with unimplementable regulations, the witness, Mr. Paul Baker, failed to discharge his burden. Counsel maintained that Mr. Paul Baker's detailed economic analysis shows just how, in the Counsel's view, figures ought to have been handled but that they go nowhere towards showing a breach of the Treaty by the Respondent, especially in the absence of the actual application of a safeguard measure.

97. In the same breath, Counsel was of the view that Ms. Ramdenee, on the other hand, had accumulated misconception upon misconception and confusion over confusion in her testimony.

98. Mr. Jean-Louis asserted that Ms. Ramdenee 'assimilated' a without-prejudice exchange of communications between Counsel with an undertaking, and linked it with a Cabinet Decision of 5 February 2021, which he said was not pleaded in this matter.

99. Counsel added that Ms. Ramdenee confused domestic production with Rules of Origin for exports whilst referring to a totally irrelevant document on Tripartite FTA Negotiations in order to allegedly show non-compliance with Rules of Origin.

100. Finally, Counsel for the Respondent and Co-Respondents No. 3 and 4 concluded his submissions by stating that, because the Applicant had not discharged its legal burden of proving the issues raised by it on the balance of probabilities, then it was not necessary for him to call any evidence.

101. Thus, the Respondent and Co-Respondents No. 3 and 4 pray that the Reference be set aside, with costs.

H. LAW, DISCUSSION AND CONCLUSIONS

Presence of Co-Respondents No. 1 and 2

102. The first issue we have to address concerns the plea of Co-Respondents No. 1 and 2 that they should not have both been joined by the Applicant as parties.

103. In the case of **Malawi Mobile**, supra, the position was clarified. In that case, the Applicant had joined both the Secretary General of COMESA and the COMESA Council. This Court in that case held that the proper party should have been COMESA, represented by the Secretary General. The same situation applies here. COMESA, being a legal entity, is represented by the person of its Secretary General. It was not necessary, thus, for the Applicant to join both in the Reference. We therefore order that Co-Respondent No. 1 be struck out as a party and that Co-Respondent No. 1 be represented by Co-Respondent No. 2.

104. Counsel for these Co-Respondents has also criticized the Applicant for joining the Respondents as parties, given that no relief is sought against either.

105. Counsel for the Applicant has submitted that the two Respondents are necessary parties to the matter as they may be concerned by the declarations and relief sought.

106. It is not improper for nominal parties, having only a peripheral interest in a matter to be joined as parties notwithstanding that no relief is sought against them. We see the presence of Co-Respondents No. 1 and 2 in that light and rule that they are proper parties to the suit and, subject to our order above as regards Co-Respondent No. 2 representing Co-Respondent No. 1, have been properly joined.

The Reference Proper

107. As the preceding summary of the case will have revealed, this Reference goes to the very foundation of the Common Market and its purpose among Member States in progressively establishing a Customs Union, eliminating customs duties and charges of equivalent effect, removing non-tariff barriers and obstacles to trade, and

establishing and maintaining a common external tariff in respect of goods imported into Member States from external sources.

108. This Court is called upon to consider the particular facts of the dispute among the parties in light of the very *raison d'être* of the Common Market and the tension unleashed by the introduction of a liberal and open regional trade regime, between trade liberalisation, on the one hand, and, on the other hand, necessary protection measures to mitigate any domestic negative impact of free trade.

109. In deciding to impose a tariff on the importation of edible oil from COMESA, did Mauritius breach the provisions of the Treaty and Regulations made thereunder?

110. Consideration of this question requires an examination of the law and procedure which have to be followed by a Member State in taking a safeguard measure, whether Mauritius followed the law and procedure, and whether the Applicant can succeed in its prayers for a declaration and an injunction.

I. THE LAW ON SAFEGUARD MEASURES

111. Safeguard measures are a by-product of the liberalisation of trade. Opening a country's trade to imports may result in the importation of goods at a price lower than similar goods produced by the country. This can have a deleterious effect on the local production of a similar commodity and result in loss of employment and revenue, and a disruption in the economy of the country. Trade organisations have thus developed a number of measures that a state may utilise to protect its domestic industry from the effects of importation of goods duty free. These are referred to as trade remedy measures and include safeguard measures, subsidies and countervailing measures, or anti-dumping duties. In implementing these measures, states will be conscious of balancing benefits which consumers may obtain from cheaper (and in some cases better quality) imports against the stability of the internal market and the economy of the state as a whole.

112. COMESA, being a major regional economic community with the objectives and purpose set out at paragraph 107 above, has provided a whole chapter (Chapter Six) of the Treaty on the subject of trade liberalisation and its consequences. Matters provided for include:

i. The reduction and eventual elimination by Member States of all customs duties and charges of equivalent effect by the year 2000 (Article 46);

ii. The gradual establishment of a common external tariff (Article 47);

iii. The provision and amendment of Rules of Origin through a Protocol (Article 48);

iv. The protection of infant industries (Article 49);

v. Necessary restrictions on trade for security, health and similar reasons (Article 50);

vi. The restriction on dumping and the provision of anti-dumping measures (Articles 51 and 54);

vii. The restriction on the provision of subsidies and the provision of countervailing measures (Articles 52, 53 and 54);

viii. The prohibition of anti-competition measures (Article 55);

ix. The granting of Most Favoured Nation status among Member States (Article 56);

x. Anti-discrimination (Article 57);

xi. Safeguard measures (Article 61); and

xii. The promotion of trade among Member States (Article 62).

113. Insofar as Safeguard Measures are concerned, the Treaty provides as follows:

"ARTICLE 61

Safeguard Clause

1. *In the event of serious disturbances 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.*

3. *The Council shall examine the method and effect of the application of existing safeguard measures and take a decision thereon."*

114. Article 61 sub-article 1 permits a Member State to take '*necessary safeguard measures*'. The trigger for the taking of the measures is '*serious disturbances occurring in the economy*' consequent upon the application of the provisions of Chapter Six of the Treaty.

115. The procedure set by the Treaty is clear. A fair reading of Article 61 of the Treaty thus assumes that the following sequence must be followed by a Member State wishing to impose a safeguard measure.

116. First, the Member State must be in possession of information showing that its economy is suffering serious disturbances as a result of the liberalisation of trade and the removal of customs duties and charges of equivalent effect in terms of Article 46 of the Treaty. How this information is gathered will be considered later.

117. Next, the Member State must consider what the necessary safeguard measure would be in the circumstances. In terms of sub-article 2, the safeguard measure should also be non-discriminatory.

118. Once the Safeguard Measure is determined, and before it is imposed, the Member State must inform the Secretary General and the other Member States of the intended imposition of the Safeguard Measure. Only then can the measure be implemented.

119. The manner of the implementation will depend on the appropriate legal regime in the Member State.

120. The action of the Member State does not stop there. Imposition of a safeguard measure is not a permanent solution; it is a temporary measure. Although it deals with the extension of a safeguard measure beyond one year, sub-article 2 of Article 61 requires action from the Member State to take reasonable steps to overcome or correct imbalances which have led to the imposition of the Safeguard Measure in the first place. This reinforces the idea that a safeguard measure is designed to immediately address a problem while a permanent solution is found.

121. Pursuant to Article 10 of the Treaty, the COMESA Council in October 2002 made and issued the COMESA Regulations on Trade Remedy Measures, (the Regulations). In terms of Article 10(2), Regulations are binding in their entirety on Member States. Part II of the Regulations deal extensively with Safeguard Measures. These are defined:

> *"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."*

122. The Regulations provide detailed requirements and procedures for safeguard measures, as expected, but also contradict the Treaty in several respects.

123. Where Article 61 of the Treaty requires '*serious disturbances occurring in the economy*' as a trigger for the imposition of a safeguard measure, Regulation 7.1, reads:

"*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.*" (underlining supplied).

124. Where Article 61.2 provides that a safeguard measure shall not exceed one year (unless the Council approves), Regulation 12.1 sets the initial period at a maximum of four years. Where the Treaty provides that the extension of the initial period be approved by the COMESA Council, Regulation 12.2 allows extension beyond four years where the importing State and the Member State's Investigating Authority have so determined.

125. The Regulations contain a number of salient provisions. Among these are:

i. That a Member State will apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment (Regulation 10.1);

ii. That, if a quantitative restriction is used, the 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 (Regulation 10.1).

126. More importantly, the Regulations require and underline that a trade remedy measure can be applied only pursuant to investigations initiated and conducted in accordance

with the provisions of the Regulations (Regulation 6). This requirement for investigations prior to the implementation of a trade remedy measure is further emphasised in Regulation 8.1:

"*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.*"

127. In addition to the requirement for an investigation imposed by Regulation 8, Regulation 15 requires that the Member State notify the COMESA Committee on Trade Remedies:

"*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 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."

128. The intent of the Regulations is clear. No Member State should implement a safeguard measure without carrying out a full and public examination of the consequences of the measure, giving an opportunity to all parties who could be affected by the measure the opportunity of disabusing the state of the accuracy or necessity of its intended measure.

129. Investigations under the Regulations are, by virtue of Regulations 2 and 3, respectively to be '*undertaken in harmony and within the framework of WTO Safeguard Agreement*' and '*applied in conjunction with the existing national legislation for conducting trade remedy investigations and reviews in the individual COMESA Member States*'. We have not been referred to any provision which would

lead us to conclude that Mauritius had an investigation regime different from that of the Regulations. Indeed, Regulation 3.3 would preclude any such deviation. It reads:

'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'.

J. DISCUSSION

130. As the summary of the case above has revealed, the respective positions of the parties, briefly stated, are the following.

131. The Government of Mauritius, having considered the domestic edible oil market in light of the increasing market share being taken by the Applicant, and having carried out a domestic investigation, concluded that it was in the interest of the state to impose a safeguard measure. Accordingly, by letter dated 14 November 2018, Co-Respondent No. 3 wrote to Co-Respondent No. 2, the COMESA Secretary General, informing the latter that the Government of Mauritius had decided to invoke Article 61 of the Treaty and, with effect from 1 January 2019, impose a duty of 10% on imports of three types of edible oil above a quota of 3000 tonnes which could be imported from COMESA countries at zero duty.

132. The letter made a further statement and a request. The statement was to attach an investigation report on which the decision had been made. The request was that the COMESA Secretariat inform the COMESA Member States of the decision.

133. Having become aware of this impending measure, the Applicant sought further information from the Government, but despite a number of letters sent, this was not forthcoming.

134. We return now to the question set at paragraph 109 above: In deciding to impose a tariff on the importation of edible oil from COMESA, did Mauritius breach the provisions of the Treaty and Regulations?

135. A preliminary consideration in approaching this question is to reconcile Article 61 and the Regulations insofar as they differ in their respective requirements.

136. Both the Treaty and the Regulations are binding on the parties to this matter. The Appellate Division of this Court held in **Appeal No. 1 of 2022** (an appeal between the same parties against the decision of this Division that the Applicant had not exhausted domestic remedies before coming to this Court) that the Treaty was binding on Mauritius before this Court, notwithstanding that it had not been domesticated through legislation:

> '*65. Secondly, we are of the view that Polytol (CCJ) is authority for the proposition that the Treaty binds Mauritius and is enforceable before the CCJ, not the Mauritian Courts. In fact, the FID in Polytol (CCJ) declined to consider any issue relating to the failure of Mauritius to domesticate the Treaty. It held that a resident in a Member State has enforceable rights when he has been prejudiced by an act of the Council or a Member State which contravenes the Treaty, but that these rights are enforceable before the CCJ when the Treaty is not domesticated in that Member State. We, therefore, agree with the FID that Polytol (CCJ) has not overruled Polytol (Mauritius). In this respect, we may refer to the following extract from Polytol (CCJ):*
>
> *"This Court holds that residents of COMESA Member States likewise have an enforceable right before this Court whenever they establish that they have been prejudiced by an act of the Council or of a Member State that contravenes the Treaty". (our emphasis)*'"

137. Mr Jean-Louis has conceded that the Regulations are binding on Mauritius.

138. It is obvious that the framers of the Regulations – at least in respect of safeguard measures – were guided less by the words of Article 61 of the Treaty and more by other international trade instruments of like effect, in particular GATT 1994 Article XIX

Emergency Action on Imports of Particular Products and WTO Safeguard Agreement, Article 2 (Conditions) which are couched in almost identical terms as Article 61. Additionally, Mr Jean-Louis has also drawn our attention to the fact that the language is borrowed from the legislative instruments of the European Union.

139. Leaving aside the discrepancy between the Treaty and Regulations as to the duration of safeguard measures, which does not arise for consideration in this matter, the appropriate trigger for the implementation of a safeguard measure needs to be resolved. Is it, as provided in Article 61, that there must be *serious disturbances occurring in the economy* or, as provided by Regulation 7.1, that imports have occurred in *increased quantities…as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products*?

140. From legislative and interpretative standpoints, this is an unhappy situation. Mr Daureeawo accepts that the Treaty must prevail over the Regulations. In that, he is correct. Nonetheless, the Applicant's case is partly based on the lack of adherence to the Regulations, particularly as regards the need for widespread and public investigations prior to implementing a safeguard measure.

141. If this Court is to consider the Treaty provisions only, then Article 61 requires Mauritius to prove three things to support the intended safeguard measure: whether there were *serious disturbances occurring in the economy* of Mauritius, whether the measure was *necessary*, and whether the measure was applied on a non-discriminatory basis. Conversely, the Applicant would – in order to impugn the intended safeguard measure – necessarily seek to prove that one or more of these conditions was or were absent.

142. If, on the other hand, the process of applying safeguard measures is to be guided by the Regulations, then a larger number of factors will require to be considered. These are:

    i. That edible oil was being imported into Mauritius 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 producing like or directly competitive products;

ii. That the safeguard measure was designed to be only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment;

iii. That, if a quantitative restriction were used in determining an appropriate measure, the measure did not reduce the quantity of imports below the level of a recent period which were the average of imports in the last three representative years for which statistics were available, unless there was clear justification that a different level was necessary to prevent or remedy serious injury;

iv. That a widespread and public investigation had been carried out, in which the views of importers, exporters and other interested parties had been heard; and

v. That notification of the investigation had been sent to the COMESA Committee on Trade Remedies.

143. This Court is satisfied that both the Treaty and the Regulations are applicable and that the conflict between them must be resolved, in accordance with the canons of interpretation which provide that primary legislation takes priority over secondary legislation, so as to give effect to the intention of the framers of the Treaty.

144. Since the Regulations exist and are binding on the parties, they must be given effect to. They are substantially complementary to the Treaty. The sole remaining discrepancy to be resolved between these two provisions is as to the trigger for the application of a safeguard measure.

145. Is it that there must be *serious disturbances occurring in the economy* as provided by the Treaty, or a surge in imports *as to cause or threaten to cause serious injury to the domestic industry producing like or directly competitive products* as required by the Regulations?

146. In attempting to reconcile these two provisions, Mr Jean-Louis submits that:

'"serious disturbances occurring in the economy of a Member State" was a loose term that was overall less stringent than the concept of "serious injury" under the WTO Agreement and that could mean a lot of things, including serious disturbances in the operations of a player, albeit a small player, Member State.'

147. He referred the Court to a WTO study prepared by that organisation's Economic Research and Statistics Division which in fact tends to show that the term 'serious injury' is more stringent than 'serious disturbance'.

148. We do not contest this. However, the terms to be considered are not these. They are respectively '*serious disturbances occurring in the economy*' and '*serious injury to the domestic industry*'. The question for the Court remains: which of these standards did Mauritius use when considering the application of the safeguard measure?

149. Serious injury to a domestic industry is clearly less stringent than serious disturbance to the economy of a country. While serious injury to a domestic industry may lead to a serious disturbance to the economy of a country, where the sector is an important one (sugar and tourism have been advanced by the Applicant as two examples in the Mauritius context), the reverse is not necessarily true. A minor domestic industry may be seriously affected without this having any impact on the country's economy taken as a whole.

150. In view of our later findings, we draw the attention of the COMESA Council of Ministers to the conflict and call upon them to resolve it, occasion arising.

K. ANALYSIS OF EVIDENCE

151. Ms Ramdenee, the CEO of the Applicant and her expert witness, Mr Paul Baker, are at one on the alleged non-compliance by Mauritius with the Treaty and Regulations as concerns the imposition of the proposed safeguard measure. We accept their evidence as cogent, truthful and persuasive.

152. In order to determine whether or not there was a breach of the Treaty and Regulations, as alleged by the Applicant, we propose to consider the requirements of these in light of the evidence adduced through a few questions.

Was an investigation as required by the Regulations carried out by Mauritius prior to deciding to implement the Safeguard Measure?

153. The Government carried out an investigation and produced a three-page report entitled *Investigation on Imports of Oil*, which it annexed to its letter to the Secretary General informing him that it had decided to impose the safeguard measure. The letter described the investigation as a '*domestic investigation on the growing imports of oil from COMESA*'.

154. The introduction to the report grounds the investigation in Regulation 7.1 in as much as it uses the language of that Regulation, namely that the application from MOROIL and REOP for safeguard was predicated on the '*increase in imports causing serious injury to the domestic industry*', of which the two companies represented a '*major proportion of the domestic industry.*'

155. The report then analyses the domestic production and the imports, the sales and market shares of the producers and importers, the impact on the domestic industry, and concludes that the profitability of the domestic industry has been continuously decreasing, that it has incurred losses, that employment had fallen, and that production had declined. The report finds that there had been a '*sudden, sharp and unforeseen surge of imports of oil over the period 2014-2017 which has displaced the market-share of the domestic industry.*' The language of the report is the language of the Regulations.

156. The report has come under attack from the Applicant and the expert witness. The Applicant challenges the investigation on two fronts: that it was not in accordance with the requirements of the law, and that its contents were wanting.

157. Ms Ramdenee complained that, having heard that the Government proposed to apply Safeguard Measures to limit the importation of edible oil, which her company had built up over a decade and which provided a significant contribution to the Applicant's business, she made repeated attempts to find out more from the relevant ministries, that these were ignored or rebuffed, that when she finally managed to engage with the Government, she was humiliated and was denied a copy of the letter notifying COMESA of the decision of the Government to impose a tariff on the importation of edible oil. In short, as the principal importer of pre-packaged edible oil into Mauritius, and the one to be affected the most by the imposition of a tariff, she had not been consulted at all by the Government as to the likely impact of the imposition of the tariff on her company. That impact, she felt, was going to be severe in that it would not only wipe out the profit of the company in that sector, but it would mean a loss from investments made for warehousing and distributing the product and US$10 million in forward contracts already entered into with the Egyptian supplier.

158. The Applicant submitted that the Government had been unduly swayed by MOROIL and, to a lesser extent, REOP, who were solely focussed on protecting the monopoly that they had enjoyed for several decades in the sector, and that the Government was blind to the fact that the importation of edible oil by the Applicant had provided the consumer with a choice, with better packaged and healthier products at competitive prices. Ms Ramdenee decried the fact that, because there had never been a full, thorough and public investigation of the industry consequent upon the application of MOROIL and REOP for protection, she had not had an opportunity (which she categorised as a lack of due process) to put the case of the Applicant forward and thereby seek to disabuse the Government of its decision to introduce the safeguard measure.

159. In this, she is undoubtedly correct. All her endeavours to prevent the safeguard measure being implemented would have occurred in the context of an investigation, not as it actually occurred.

160. Mr Paul Baker, the Applicant's expert, concurred. He underlined the importance of consultations in the lead-up to the imposition of safeguard measures thus:

'*Consultations are essential in the investigation of safeguards. These ensure that the public interest can be evaluated in the case of the imposition of duties. This is to ensure that all angles of a safeguard is (sic) considered: consumers, producers and downstream industries. Moreover, the introduction of safeguard measures could lead to retaliatory measures under the COMESA agreement from (all) other member countries on other products exported by Mauritius to compensate for the temporary suspension of rights. This is why it is so important to consult the industry players, civil society and other industries.*'

161. Although Article 61 of the Treaty does not specifically require an investigation or prior consultations with interested parties prior to the imposition of safeguard measures, Regulation 8 does, in clear terms:

'*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*.' (underlining supplied).

162. This is an imperative. Only after an investigation by the Member State's investigation authority can a safeguard measure be applied. Additionally, the investigation must follow the procedures set out in Regulation 8. These procedures are:

'*Th(e) 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.*

163. The evidence on record, both oral and documentary, reveals that no such investigation was carried out by the Government prior to applying the safeguard measure. We are not satisfied that the investigation carried out by the Government and recorded in the report entitled *Investigation on Imports of Oil* satisfies the requirements of the Regulations.

Notwithstanding the non-compliance with the Regulations, was the investigation carried out of a quality which could justify the application of the safeguard measure?

164. The report on Investigation on Imports of Oil has come under criticism from both the Applicant and Mr Paul Baker.

165. Mr Paul Baker finds the report inaccurate and wanting in several respects. He criticises the lack of international benchmarking for the price of oil and concludes that the rates in the report are inaccurate when compared with oil prices internationally. He opines that in its calculations of the fall in domestic production, the report does not take into account all relevant factors and the drop cannot be laid at the door solely of imports of pre-packaged oils. He points to Regulation 9, which requires that "*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*". He does not find that there was a surge in imports from the figures in the report. On the other hand, he concludes that the figures reveal a linear growth over 10 years and one against which the domestic producer should have been able to adjust.

166. The Respondent did not call any evidence to rebut that of Mr Paul Baker. The expert witness was not shaken in cross-examination. In such a case, it is difficult not to accept his evidence otherwise than as fair and objective.

167. We conclude that the investigation carried out by the Respondent did not comply with the provisions of the Treaty and Regulations.

Was notification of the investigation sent to the COMESA Committee on Trade Remedies?

168. Regulation 15.1 requires a Member State to *'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.'

169. Mr Paul Baker explains in his testimony that the reason for the notification to the Committee on Trade Remedies is '*in order for other COMESA Members to prepare for the potential response they would like to make and assess how the imposition of a safeguard may affect them.*' The same can be said of the requirement for the Member States to be informed under Article 61.

170. The Government initiated an imperfect investigatory process, by accepting a finding of serious injury made in the report on Investigation on Imports of Oil, and took a decision to apply a safeguard measure. It was thus required to notify the Committee on Trade Remedies. Such notification should have included, in terms of Regulation 15.2, '*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.*'

171. The Respondent does not dispute not complying with Regulation 15. It contends that, although the Regulations provide for a Committee on Trade Remedies, one was not set up by COMESA until 2023. Mr Jean Louis requested the Court to take judicial notice of that fact and also of the fact that the Committee only had its first meeting in April 2024. Consequently, he submits, '*(a)bsent a Trade Remedies Committee, the COMESA Regulations on Trade Remedy Measures could not be operationalised and*

the issue of compliance with COMESA Regulations on Trade Remedy Measures … did not arise at the time the letter of 14 November 2018 was issued by the Government to the Secretary-General.'

172. We are of the view that Mr Jean-Louis overstates his case. While it is possible to submit that, because there was no Trade Remedies Committee in operation in 2018 and 2019, and that compliance with Regulation 15 may not have been possible, it does not follow that non-compliance with the other Regulations which did not require notification to the Trade Remedies Committee could equally be excused. In particular, we are not convinced that, simply because notification of an investigation could not be given to a non-existent Trade Remedies Committee, an investigation as required by Regulation 8 could not take place. Regulation 6 says in clear terms:

'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.' (underlining supplied).

173. While the answer to the question set out at the start of this section must be answered in the negative, and while this was not a breach of the Regulations for the reason that no Committee on Trade Remedies existed at the material time, we find that this did not prevent the Respondent from initiating a full investigation in terms of Regulation 8, and that it failed so to do.

Were the proposed safeguard measures designed to be only what was necessary and did they meet the quantitative criteria?

174. Both Article 61 of the Treaty and Regulation 10.1 limit a safeguard measure to that which is necessary in the particular circumstances. The reason for this is to prevent over-protection of the domestic industry, a safeguard measure by definition being an immediate and temporary solution to a surge in imports.

175. Calculation of what is necessary will require analysis of market conditions and circumstances prevailing therein. A thorough and widespread investigation, where all

relevant stakeholders are consulted, is not only the best way of achieving this, but is what is required in the Regulations.

176. The safeguard measure intended to be applied here was a 10% customs duty on three categories of edible oil imports from COMESA above a 3000 tonnes non-tariff annual quota, applicable from 1 January 2019.

177. There is no explanation in either the letter dated 14th November 2018 or the report as to why a quota of 3000 tonnes was decided upon and why the tariff applicable above that quota was fixed at 10%. No evidence was called by the Respondent to explain the quota and tariff rate. The Court is left only with the evidence of Mr Paul Baker that the rate of 10% '*appears to be an arbitrary value, which is not supported by any modelling work to suggest the impact that a 10% tariff could have on supplies. Indeed, 10% is the applied MFN rate of Mauritius. The Government does not appear to have followed COMESA's Trade Remedy Regulations, which suggest a basis for the rate or quantitative restrictions to be applied to the extent necessary to prevent or remedy serious injury.*'

178. Additionally, Regulation 10.1 states that *'(i)f 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*'.

179. Given that the figures of imports from COMESA provided in the report on Investigation on Imports of Oil, on which the decision of the Government was based, show imports from COMESA for the years 2015-2017 (being the three years in question) as 1,979, 4,458 and 7,069 tonnes respectively, and that the average of the imports for these three years would be 4,500 tonnes, and in the absence of any explanation for not accepting this level, it is hard to accept as other than arbitrary the quota of 3,000 tonnes exempted from duty set by the Government.

180. Faced with this paucity of evidential support for the quota and rate of duty, this Court can only fall back on the evidence of Mr Paul Baker and conclude that it is unable to accept that the safeguard measure was no more than that absolutely necessary in the circumstances.

Was the proposed safeguard measure discriminatory?

181. The proposed measure was supposed to apply to all COMESA edible oil imports. In that sense, thus, it was not discriminatory among edible oil producers in COMESA, On the other hand, since the Applicant was importing edible oil from Egypt and no evidence has been given as to whether any other countries were importing edible oil into Mauritius, it could be said that the proposed measure was discriminatory in respect of exports from Egypt.

182. In light of our substantive findings, and both because the question was not raised and because Egypt has not complained against the application of the measure, this question does not require our further attention.

Did the domestic industry require protection against the imports by the Applicant?

183. The trigger for application of a Safety Measure under Regulation 7 is that a product is being imported into a Member State '*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*." (underlining supplied).

184. Much has been made of whether or not MOROIL and REOP are domestic producers.

185. Ms Ramdenee, the Applicant's CEO, has testified that they are not. For her, both companies are no different from the Applicant. They are all importers of edible oil – Agiliss imports in pre-packaged units; MOROIL and REOP in bulk containers for

refining and packaging in Mauritius. MOROIL and REOP could not be classified as domestic producers.

186. Mr Baker concurred, stating that, while the definition of what constitutes a domestic industry is subject to quite liberal interpretation, the evidence showed '*insufficient processing at present by the Mauritian industry to qualify for the rules of origin of COMESA*'.

187. Mr Jean Louis submitted that domestic production should not be confused with Rules of Origin and that the 2015 document relied upon by the Applicant was not relevant to the matter.

188. Be that as it may. The Regulation speaks of '*domestic industry*' and not '*domestic producer*'. While there may be overlap between the two, we are prepared, for the purposes of this judgment, to consider MOROIL and REOP as domestic industries engaged in the refining, packaging and distribution of edible oil products.

189. The question that requires our response relates to whether the domestic industry required protection from the imports of pre-packaged edible oil by the Applicant.

190. The answer requires an analysis of the elements of Regulation 7, namely whether (a) there was importation of edible oil into Mauritius in increased quantities and under such conditions (otherwise known as a surge in imports) (b) as to cause or threaten to cause (c) serious injury to the domestic industry that (d) produces like or directly competitive products, the domestic industry being MOROIL and REOP.

191. Aside from the report on the Investigation on the Imports of Oil annexed to the letter of the Respondent informing Co-Respondent No. 2 of the decision to apply a safeguard measure, the Court has benefitted from only the testimony of Ms Ramdenee and Mr Baker on these factors.

192. The sum total of the evidence before the Court is this: Imports of edible oil from COMESA rose from 2,666 tonnes in 2014 to 7,069 tonnes in 2027; the sales volume of the domestic industry fell from 22,975 tonnes to 18,748 tonnes over the same

period; the market share of imported oil grew by 9.3% and the market share of the domestic industry fell by 8.3%. The domestic industry was impacted in other ways: its gross profit margin fell by 3%, its net profit margin went into negative territory, employment fell by 24 persons (from 295 to 271) and actual production by about 3,400 tonnes.

193. The Government of Mauritius clearly concluded that this situation required protection in that it resolved to apply the safeguard measure. However, the figures produced have been the subject of a different interpretation by the Applicant and Mr Paul Baker. Extrapolating figures from two documents, a report produced by the Association of Mauritius Manufacturers supporting the domestic industry and the financial statements of MOROIL for 2017 (being public documents), the situation reveals a number of flaws in the figures relied upon by the Government to arrive at the decision to apply a safeguard measure.

194. On the question of the profitability of the domestic industry consequent on the importation of edible oils by the Applicant, Ms Ramdenee, examining the financial statements of MOROIL for the year 2017, deponed that, in fact, MOROIL had shown a profit before tax of MUR32.9m for that year and had paid its directors MUR17.2m. MOROIL was a wealthy company, with a positive working capital.

195. With regard to the impact of the pre-packaged edible oil imports on the economy of Mauritius, Mr Paul Baker was of the view that the impact was insignificant: employment in the domestic sector was 0.001% of the total national workforce and the impact of the importation of oil some 0.03% of GDP.

196. The witnesses concluded that there was neither a surge in imports, nor a decline in the activity of the domestic market requiring protective measures. In the absence of evidence to counter these statements we are bound to agree with the Applicant and its expert witness. We find that the elements required to be satisfied under Regulation 7 were not present to support the safeguard measure.

197. Having concluded that there was no proven serious injury to the domestic industry engaged in the edible oil market, it follows that there could likewise be no serious disturbance occurring in the economy of Mauritius as a result of the import of edible oil by the Respondent requiring application of a safeguard measure. Consequently, neither of the two triggers for the launching of an investigation into whether or not a safeguard measure should be applied was present.

198. On the trigger to be used, we find that, in view of the primacy of the Treaty over the Regulations, the trigger of serious disturbance occurring in the economy of Mauritius, required by Article 61 for the implementation of a safeguard measure, was not proved by the Respondent and Co-Respondents No. 3 and 4.

199. There is a further instance of the non-compliance of Mauritius with Article 61 of the Treaty. The Article requires a Member State to inform '*the Secretary General and the other Member States*'. There is no record of Mauritius informing the other Member States of its decision. Instead, the letter to the Secretary General notifying him of the proposed Safeguard Measure requested the Secretariat of COMESA to do so. Although such an omission might not, of itself, have invalidated an otherwise, properly conducted process, the omission is another example of the failure of the Respondent to fully comply with the law.

200. The Court concludes that Mauritius, in deciding to apply the safeguard measure contained in its letter of 14 November 2018 addressed to the Co-Respondent No. 2, did not follow the law as contained in Article 61 and Part II of the Regulations. Consequently, the Court finds the proposed safeguard measure inoperative.

L. PRAYERS

201. The Applicant seeks four prayers from the Court:

202. The first prayer seeks a declaration of this Court that the decisions of Mauritius to impose customs duty on the importation of edible oil from COMESA into Mauritius and to notify Co-Respondents No. 1 and 2 of the imposition of the duty as an alleged

safeguard measure under Article 61 of the Treaty, and the act of so notifying the two Co-Respondents breach the Treaty, in particular Articles 46, 48, 56, 57 and 61 and the Regulations.

203. The Respondent and Co-Respondents No. 3 and 4 take issue with this prayer and submit that, since the safeguard measure was never actually applied, the declaration cannot be made. In their statement of defence, they plead that the Applicant has no cause of action inasmuch as the Respondent and Co-Respondents No. 3 and 4 had not taken any step to formally implement the imposition of any customs duty on imports of edible oil in Mauritius and had not notified importers of edible oil of any intention to impose any customs duty on those imports.

204. The Respondent and Co-Respondents No. 3 and 4 further submit that the prayer for a declaration is too vague to be satisfied, and that in any event the application of the Treaty provisions of Article 46 as regards the abolition of duties by the year 2000 have not been rigorously applied. Counsel referred us to the situation in respect of sugar safeguards applied in Kenya well beyond 2000.

205. We are not concerned with the application or non-application of the Treaty provisions in other Member States. This case must be judged on its own merits. In this respect, the wording of the first prayer of the Applicant is important. The prayer does not seek a declaration based on the application of a safeguard measure, presumably because the measure was never applied. Rather, it seeks a declaration that the taking of the decision to apply the measure and to notify the Secretary General, and the act of so notifying, breached the Treaty and Regulations.

206. The distinction is a fine one and the needle requires careful threading. It is obvious that the safeguard measure decided upon by the Respondent was never applied. As can be gleaned from the submissions of the Respondent, it is the fact of imposing a safeguard measure that is important, not the procedural steps leading to it. A safeguard measure is not a safeguard measure until it is applied. Up to the time of application, it remains a mere desire.

207. Nonetheless, we do not agree with Counsel for the Respondent and Co-Respondents No. 3 and 4 that the fact that the safeguard measure was never applied must result in the prayers being declined. The Applicant was careful not to target the safeguard measure itself, but to target the matters leading up to its implementation. It is the decision to apply a measure and the notification to COMESA that are attacked. A procedural breach can occur without the consequent substantive breach being committed. This is the thrust of the Reference and the reach of the first prayer.

208. We have found that the Respondent failed to comply with the provisions of the Treaty and Regulations in the manner in which it approached its decision to apply the safeguard measure in this matter. It is evident that the party which stood most to lose in the application of the measure was the Applicant. It is also to the Applicant's credit that it did everything it could to prevent the application of the measure. In fact, it succeeded in its endeavours. Over five years on, the status quo endures.

209. For these reasons, we are satisfied that the Applicant has proved that the decision of the Respondent to impose the safeguard measure, and its decision to notify COMESA of that fact, as well as the act of so notifying, breached the Treaty and Regulations, in particular in that:

(a) The Respondent failed to carry out an investigation in the manner required by the Regulations.

(b) As a consequence, it failed to engage with all the stakeholders and consider all factors which it should have considered in deciding to apply the safeguard measure.

(c) Its analysis of the evidence on which it relied for deciding on the safeguard measure was wanting.

(d) Having decided to apply the safeguard measure, it failed to notify Member States in breach of Article 61.

210. As mentioned above, the thrust of the Reference is not that the Respondent imposed a safeguard measure. It is that the Respondent intended and took all steps, short of actually implementing the measure, to do so.

211. Had the measure been implemented, we would have struck it down for non-compliance with the Treaty and the Regulations. It follows that the steps taken in non-compliance with the Treaty and the Regulations must likewise be struck down as a nullity. It is unimportant that the measure was never implemented. Because of the lack of compliance with the Treaty and Regulations in the process, the whole process was a nullity. The measure, drawn up but not implemented, was, in effect, deficient.

212. The steps taken to reach the point of actually applying the measure cannot be divorced from the actual application of the measure. They are all part of a process. That process, but for the intervention of the Applicant in filing this Reference, would in all likelihood have concluded with the application of the measure, of which the decision to notify the Secretary General was the last step. We agree with the Applicant, therefore, that the decisions and act complained of were in breach of the Treaty and Regulations.

213. In view of our general findings that the Regulations relating to safeguard measures were breached by the Respondent in the manner in which it carried out its investigations, and of our specific finding that Article 61 of the Treaty was breached in that the trigger for the imposition of a safeguard measure thereunder was not proven, we do not need to consider the other Treaty Articles targeted by the Applicant in its first prayer.

214. Accordingly, we **declare** that the decision of the Respondent to impose the safeguard measure contained in its letter INT/TR/34 of 14 November 2018 and all the steps consequent thereto are a nullity.

215. The second prayer seeks an order prohibiting the Respondent from imposing any customs duty and other non-tariff barriers on the import of edible oil into the Republic of Mauritius from COMESA. By this prayer the Applicant effectively seeks an

injunction restraining Mauritius from imposing safeguard measures in respect of edible oil imports into Mauritius from COMESA. The framing of the prayer seeks such an injunction in perpetuity.

216. Counsel for the Respondent and Co-Respondents No. 3 and 4 has submitted, and Counsel for the Applicant has rightfully conceded, that a permanent injunction cannot be ordered and that a Member State of COMESA has the unfettered right, occasion arising and after complying with the requirements of the law, to impose measures to protect domestic industries. To hold otherwise would be to nullify Article 61 and offend the very raison d'être of protection measures which States are able to take to counter some negative effects of trade liberalisation.

217. Counsel for the Applicant has nonetheless invited the Court to read the prayer in the context of the time and circumstances in which it was made. If this is done, it will be clear that the injunction will be seen to be targeted at the decision of Mauritius to impose the particular safeguard measure.

218. We must nonetheless read the prayer as it is and not as Counsel would have wished it to read. No application having been made for an amendment to the prayer, we are unable to accede to it as it reads as to do so would fetter the discretion of Mauritius to evermore apply safeguard measures to protect its domestic industry. We therefore decline to accede to the prayer for a prohibition order.

219. We are nonetheless particularly concerned at the action of the Cabinet in 2021, despite an undertaking by the Government not to apply the proposed safeguard measure, and in breach of that undertaking, in deciding to apply the measure anyway. We believe that the Applicant must be protected from any such further action.

220. The fourth prayer of the Applicant is for such other orders as this Honourable Court deems just, fit and proper in the circumstances. This prayer enables this Court, notwithstanding that we cannot, for the reasons given, grant the Applicant its second prayer for a prohibition order, to grant a similar order under prayer 41(d).

221. Consequently, and for the reasons given hereinabove, and for the reason of our immediately preceding declaration, we **order** the Respondent and Co-Respondents No. 3 and 4 not to apply the safeguard measure contained in Co-Respondent No. 3's letter INT/TR/34 of 14 November 2018.

M. COSTS

222. The third prayer of the Applicant is for an order awarding the Applicant costs of and incidental to this reference. Co-Respondents No. 1 and 2 seek costs incurred in litigating the matter. The Respondent and Co-Respondents No. 3 and 4 seek costs.

223. At the conclusion of the hearing, the Applicant agreed not to seek costs against the Co-Respondents No. 1 and 2.

224. In assessing its prayer for costs, we have considered that the Applicant was forced to file the Reference to obtain information about the proposed safeguard measure after the Respondent's refusal to provide this. That the undertaking of the Respondent not to apply the safeguard measure was only made after the Applicant had filed a motion seeking an injunction against the application of the measure. That the undertaking was not permanent but was limited in time until the final hearing of the Reference. That, even after the undertaking had been given, the Respondent had made a Cabinet decision which ran counter to it. That, in consequence of all these facts, the Reference had to proceed to a hearing when, at any point up to then, the Respondent could have upgraded its temporary undertaking to a permanent assurance that the measure would not be applied, but did not do so.

225. Taking the foregoing into consideration, the Court is minded to award costs of the suit to the Applicant. However, in view of the public interest in the matter we order the Respondent to pay half the costs of the Applicant.

226. With regard to Co-Respondents No. 1 and 2, we make no order as to costs.

N. FINAL ORDERS

227. In the final analysis this Court makes the following orders:

(a) The Court hereby declares that the decision of the Respondent to impose the safeguard measure contained in its letter INT/TR/34 dated 14th November 2018 and all consequential steps taken thereof are a nullity.

(b) The Respondent and Co-Respondents No. 3 and 4 are hereby restrained from applying the safeguard measures contained in the letter INT/TR/34 dated 14th November 2018.

(c) The Respondent shall pay half of the costs of this Reference to the Applicant.

(d) In respect of Co-Respondents No. 1 and 2 there shall be no order as to costs

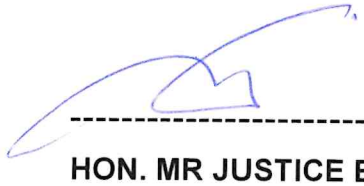
IT IS SO ORDERED.

DATED this 4th day of February 2025 at PORT LOUIS, MAURITIUS.

HON. LADY JUSTICE QINISILE MABUZA - PRESIDING JUDGE

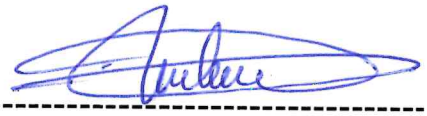
HON. MR JUSTICE ALI S. MOHAMMAD

HON. LADY JUSTICE MARY N. KASANGO

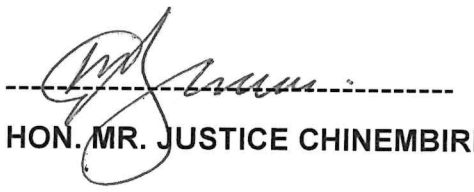


HON. MR JUSTICE BERNARD GEORGES

HON. DR. JUSTICE LÉONARD GACUKO



HON. LADY JUSTICE CLOTILDE MUKAMURERA



HON. MR. JUSTICE CHINEMBIRI BHUNU