COMMON MARKET FOR EASTERN
AND, SOUTHERN AFRICA

MARCHE COMMUN DE
L'AFRIQUE ORIENTALE ET
AUSTRALE

COUR DE JUSTICE

السوق المشتركة للشرق والجنوب
الأفريقى

محكمة العدل

COMESA

COURT OF JUSTICE

IN THE COURT OF JUSTICE OF THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA - APPELLATE DIVISION AT KHARTOUM, SUDAN (TO SIT TEMPORARILY IN LUSAKA, ZAMBIA)

APPEAL NO.1 OF 2022

Arising from REFERENCE NO.1 OF 2019

AGILISS ..... APPELLANT

VERSUS

THE REPUBLIC OF MAURITIUS ..... RESPONDENT

COMESA..... CO-RESPONDENT NO.1

SECRETARY- GENERAL OF COMESA..... CO-RESPONDENT NO.2

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

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

AND

APPEAL NO.2 OF 2022

Arising from REFERENCE No.2 of 2022

AGILISS LTD..... APPELLANT

VERSUS

THE REPUBLIC OF MAURITIUS..... RESPONDENT

MINISTER OF FINANCE, ECONOMIC PLANNING AND DEVELOPMENT OF THE REPUBLIC OF MAURITIUS.....CO-RESPONDENT NO.1

THE MINISTER OF COMMERCE AND CONSUMER PROTECTION OF THE REPUBLIC OF MAURITIUS.....CO-RESPONDENT NO.2

THE STATE TRADING CORPORATION ..... CO-RESPONDENT NO.3

CORAM:

Hon. Lady Justice Lombe Chibesakunda – Judge President

Hon. Dr. Justice Michael Mtambo

Hon. Mr. Justice David Chan Khan Cheong

Hon. Mr. Justice Wael Rady

Hon. Lady Justice Salohy Norotiana Rakatondrajery Randrianarisoa

REGISTRY

Hon. Ruboneza Philippe- Assistant Registrar

Mr Asiimwe Anthony- Clerk of Court

Mr. James Ngwira – Research Advocate

COUNSEL

Rashad Daureeawo- SC, Ms Yanilla Moonshiram and Ms Ashwina Pittea,- Appellant

Mr. Yves Jean- Louis- Respondent and Co- Respondents No. 3 & 4 in Appeal No. 1 of 2022 and for the Respondent and Co- Respondents No.1, 2 & 3 in Appeal No.2 of 2022

Dr. Suzgo Lungu - Co- Respondents No. 1 & 2 in Appeal No. 1 of 2022

COURT REPORTERS

Mr. Mutale Mpemba

Mr. Kambole Ng'andu

JUDGMENT

A. INTRODUCTION

1. The Appellant, Agiliss Ltd, is a private company duly incorporated under the laws of the Respondent and is engaged principally in the business of import and distribution of staple food. It has lodged two References, namely Reference No.1 of 2019 and Reference No.2 of 2022, before the COMESA Court of Justice ("the CCJ").

2. These are two appeals against the decision of the First Instance Division ("the FID") of the CCJ to uphold a preliminary objection of the Respondent and Co-Respondents and to accordingly decline jurisdiction in (i) Reference No.1 of 2019 in a judgment dated 31 August 2022 and (ii) a motion dated 29 August 2022 in a ruling dated 21 October 2022.

3. The two appeals have been consolidated as they both turn on the following issue: did the FID err in law in upholding the preliminary objection of the Respondent and Co-Respondents, which was to the effect that the Appellant had failed to first exhaust local remedies in the national Courts or Tribunals of Mauritius (the Respondent) as required under Article 26 of the COMESA Treaty ("the Treaty") prior to lodging its References before the CCJ?

4. Appeal No.1 of 2022 emanates from Reference No.1 of 2019, where the Appellant sought various reliefs against a proposal of the Respondent and Co-Respondent No. 3 to invoke Article 61 of the Treaty in order to introduce a Safeguard Measure in the form of the imposition of customs duty on the importation into Mauritius of edible oil from COMESA countries.

5. Appeal No.2 of 2022 is against the ruling of the FID dated 21 October 2022 setting aside the appellant's motion for interlocutory relief (Interim Application No.1 of 2022), which arose out of the main motion (Reference No.2 of 2022). The Appellant invoked various Articles of the Treaty to challenge the grant of a subsidy on edible oil by the Respondent to the State Trading Corporation (Co-Respondent No.3).

B. ISSUES TO BE DETERMINED IN BOTH APPEALS

6. As per the grounds of appeal and the submissions of all learned Counsel, the common issues to be determined in both appeals are as follows:

a) whether there were local remedies available to the Appellant in the Republic of Mauritius capable of addressing its grievances;

b) whether the available local remedies, if any, were effective and sufficient to address the Appellant's grievances;

c) who between the Appellant or the Respondent bore the burden of proof with respect to the question whether local remedies were exhausted by the Appellant or not.

C. APPLICABLE LAW AND PRINCIPLES IN BOTH APPEALS

7. The Appellant (then Applicant) lodged the two References under Article 26 of the Treaty which provides as follows:

> **Article 26**
>
> **Reference by Legal and Natural Persons**
>
> *Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty.*
>
> ***Provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts or tribunals of the Member State.*** (emphasis added)

8. For the purposes of both appeals, we are concerned with the above highlighted proviso to Article 26. Having regard to the issues to be determined, as set out above, this entails considering (a) the meaning and scope of the rule on the exhaustion of local remedies; (b) the burden of proof; and (c) whether Mauritius follows a dualist system.

(a) Rule on Exhaustion of Local Remedies

9. The rule on exhaustion of local remedies and its exceptions is based on customary international law. The parties referred us to the cases of the CCJ in **Intelsolmac v Rwanda Civil Aviation Authority (Reference No. 1 of 2009)**, and **Government of the Republic of Malawi v Malawi Mobile Limited (Appeal No. 1 of 2016)**, which held that the rule of exhaustion of local remedies contained in Article 26 of the Treaty is well-recognized in international law as a rule of customary international law. Similarly, in **Interhandel (Switzerland v. United States of America) Preliminary Objections**, **1959 I.CI 6, 27 (Mar. 21)**, the International Court of Justice (ICJ) held that *'[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law.'* In addition, the ICJ Chamber in **The ELSI case (Elettronica Sicula S.P.A. (ELSI) (Italy v. U.S.), Judgment, 1989 I.C.J. Rep. 15, 28 I.L.M. 1109 (July 20)** referred to it as "*an important principle of customary international law*".

10. In **Interhandel** (supra), the ICJ held that the rationale of the rule on exhaustion of local remedies is that:

> *"the State where the violation occurred should have an* opportunity *to redress it by its own means, within the framework of its own domestic system*".

11. The customary international rule on exhaustion of local remedies is reflected in Draft Articles 14 and 15 of the **Draft Articles on Diplomatic Protection** published in 2006 by the International Law Commission (ILC) of the United Nations. Article 14 lays down the rule while Article 15 stipulates exceptions to the rule in the following terms:

Article 14 Exhaustion of local remedies

1. *A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has,* ***subject to draft article 15, exhausted all local remedies****. (Emphasis added.)*

2. *"Local remedies" means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.*

3. *Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.*

Article 15 Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) *there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;*

(b) *there is undue delay in the remedial process which is attributable to the State alleged to be responsible;*

(c) *there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;*

(d) *the injured person is manifestly precluded from pursuing local remedies; or*

(e) *the State alleged to be responsible has waived the requirement that local remedies be exhausted.*

12. According to the ILC, in its official commentary on the Draft Articles, the remedies available to an alien that must be exhausted before diplomatic protection can be exercised will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. According to the ILC, paragraph 2 of Article 14 seeks to describe, in broad terms, the main kind of local remedies that must be exhausted. In the first instance, it is clear that the foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter.

13. Further, in the **ELSI** case (supra), the ILC has observed that "*although Draft Article 14 requires that the injured person must himself have exhausted all local remedies, this* does *not preclude the possibility that the exhaustion of local remedies may result from the fact that another person has submitted the substance of the same claim before a court of the respondent State*".

14. For our purposes, we are concerned with the exception contained in paragraph (a) of Article 15, set out above. Regarding that paragraph (a), the ILC has observed that it deals with the exception to the exhaustion of local remedies rule sometimes described, in broad terms, as the "*futility*" or "*ineffectiveness*" exception, whose test requires **that there are no reasonably available local remedies to provide effective redress or that the local remedies provide no reasonable possibility of such redress**. According to the ILC, in this form, the test is supported by judicial decisions which have held that local remedies need not be exhausted where: *the local court has no jurisdiction over the dispute in question* **[The Finnish Ships Arbitration, Award of 9 May 1934, UNRIAA, Vol.III (Sales No.1949. V2) p. 1479]**; *the national legislation justifying the acts of which the alien complains will not be reviewed by local courts* [**Ambatielos Claim page 119**]; *the local courts are notoriously lacking in independence*; *there is a consistent and well-established line of precedents adverse to the alien* [**The Finnish Ships Arbitration, page 1495**]; *the local courts do not have the competence to grant an appropriate and adequate remedy to the alien* [**Hornsby v Greece, European Court of Human Rights, Judgment of 19 March 1997, paragraph 37**]; or *the respondent State does not have an adequate system of judicial*

protection [**Mushikiwabo and Others v Barayagwiza, Decision of 9 April, ILR, vol. 107 (1997), pp. 457 at 460**].

15. In our view, the following principles laid down by this Court in **Republic of Malawi v Malawi Mobile Limited Appeal No. 1 of 2016**, whilst dealing with the question of exhaustion of local remedies under Article 26 of the Treaty, are in line with the above principles and authorities:

(i) *the national courts or tribunals should initially be afforded the opportunity to prevent or put right any alleged violation of the Treaty or to determine any Treaty related issue;*

(ii) *a remedy existing at national level, which enables the national courts to address, at least in substance, the alleged violation of the Treaty or Treaty related issue, should first be exhausted;*

(iii) *it is not necessary for the alleged Treaty related issue to be expressly raised in domestic proceedings before national courts provided that the complaint or issue was raised at least in substance, that is, if an applicant has not relied on the Treaty, he must have raised arguments to the same or like effect on the basis of domestic law, in order to have given the national courts the opportunity to redress the alleged violation or determine the issue in the first place;*

(iv) *it is not sufficient that an Applicant may have unsuccessfully exercised another remedy on other grounds not connected with the alleged Treaty violation or Treaty related issue; it is the Treaty complaint which must have been aired at national level for there to have been exhaustion of the remedy before national courts;*

(v) *the applicant is only obliged to exhaust before the national courts remedies which are available and effective; and*

WR

LPC MM

(vi) where the government claims non-exhaustion of domestic remedies, it bears the burden of proof that the applicant has not used a remedy that was both effective and available.

16. A local remedy, to be exhausted, should not only be available but must also be effective. In **Article 19 v. The State of Eritrea [Communication No. 2751 2003]** and **Anuak Justice Council v. Ethiopia [African Communication No.299/05] (2006)**, what is meant by an "*effective remedy*" was considered.

17. In **The State of Eritrea** (supra), the African Commission held at paragraphs 46 and 47 as follows:

> *"The African Commission has held in previous communications that for local remedies to be exhausted,* ***they must be available, effective and sufficient.*** *In communication Nos. 147/95 and 149/96, the African Commission held that a remedy is considered available if the Complainant can pursue it without impediment,* ***it is deemed effective if it offers a prospect of success****, and it is found sufficient if it is capable of redressing the complaint.* [Emphasis added]"

18. Further in **Anuak Justice Council** (supra), the African Commission held as follows:

> *"In the jurisprudence of this Commission, three major criteria could be deduced in determining the rule on the exhaustion of local remedies, namely: that the remedy must be available, effective and sufficient. The word 'available' means 'readily obtainable; accessible'; or 'attainable, reachable; on call, on hand, ready, present; . . . convenient, at one's service, at one's command, at one's disposal, at one's beck and call. 'In other words, "remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the Complainant.' A remedy will be deemed to be effective if it offers a prospect of success. If its success is not sufficiently certain, it will not meet the requirements of availability and effectiveness. The word "effective" has been defined to mean 'adequate to accomplish a*

purpose; producing the intended or expected result," or "functioning, useful, serviceable, operative, in order; practical, current, actual, real, valid."

19. In determining the two appeals, we therefore need not only to consider whether there were local remedies available to the Appellant but also whether the remedies in question, if any, were effective and sufficient.

(b) Burden of Proof

20. As already stated above, for the purposes of determining the present appeals, we also need to consider who bears the burden of proof when there is an issue as to whether local remedies have been exhausted as required under Article 26 of the Treaty.

21. In **Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), I.C.J. Reports 2007**, Mr Diallo, a businessman of Guinean nationality, was expelled after being despoiled of his businesses, properties and bank accounts by the authorities of the Democratic Republic of the Congo (DRC). Guinea lodged an application against the DRC before the International Court of Justice (ICJ). The DRC raised a preliminary objection to the effect that the application was not admissible as the applicant had not exhausted local remedies. In the course of its judgment, the ICJ made the following pertinent observations:

> "*It is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies. It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted.*"

The ICJ then observed that Guinea (the applicant) must establish that Mr. Diallo exhausted any available local remedies or, if not, must show that exceptional circumstances justified the fact that he did not do so. The ICJ further observed that it was, on the other hand, for the DRC (the respondent) to prove that there were

available and effective remedies in its domestic legal system against the decision to remove Mr. Diallo from the territory and that he did not exhaust them.

22. In **The State of Eritrea** (supra), the State of Eritrea raised a preliminary objection that the case could not proceed as the applicant had not exhausted local remedies as required by Article 56 of the Charter. In its ruling, the African Commission stated as follows at paragraph 51:

> "*Whenever a State alleges the failure by the Complainant to exhaust domestic remedies, it has the burden of showing that the remedies that have not been exhausted are available, effective and sufficient to cure the violation alleged, i.e. that the function of those remedies within the domestic legal system is suitable to address an infringement of a legal right and are effective. When a State does this, the burden of responsibility then shifts to the Complainant who must demonstrate that the remedies in question were exhausted or that the exception provided for in Article 56(5) of the African Charter is applicable.*"

23. In **Akdivar and Others v. Turkey, 16 September 1996, No. 21893/93**, the Government raised a preliminary objection that the application should be rejected for failure to exhaust domestic remedies as required by Article 26 of the Convention for the Protection of Human Rights and Fundamental Freedoms according to the generally recognised rules of international law and within a period of six months from the date on which the final decision was taken. In its judgement, the European Court of Human Rights held as follows:

> "*The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 26 of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption, reflected in Article 13 of the Convention - with which it has*

close affinity, that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law."

24. The Court went on to state that

"*in the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement.*"

25. On this issue of burden of proof, we find it of interest to quote the following extract from a publication titled **Local remedies in international law New York: Cambridge University Press (2004)** by Prof C.F Amerasinghe:

"*In relation to the exhaustion of local remedies, the application of the principle onus probandi actori incumbit has resulted in the division of the burden of proof. The difficulty is to establish exactly how the burden of proof is divided and consequently which party is to be regarded as the actor in respect of the claims made, which involves deciding what claims are being made by each party.*

It is not difficult to appreciate that, according to the basic principle, the burden of proof will be assumed by the respective parties depending on how their respective claims in regard to the exhaustion of local remedies are interpreted. Thus, for example, if the claim made by the respondent is regarded as being that effective local remedies had not been exhausted,

when there was no direct injury and there was a jurisdictional connection, it will be for the respondent to prove not only that some local remedies existed but also that they were effective, and had not been exhausted in circumstances in which there was no direct injury and there was the appropriate jurisdictional connection. If, on the other hand, the claim of the respondent is regarded as being that there were some remedies which had not been exhausted, while the plaintiff counterclaims that such remedies were not effective, or that the circumstances revealed a direct injury or the absence of a jurisdictional connection, the burden of proof will clearly be divided. The plaintiff would have to prove to the satisfaction of the court or tribunal that remedies existed which had not been fully exhausted, while the respondent would bear the burden of proving that these remedies were not effective, or that there was a direct injury, or that there was no jurisdictional connection.

What is important at this point, moreover, is to recognize also that it is not necessarily the party or parties that determine what the claims are by the manner in which the claims may be formulated. Rather, it is the law that attributes the particular claims made to the parties, so that the burden of proof laid upon each one will be identified accordingly. While ***there are not many decided cases which have faced the specific problems encountered in regard to the burden of proof*** *in the application of the rule of local remedies, some do exist in which the problems have been at least adverted to, so that it is possible to discuss the trends which have been followed in respect of the burden of proof."*

26. As can be seen from the above, the question as to which party should bear the burden of proof where there is a claim of non-exhaustion of local remedies is not free from difficulty. As pointed out by the ILC, in its official commentary on the **Draft Articles on Diplomatic Protection**, the local remedies will, inevitably, vary from State to State and no codification can therefore succeed in providing an absolute rule governing all situations. We bear in mind that while the CCJ deals with trade matters, most of the decisions referred to above, apart from **Diallo** (supra), deal with human rights matters but they are nevertheless helpful in determining the present issue. We

also bear in mind the principle "*He who alleges must prove*". This has resulted in a division of the burden of proof in relation to the exhaustion of local remedies. It is clear that the rule places obligations on both an applicant and a Respondent State.

27. In the present cases, the Appellant lodged both References under Article 26 of the Treaty. The rule on exhaustion of local remedies is contained in the proviso to Article 26 which stipulates that "*provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State,* ***such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts or tribunals of the Member State***". [our emphasis]

28. Having regard to the wording and language of the proviso to Article 26 of the Treaty and the above authorities and principles, we are of the view that an applicant, who wishes to lodge a Reference before the CCJ, has a duty to first exhaust local remedies. We therefore find that, flowing from that duty, the burden is primarily on an applicant who lodges a reference before the CCJ to prove exhaustion of local remedies. We, however, also find that where the respondent State raises a preliminary objection claiming non-exhaustion of local remedies, the burden shifts to the respondent State to prove that there were available and effective remedies in its domestic legal system which were not exhausted by the applicant.

(c) Does Mauritius follow a Dualist System?

29. An additional issue in law which arises in these appeals is whether Mauritius follows a dualist system.

30. True it is that, as submitted by learned Counsel for the Respondent, unlike some other jurisdictions, there is nothing in the Constitution or any other law of Mauritius which indicates that Mauritius is a dualist country.

31. However, as rightly pointed out by learned Counsel for the Appellant, there is abundant case law which supports the proposition that Mauritius follows a dualist

system of law. In this respect, we shall refer below to a few decisions of the Supreme Court of Mauritius quoted by learned Counsel.

32. In **Pierce v Pierce [1998 SCJ 397]**, it was held as follows:

> *"Though Mauritius has acceded to that Convention [Convention on the Civil Aspects of International Child Abduction], the provisions of the whole or part of that Convention have not been implemented in our national laws, unlike, for example, the Convention Abolishing the Requirements of Legalisation for Foreign Public Documents Act which gave the force of law in Mauritius to the Convention on that matter signed at the Hague on 5 October 1961 and published in [GN No. 14 of 1966]. Consequently, [.] suffice it to say that that the Convention is not part of our law and that this Court is not bound to give effect to its provisions."*

33. In **Jordan v Jordan [2000 SCJ 57]**, it was held as follows:

> *"Whilst the Constitution proclaims that Mauritius shall be a sovereign democratic State, it also establishes the principle of separation of powers. Each of the three arms of Government has a distinct and different role to play and each should confine itself to its specific domain. If our domestic legislation has not been brought into line with the Hague Convention for Mauritius to comply with its international obligations, the Judiciary can only make the relevant observations."*

34. Finally, in **Federation Mauricienne de Triathlon v. Hao Thyn Voon [2013 SCJ 158]**, it was held as follows:

> "*Any international body does not begin regulating our activities under our concept of the nation state without its diktat having been incorporated upfront in our legislation.*"

WR

LPC

35. In light of the above, we agree with learned Counsel for the Appellant that Mauritius follows, at least in practice, a dualist system of law.

36. Having set out the law and principles applicable in both appeals, we shall now proceed to consider each appeal on its own facts and circumstances and in light of its own specific applicable legislation.

D. APPEAL NO.1 OF 2022

Background

37. As already stated above, Appeal No.1 of 2022 emanates from Reference No.1 of 2019, where the Appellant sought various reliefs against a proposal of the Respondent and Co-Respondent No. 3 to invoke Article 61 of the Treaty in order to introduce a Safeguard Measure in the form of the imposition of customs duty on the importation into Mauritius of edible oil from COMESA countries.

38. Agiliss Ltd (the Appellant) is a Mauritian company engaged principally in the business of import and distribution of staple food. As part of its activities, the Appellant has been importing edible oil from Egypt since March 2012 and selling it after processing on the Mauritian market. In 2017, the Mauritian Government (the Respondent) expressed an intention to apply a safeguard measure by introducing the collection of extra customs duties on imported edible oil from COMESA countries. In November 2018, the Ministry of Foreign Affairs, Regional Integration and International Trade of the Republic of Mauritius (Co-Respondent no.3), as required by the Treaty, sent a letter to the COMESA Secretary General informing him of the Respondent's intention to apply the safeguard measure under Article 61.

39. Having failed to obtain a copy of the said letter from the Respondent, despite its request, the Appellant lodged Reference No.1 of 2019 before the CCJ on 22 February 2019 to challenge the proposed safeguard measure and asked the Court to declare that the measures taken by the Respondent contravened the provisions of Article 61 of the Treaty and also Articles 46, 48, 56 and 57, and the COMESA regulations on trade remedies.

40. Before the FID, the Respondent and Co-Respondents raised a preliminary objection that the Appellant had failed to exhaust local remedies before the domestic Courts prior to seizing the CCJ. After hearing the parties on the preliminary objection, in a judgment dated 31 August 2022, the FID concluded that (a) the exhaustion of local remedies is a prerequisite for a natural or legal person to invoke the jurisdiction of the CCJ under Article 26 of the Treaty; and (b) the remedies of judicial review and injunction were available and effective to the Appellant before the Mauritian courts but they were not invoked. The FID accordingly upheld the preliminary objection and declined jurisdiction over Reference No.1 of 2019.

41. Not satisfied with the judgment of the FID, the Appellant has appealed to the Appellate Division of the CCJ on the ground that the FID has erred in law.

Submissions of the Parties

(a) Submissions of the Appellant

42. The Appellant contended that although the principles governing the rule on exhaustion of local remedies are well ingrained in international law, one ought not to lose sight of the fact that this rule is not absolute. There is a string of cases which shows that the rule on exhaustion of local remedies is subject to exceptions such that an applicant may be dispensed from the need to exhaust local remedies if they are not available and effective, exist only in theory, offer no reasonable likelihood of success or would have failed outright in light of the doctrine of precedent.

43. In particular, the Appellant submitted that there is no law in Mauritius under which the Appellant could have ventilated treaty violations or treaty related issues before the Courts or Tribunals of Mauritius. The Appellant relied on the decision of the Supreme Court of Mauritius in **Polytol Paints & Adhesive Manufacturers Co Ltd v The Minister of Finance [2009 SCJ 106]** ("**Polytol (Mauritius)**") to submit that the Mauritian Courts cannot entertain applications for any violation of the Treaty since it has not yet been domesticated locally. According to the Appellant, this is due to the

fact that Mauritius follows a dualist system such that treaties can only become part of Mauritian law if they have been domesticated through an enabling legislation.

44. It was further submitted by the Appellant that throughout the proceedings, their stand was that breaches of the Treaty are not enforceable in the Courts of Mauritius and there was no local legislation of the same or similar effect as the Treaty on which the Appellant could ground its case. The question of ventilating the COMESA Treaty issue was non-existent before the Mauritian Courts and as such could not have been resorted to by the Appellant.

45. The Appellant further indicated that the remedy for injunction was not available due to the fact that, other than a press release, there was no official communication from the Government of Mauritius that the Appellant could base on to apply for an injunction.

46. On the issue of burden of proof, the Appellant submitted that the FID erred in holding that the burden of proof had been discharged by the Respondent and Co-Respondents Nos. 3 and 4 in that they merely made bald and unsubstantiated averments to the effect that judicial review and injunction were available. The Respondent and Co-Respondents Nos. 3 and 4 failed to show in what manner these alleged remedies were effective, adequate and whether the local Courts could have given relief to the Appellant. To buttress their submission, the Appellant relied on Paragraph 84 of the judgment of **Mbiankeu v. Cameroon, Decision, Comm. 389/10 (ACHPR, May. 07, 2015)** and **Sankara v. Burkina Faso Communication 1159/2003 (2006) AHRLR 23 (HRC 2006)**, where it was held as follows:

> *"84. The Commission recalls the jurisprudence of the UN Human Rights Committee in the Sankara case to note that* ***the burden of proof does not mean that the Respondent State should confine itself to a mere recital of remedies available under its law but should rather demonstrate that they would have constituted effective remedies for the applicant****.*

85. The Commission notes that ***the Respondent State merely recited remedies****, in particular* ***judicial remedies, without necessarily demonstrating their effectiveness in the case of the Complainant****."*

47. According to the Appellant, it was incumbent on the Respondent and the Co-Respondents in raising the preliminary objection to show that there were available remedies in Mauritius. The Respondent and the Co-Respondents could only have discharged this burden of proof by putting in cogent evidence before the FID but this was not done.

(b) Submissions of Respondent and Co-Respondents Nos. 3 and 4

48. The Respondent submitted that the purported justification of the Appellant for escaping the application of the proviso to Article 26 of the Treaty which was founded on the case of **Polytol (Mauritius)**, on the basis that the Supreme Court of Mauritius held that the Treaty, to the extent that it had not been domesticated in the laws of Mauritius, was not enforceable in the domestic Courts, ignored the basic principle that the case of **Polytol (Mauritius)** was only res judicata between the parties in that instant case. According to the Respondent, the determination of rights as between the parties in that case could not be imported into the present References as Mauritius does not follow a dualist system of law as alleged by the Appellant. To buttress its point, the Respondent cited a number of authorities and did a comparative analysis of Constitutions of other African States.

49. On the issue of burden of proof, the Respondent submitted that the onus was on the Appellant to show, by concrete evidence, the steps it took in the pursuit of local remedies, and in that, the Appellant failed by making mere reference to **Polytol (Mauritius)** without even attempting to vindicate a right, let alone a Treaty right, before the domestic courts.

(c) Submissions of Co-Respondents Nos. 1 and 2

50. According to Co-Respondents Nos. 1 and 2, the Appellant having referred the matter to the CCJ, pursuant to the provisions of Article 26 of the Treaty, had an

obligation to first exhaust local remedies in the national courts or tribunals before coming to the CCJ. It is not disputed that the principle of exhaustion of local remedies has exceptions. However, a person must still demonstrate that he or she exhausted local remedies or at least attempted to do so before petitioning an international tribunal.

51. It was further submitted that to assess whether local remedies have been exhausted, numerous international tribunals have pronounced that the said remedies must relate to ordinary judicial remedies. In line with this, local remedies were available before the Courts of Mauritius, which the Appellant failed to exhaust. The Appellant neither disputed nor challenged the Court's conclusion that, other than treaty remedies, there were other judicial remedies which were open to them, including judicial review and injunctive relief. The FID correctly held that the remedies of judicial review and injunction were available to the Appellants but were not exhausted.

52. On the issue of burden of proof, Co-Respondents Nos. 1 and 2 submitted that Article 26 of the Treaty imposes an obligation on the person who refers a case for the determination of the CCJ to first exhaust local remedies in the national Courts or Tribunals. It is therefore, common cause that an Applicant should not wait for an objection by a responding party to satisfy this requirement and that the CCJ cannot proceed to hear a matter without satisfying itself that the above requirement has been met. It would be contrary to both Article 26 of the Treaty and established principles on burden of proof if the CCJ were to accept the Appellant's contention that the burden to prove whether local remedies were exhausted was on the Respondent, as both impose an obligation on the Appellant to demonstrate on a balance of probabilities that it has exhausted local or domestic remedies before petitioning the CCJ. The Appellant's obligation in this matter never shifted and remained the same throughout regardless of the fact that the Respondent raised a preliminary objection.

Analysis and Conclusions

53. The FID upheld the preliminary objection raised by the Respondent and Co-Respondents and declined jurisdiction over Reference No.1 of 2019 on the ground that the Appellant had failed to exhaust available and effective local remedies before

the Mauritian Courts, namely judicial review and injunctive relief. Whether the FID reached the right decision must be determined by this Court in the context of the local laws of Mauritius and the prevailing circumstances.

54. It is not disputed that the Appellant lodged Reference No.1 of 2019 under Article 26 of the Treaty directly before the CCJ without first seeking local remedies before the domestic Courts of Mauritius. On the face of it, the Appellant has therefore not complied with the rule on the exhaustion of local remedies contained in the proviso to Article 26.

55. It is, however, the Appellant's contention that there were exceptional circumstances in Mauritius which excused it from exhausting local remedies and that there are no available and effective remedies in Mauritius since the Supreme Court of Mauritius had determined in **Polytol (Mauritius)** that the courts of the Republic of Mauritius do not have jurisdiction to adjudicate on breaches of the Treaty.

56. In **Polytol (Mauritius)**, the Mauritian Government, pursuant to Article 46 of the Treaty, passed regulations in 2000 to eliminate customs duties on products originating from COMESA Member States. In 2001, the Mauritian Government amended the regulations to introduce a 40% customs duty on specific products imported from Egypt. In 2006, the regulations were again amended to reduce that rate of duty from 40% to 30%. Polytol applied for leave to apply for a judicial review of the decision to impose the 40% customs duty.

57. The Supreme Court of Mauritius refused leave on the grounds that the application was outside delay and the impugned regulations had already been repealed. It also held as follows:

> "*Secondly, we can only take cognizance of the provisions of the COMESA Treaty to the extent that they have been incorporated in our municipal law which for the time being is the First Schedule to the Customs Tariff Act…In the absence of any specific legislation to that effect, non-fulfilment by Mauritius as a Member State of its obligations, if any, under the COMESA Treaty is not enforceable by the national courts.*"

58. Polytol then lodged a Reference before the FID which held that Mauritius was bound by the Treaty which it had signed and ratified ("**Polytol (CCJ)**).

59. It is the Appellant's case that the proposal of the Respondent and Co-Respondent No. 3 to introduce a Safeguard Measure is in breach of Article 61 of the Treaty and of COMESA Regulations on Trade Remedy Measures.

60. The relevant provisions of the law read 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.*
>
> ***Regulation 7: Conditions***
>
> 1. *A Member may apply a safeguard Measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities*, absolute or *relative to domestic production*, and under such *conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.*

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

Regulation 8: Investigation

1. *A Member may apply a safeguard measure only following an Investigation by the Investigating Authority…*

61. It is not contested that, at the time Reference No.1 of 2019 was lodged, the domestic law of Mauritius did not contain provisions of the same or similar effect as the above COMESA provisions. (The situation is different now with the recent enactment of the **Trade (Anti-Dumping, Countervailing and Safeguard Measures) Act 2022** which provides, inter alia, for safeguard investigations and safeguard measures).

62. Be that as it may, the Appellant relied on the decision of **Polytol (Mauritius)** (supra) to submit that the non-domestication of Article 61 of the Treaty and COMESA regulations at the material time by Mauritius constitutes exceptional circumstances absolving it from the need to comply with the rule on exhaustion of local remedies.

63. In reply, the Respondent submitted that Mauritius did not follow a dualist system and that, in any case, **Polytol (CCJ)** had overruled **Polytol (Mauritius)** so that the Treaty was directly applicable in Mauritius and the Appellant should therefore have first sought relief before the Mauritian Courts.

64. We do not agree with the Respondent. As already stated earlier, we accept that Mauritius follows, at least in practice, a dualist system so that any foreign instrument has to be domesticated in the laws of Mauritius for it to be enforceable before the Courts of Mauritius.

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)

66. In these circumstances, in light of the above applicable principles, we find that in view of the non-domestication by Mauritius, at the material time, of the relevant provisions of the Treaty and of COMESA regulations, it was not open to the Appellant to ventilate the alleged Treaty breach, even in substance on the basis of domestic law, let alone expressly, before the Mauritian Courts. We, therefore, find that the Appellant has discharged the primary burden of proving that it has complied with the rule on the exhaustion of local remedies pursuant to Article 26 of the Treaty, or rather that there were exceptional circumstances absolving it from such compliance.

67. Moreover, we have earlier held that where the respondent State raises a preliminary objection claiming non-exhaustion of local remedies, the burden shifts to the respondent State to prove that there were available and effective remedies in its domestic legal system which were not exhausted by the applicant.

68. In this respect, we find that the Respondent failed to discharge the burden which had shifted to it inasmuch as it did not give any concrete example of any available and effective remedy existing at the time in its domestic legal system.

69. Nevertheless, the FID found that the Appellant had indeed failed to exhaust, before the Mauritian Courts, local remedies which were available and effective, namely judicial review and injunctive relief. The FID held that:

"these remedies would certainly offer a remedy and relief which is akin to what the Applicant was seeking before CCJ in substance; that is to quash the decision to apply the safeguard measure and stop its application."

70. In Mauritius, judicial review is a public law remedy by which the Supreme Court exercises a supervisory jurisdiction over the administrative decisions of Ministries, Government Departments, inferior Courts, Tribunals, and other public bodies. It is well settled that the remedy of judicial review is concerned, not with the merits of the decision, but with the decision-making process itself. It is not part of the purpose of judicial review to substitute the opinion of the Judge for that of the public authority concerned.

71. In the present case, the responsible Minister would probably have exercised his discretion under section 4 of the Customs Tariff Act to give effect, by way of regulations, to the proposal to introduce the Safeguard Measure in the form of the imposition of customs duty. Section 4 reads as follows:

"The Minister may, by regulations, impose on any goods, duties in addition to those specified in the First Schedule, where it is shown to his satisfaction that similar goods are being, will be or are capable of being produced or manufactured in Mauritius."

72. True it is that it would have been open to the Appellant to challenge by way of judicial review before the Supreme Court of Mauritius any such regulations. But the Appellant's prospect of success would have been minimal. We say so for the following reasons. The provisions relating to safeguard measures in the Treaty and COMESA regulations had, at the material time, not yet been incorporated in the domestic law of Mauritius.

73. The above decision of the Supreme Court in **Polytol (Mauritius),** which was an application for leave to apply for judicial review, would therefore have been a formidable, if not insurmountable, obstacle in the Appellant's path. In view of the state of the law at the time, the Mauritian Courts would have been most reluctant to entertain a claim for a violation of the Treaty when the relevant provisions had not yet been

incorporated in Mauritian law. In effect, the Appellant would have been unable to pursue before the Mauritian Courts a claim for violation of Article 61 of the Treaty, be it expressly or at least in substance on the basis of a domestic law of same or similar effect.

74. In these circumstances, we are of the view that the remedy of judicial review before the Mauritian Courts was not reasonably available to provide effective redress and did not provide any reasonable possibility of such redress. In other words, judicial review was available, but the Respondent has failed to discharge the onus of proving that it was an effective remedy.

75. With regard to the availability of injunctive relief, the FID held that the Appellant could easily have used the judgment of the Supreme Court in **Polytol (Mauritius)** to obtain an injunction to block the Government from applying the safeguard measure before the domestication of the Treaty.

76. We do not agree that the Appellant could easily have obtained an injunction before a Mauritian Judge in the absence of the domestication of the Treaty. Regulation 4 of the COMESA Regulations on Trade Remedy Measures allows COMESA Member States without existing national legislation for the conducting of safeguard investigations to take trade remedy Measures in accordance to and in compliance with the provisions of the Regulations.

77. Moreover, as pointed out by the Appellant, there was no basis for it to apply for an injunction. At the time, it was only in presence of the Respondent's statement of intention to apply a safeguard measure under Article 61 of the Treaty. The Appellant applied for a copy of the letter sent in November 2018 by the Ministry of Foreign Affairs, Regional Integration and International Trade of the Republic of Mauritius (Co-Respondent no.3) to the Secretary General of the COMESA informing him of the Respondent's intention to apply the safeguard measure under Article 61. The Appellant's request was denied. It was only after it had lodged Reference No.1 of 2019 before the CCJ on 22 February 2019 that it obtained a copy of the letter. By then, it was too late for the Appellant to apply for an injunction as delay defeats equity.

78. It is also well settled that an interim injunction can only be granted pending the determination of a main case, here a judicial review. But, as shown above, any application for a judicial review would have been on very shaky grounds, especially in view of the fact that the relevant provisions of the Treaty had not yet been domesticated. There was, therefore, little prospect of success for the Appellant to obtain an injunction.

79. For the above reasons, we find that the Appellant has established that there were exceptional circumstances in Mauritius which relieved it from the need to comply with the rule on exhaustion of local remedies pursuant to Article 26 of the Treaty. We also find that although judicial review and injunctive relief were available remedies to the Appellant, the Respondent has failed to prove that they were effective remedies.

80. We, therefore, hold that the FID erred when it concluded that the Appellant had failed to exhaust available and effective local remedies before the domestic Courts prior to seizing the CCJ pursuant to Article 26 of the Treaty and upheld the preliminary objection of the Respondent and Co-Respondents. We, accordingly, allow Appeal No.1 of 2022 and quash the judgment of the FID dated 31 August 2022. Reference No.1 of 2019 is remitted back to the FID to be heard on the merits.

E. APPEAL NO.2 OF 2022

Background

81. Appeal No.2 of 2022 is against the ruling of the FID dated 21 October 2022 setting aside the appellant's motion for interlocutory relief (Interim Application No.1 of 2022), which arose out of the main motion (Reference No.2 of 2022).

82. On 7 June 2022, in the 2022-2023 budget speech, the Respondent announced that it would provide subsidies to the State Trading Corporation (Co-Respondent no. 3) to supply essential products such as milk, edible oil and pulses at a subsidised rate. Being conversant with the effects this subsidy measure would have on competition and its own viability, the Appellant expressed its concerns about distortion of competition and unfair practices in the local market by sending a letter to the

Respondent, which was copied to the Executive Director of the Mauritian Competition Commission, the Ministry of Finance and the Attorney General.

83. Having received no response to the various steps it took, the Appellant referred the matter to the the FID of the CCJ on 9 August 2022 in Reference no. 2 of 2022 and sought a declaration that the decision and action taken by the Respondent is contrary to the Treaty and its implementing regulations, in particular Articles 4, 5, 6, 52, 55, 56, 57 and/or 151 of the Treaty. The Appellant also sought an order requiring the Respondent to remedy the illegality in the decision to grant the subsidy to Co-Respondent no.3 by also granting the subsidy to the Appellant.

84. On 29 August 2022, the Appellant filed an application (Interim Application No.1 of 2022) for an ex parte order of injunction pursuant to rules 41(4) and 46 of the COMESA Court of Justice Rules of Procedure. The Appellant claimed to have suffered irreparable harm as a result of the Respondent's decision to grant a subsidy to Co-Respondent no.3. It sought from the Court an order suspending the Respondent's decision relating to the granting of subsidy to Co-Respondent no.3 and/or indirectly to another company, MOROIL.

85. On 12 September 2022, the Respondent raised a preliminary objection in the injunction application to the effect that the FID had no jurisdiction to hear the case because domestic remedies had not been exhausted as required under Article 26 of the Treaty. On 28 September 2022, the Principal Judge of the FID issued ex-parte an interim order suspending the subsidy to Co-Respondent no.3 pending the hearing of an inter partes application.

86. On 21 October 2022, after hearing the parties on the preliminary objection, the FID delivered its ruling and held, inter alia, that:

(a) the Appellant had not exhausted domestic remedies;

(b) the Appellant did not present the FID with clear evidence of the steps it had taken, if any, in pursuit of local remedies; and

(c) since the Appellant had alleged that it has exhausted domestic remedies, it bore the burden of proof.

87. The FID accordingly declined jurisdiction to hear and determine the motion dated 29 August 2022 and set aside the interim order dated 28 September 2022, hence the present Appeal No.2 of 2022.

88. On 2 March 2023, this Court granted an interim order suspending the Respondent's decision to grant a subsidy to Co-Respondent no.3 pending the hearing of the present appeal.

Submissions of the parties

(a) Submissions of the Appellant

89. The Appellant submitted that there is no law in Mauritius under which it could have ventilated treaty violations or treaty related issues before the Courts or Tribunals of Mauritius. In this respect, the Appellant relied essentially on the case of **Polytol (Mauritius)**, already referred to earlier.

90. It is the Appellant's contention that if there is a real likelihood that a domestic remedy would be ineffective on the basis of previous Court decisions, there is no need to comply with the rule on the exhaustion of local remedies.

91. The Appellant further submitted that the FID merely declined jurisdiction without giving a reasoned judgment as to what local remedies were available to the Appellant and consequently, as at today, the Appellant is left in the dark as to what local remedies the FID had in mind when it made that finding. Due to that fact, the FID's reasoning is wanting.

92. With regard to the burden of proof, the Appellant averred that the FID erred in law in holding that the Appellant bears the burden of proving that it had exhausted local remedies for the purposes of Article 26 of the Treaty. The FID's reliance on the dictum "*He who alleges must prove*" appears to be unwarranted as the dictum should

be applied to the party who has made the allegation which has triggered the issue before the Court. In this case, the issue of jurisdiction was triggered by the preliminary objection of the Respondent and Co-Respondents alleging that the applicant had not exhausted local remedies, the dictum "*He who alleges must prove*" should, therefore, have been applied in relation to that allegation by the Respondent and Co-Respondents.

93. The Appellant asserted that the burden of proof only shifts to a complainant if the Respondent discharges the burden first. The Respondents have failed to demonstrate, through concrete examples, the available and effective remedies. They did not put forward any submissions of what remedies were available to the Appellant, unlike in Appeal No.1 of 2022. The FID's finding on the burden of proof was flawed, wrong in law and could not be allowed to stand.

(b) Submissions of Respondent and Co-Respondents

94. The Respondent and Co-Respondents reiterated their submissions under Appeal No.1 of 2022. They submitted that the Appellant erroneously relied upon the case of **Polytol (Mauritius)**. The onus was on the Appellant to show, by concrete evidence, the steps it took in the pursuit of local remedies, and in that, the Appellant failed by making mere reference to **Polytol (Mauritius)** without even attempting to vindicate a right, let alone a Treaty right, before the domestic courts. The Appellant had failed to prove that it had exhausted local remedies.

Analysis and conclusions

95. The issue to be determined is whether the FID erred in upholding the preliminary objection raised by the Respondent and Co-Respondents and declining jurisdiction on the ground that the Appellant had failed to exhaust local remedies pursuant to Article 26 of the Treaty. Whether the FID reached the right decision must be determined by this Court in the context of the local laws of Mauritius and the prevailing circumstances.

96. In Reference No. 2 of 2022 and Interim Application No.1 of 2022, the Appellant is challenging the grant of subsidies, announced in the the 2022-2023 budget speech, by the Respondent to Co-Respondent No.3. The Appellant's contention is that its case falls within the Treaty and the grant of subsidies is contrary to Articles 4, 5, 6, 52, 55, 56, 57 and/or 151 of the Treaty.

97. It is not disputed that the Appellant lodged Reference No.2 of 2022 directly before the CCJ without having recourse to the domestic Courts of Mauritius as required under Article 26 of the Treaty. It is, however, the Appellant's contention that there were exceptional circumstances in Mauritius which excused it from exhausting local remedies and that there are no available and effective remedies in Mauritius. In this respect, the Appellant relied essentially on the decision of the Supreme Court of Mauritius in **Polytol (Mauritius)** which was that "*(in) the absence of any specific legislation to that effect, non-fulfilment by Mauritius as a Member State of its obligations, if any, under the COMESA Treaty is not enforceable by the national courts.*"

98. The Appellant submitted that there is no law on subsidies in Mauritius and it cannot therefore challenge the grant of subsidies before the national Courts. In Reference No.2 of 2022, it alleges that there is a breach of Article 52 of the Treaty which is in relation to subsidies and reads as follows:

> ***Article 52***
>
> ***Subsidies Granted by Member States***
>
> 1. *Except as otherwise provided in this Treaty, any subsidy granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Member States, be incompatible with the Common Market.*
>
> 2. *A Member State may, for the purposes of offsetting the effects of subsidies and subject to regulations made by the Council, levy countervailing duty on any product of any Member State imported into*

another Member State equal to the amount of the estimated subsidy determined to have been granted directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation.

3. *Except as otherwise provided in this Treaty, any subsidy granted by a third country or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Member States and the third country, be incompatible with the Common Market…*

99. The main thrust of the Appellant's argument is that since there is no law on subsidies in Mauritius, it is unable to ventilate, before the Courts of Mauritius, an alleged breach of Article 52 of the Treaty, be it expressly or at least in substance on the basis of a domestic law of the same or similar effect.

100. We find that the Appellant's argument is misconceived. At the time the Appellant lodged Reference No.2 of 2022 directly before the CCJ, the **Trade (Anti-Dumping and Countervailing Measures) Act 2010** was in force in Mauritius (it has now been repealed and replaced by the **Trade (Anti-Dumping, Countervailing and Safeguard Measures) Act 2022** with effect from 2 May 2023) and regulated matters of subsidies, as shown below.

101. The purpose of the **Trade (Anti-Dumping and Countervailing Measures) Act 2010** ("**Trade Act 2010**") is stated as being "*to protect the domestic industry against the negative effects of dumped, **subsidised** and increased imports*". At section 2 of the Trade Act 2010, "*subsidy*" is defined as follows:

(a) *a financial contribution by a government of a country other than Mauritius that confers a benefit to persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of goods but does not include the amount of any duty or internal tax imposed on goods by the*

government of the country of origin or country of export from which the goods, because of their exportation, have been exempted or have been or will be relieved by means of a refund or drawback; or

(b) *any form of income or price support within the meaning of Article XVI of the General Agreement on Tariffs and Trade, 1994, that confers a benefit.*

102. Section 3 of the **Trade Act 2010** stipulates that the Act shall apply to any investigation into a dumped or subsidised product. In fact, throughout the whole Trade Act 2010, reference is made to subsidies, subsidised imports and subsidised products.

103. In light of the above, we find that, contrary to the Appellant's argument, during the time of imposition of the impugned subsidy measure, Mauritius had a law on subsidies which could have formed the basis of the Appellant's case against the Respondent. The Appellant's utmost reliance on the erroneous fact that there was no law on subsidies in Mauritius at the material time has turned out to be misplaced. The Trade Act 2010 was a domestic law of the same or similar effect as Article 52 of the Treaty, on which the Appellant is basing its case in Reference No.2 of 2022. The Appellant could, therefore, have ventilated in substance the alleged Treaty violation on subsidies before its national Courts on the basis of a domestic law.

104. In these circumstances, we are of the view that the Appellant has failed to discharge the primary onus of establishing that there were exceptional circumstances in Mauritius which relieved it from the need to comply with the rule on exhaustion of local remedies pursuant to Article 26 of the Treaty. It did not resort to local remedies which were available and effective. The FID was, therefore, right in finding that the Appellant failed to exhaust local remedies prior to lodging Reference No.2 of 2022 directly before the CCJ, as required by Article 26 of the Treaty.

105. But there is more. In any case, ex facie the Appellant's own averments in Reference No.2 of 2022 and Interim Application No.1 of 2022, we are of the view that the facts and circumstances, as averred, do not disclose Treaty related issues. We say so for the reasons set out below.

106. From the Appellant's own averments, it is clear that it is complaining about a **local subsidy** on edible oil being granted by Respondent to a **domestic company** (Co-Respondent No.3). The subsidy was announced as a budgetary measure by the Mauritian Government for the financial year 2022 to 2023. The subsidy was not only in respect of edible oil but also such other essential products as milk and pulses. As borne out in a letter dated 28 June 2022 from the Appellant's Chief Executive Officer to the Minister of Finance, Economic Planning and Development (Co-Respondent No.1), the subsidy was part of the policy of the Mauritian Government to protect consumers from increasing prices. The Applicant, however, complained that the subsidy might lead to a distortion of competition and unfair practices on **the local market**.

107. On the above facts and circumstances, as averred by the Appellant itself, it complains that the subsidy on edible oil is in breach of various Articles of the Treaty, namely Articles 4 (Specific Undertakings), 5 (General Undertakings), 6 (Fundamental Principles), 52 (Subsidies Granted by Member States), 55 (Competition), 56 (Most Favoured Nation Treatment) 57 (National Treatment) and 151 (Creation of an Enabling Environment for the Private Sector).

108. We shall first consider the Appellant's compliant about an alleged breach of **Article 52 of the Treaty** which deals with "***Subsidies Granted by Member States***" and the relevant provisions of which have already been set out above.

109. It is to be noted that subsidies are a very sensitive matter in international trade relations as they are used by governments to pursue and promote important and fully legitimate objectives of economic and social policy. Under the World Trade Organisation Subsidies Regime, on which the COMESA Regime is based, it has been stated that Articles XVI and VI of the General Agreement on Tariff and Trade 1994, recognise subsidies as a legitimate instrument of public policy, obliging members only to forsake **export subsidies** (not local subsidies) and to avoid affecting their partners' interest in a unfavourable way.

110. Now for a subsidy measure to be challenged pursuant to Article 52 and the COMESA Regulations on Trade Remedies, there is a need for local production of a like product to the one that is being imported into a Member State to suffer from unfair competition arising from subsidised products coming from another member State. In line with this, Article 52(1) clearly states that for a violation to occur, any subsidy granted by a Member State must distort or threaten to distort competition by favouring certain undertakings or the production of certain goods in a manner that affects trade between the Member States. This position is reinforced by provisions of the Mauritius Trade Act 2010 (then in force), section 16 of which provides as follows:

> ***Section 16. Imposition of countervailing measures***
>
> *(1) The Investigating Authority may impose countervailing measures on products imported into Mauritius where it is determined, pursuant to an investigation initiated and conducted in accordance with this Act, that –*
>
> *(a) the investigated product is subsidised;*
>
> *(b) there is injury to the domestic industry; and*
>
> (c) *there is a causal link between the subsidised imported product and injury to the domestic industry.*
>
> *(2)…*

111. In light of the above facts and circumstances, relied on by the Appellant itself, we find that its complaint against the Respondent's subsidy does not fulfil the above conditions and those of Article 52 of the Treaty, it being a local subsidy to a domestic Mauritian company, not concerning importation of oil subsidised by one Member State in another Member State, and allegedly resulting in injury to the domestic industry and not the Common Market. We, therefore, find that the Appellant's complaint deals with matters which are not covered by Article 52 of the Treaty, as basic conditions for a finding of violation of that Treaty provision are not in place.

112. We now turn to Appellant's complaint about an alleged breach of **Article 55 of the Treaty (Competition)** which provides as follows:

1. *The Member States agree that any practice which negates the objective of free and liberalised trade shall be prohibited. To this end, the Member States agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market.*

2. *.....*

3. *The Council shall make regulations to regulate competition within the Member States.*

113. The relevant provisions of the COMESA Competition Regulations, 2012 stipulate as follows:

Article 3 Scope of Application

1. *These Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market, except for those activities as set forth under Article 4.*

2. *These Regulations apply to conduct covered by Parts 3, 4 and 5 which have an appreciable effect on trade between Member States and which restrict competition in the Common Market.*

114. Reading the provisions of Article 55 and the COMESA Competition Regulations, we note that similar to the observations made in respect of Article 52, for a violation of Article 55 as read with the Regulations to occur, there must be distortion of competition within the COMESA Market, not only in the domestic market of the complained party. Regulation 16 would require the Appellant to prove that in Mauritius there are enterprises that have entered into an undertaking whose effect is to *prevent, restrict or distort competition within the Common Market.* It is clear that such circumstances are not borne out by the Appellant's Reference No.2 of 2022 and Interim Application No.1 of 2022.

115. The Appellant is also alleging that the impugned subsidy is in breach of **Articles 56 and 57 of the Treaty**, the relevant parts of which read as follows:

> ***ARTICLE 56***
>
> ***Most Favoured Nation Treatment***
>
> *1. The Member States shall accord to one another the most favoured nation treatment.*
>
> ...
>
> ***ARTICLE 57***
>
> ***National Treatment***
>
> *The Member States shall refrain from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of other Member States.*

116. We are of the view that Article 56 requires a producer of edible oil from one Member State to complain to its Government against the Republic of Mauritius for providing less favourable treatment to its edible oil compared to that afforded to like edible oil from other Member States or other third Countries during import into Mauritius. Ex facie the facts and circumstances averred by the Appellant itself, we find that Article 56 is not applicable as the Appellant is a company domestically registered and operating in the Respondent's country and its complaint relates to a purely domestic matter.

117. Similarly, the conditions in Article 57 are not satisfied as the Appellant is not a foreign company whose edible oil is treated less favourably than locally produced edible oil. In this context, we find it apposite to refer to the judgment of the FID in **Polytol (CCJ)** (supra). In that case, one of the questions raised by the applicant was whether there was a breach of the Treaty by Mauritius, in particular Article 57, by imposing discriminatory legislation or measures in levying duty on products from Egypt but not from other Member States manufacturing the same or like products. The FID held as follows:

> "*In the view of the Court, the allegation of infringement of the Treaty in this respect is misconceived. Article 57 states that 'A Member State shall refrain*

from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of the Member States'. This provision is intended to protect products from Member States against protectionist measures such as duties, quantitative limitations and other non-tariff barriers. The Applicants did not produce evidence to show that like or same products were discriminated against. The Court therefore, finds that there was no infringement of Article 57 of the Treaty by Mauritius on grounds of discrimination."

118. Finally, we may easily dispose of the Appellant's complaint under Articles 4, 5 and 6 of the Treaty which, as this Court has already held in **Malawi Mobile Limited** (supra), are not actionable per se. We are of the view that the same reasoning would apply to Article 151 of the Treaty which advocates the creation of an enabling environment for the private sector to take full advantage of the Common Market.

119. For the above reasons, we find that, ex facie, the facts and circumstances averred in Reference No. 2 of 2022 and Interim Application No.1 of 2022 do not disclose any Treaty related issue. The FID was accordingly right to decline jurisdiction.

120. On another note, in light of the Appellant's own averments, we wish to further consider the question as to whether there were effective local remedies available to the Appellant. In this respect, we have in mind the provisions of the Competition Act of Mauritius.

121. The Appellant submitted that the decision of the Respondent to grant a subsidy was discriminatory, unfair, illegal and distorted competition. At paragraphs 20 and 21 of Reference No.2 of 2022, the Appellant highlighted that Co-Respondent No.3 negotiated and entered into an agreement with Mauritius Oil Refineries Limited (MOROIL) to purchase edible oil from MOROIL at MUR 100/ litre and selling the same at MUR 75/litre. Furthermore, at paragraphs 24 and 25, the Appellant indicated that, due to not being granted a subsidy, it is not able to sell its edible oil at MUR75 per litre and that despite raising concerns, the Respondent and Co-Respondents maintained the discriminatory, unfair, illegal and anti-competitive practices.

122. For our purposes, the relevant provisions of the Mauritian Competition Act read as follows:

Section 40. Horizontal agreements

1) *For the purposes of this section, an agreement, or a provision of such agreement, shall be collusive if –*

a) *……..;*

b) *it has the object or effect of, in any way –*

(i) fixing the selling or purchase prices of the goods or services;

(ii) sharing markets or sources of the supply of the goods or services; or

(iii) …… and

c) *significantly prevents, restricts or distorts competition.*

2) *Any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void.*

3) *…*

Section 44. Non-collusive horizontal agreements

A horizontal agreement that is not collusive under section 41 may be reviewed by the Commission where -

(a) the parties to the agreement together supply 30 per cent or more……..

(b) the Commission has reasonable grounds to believe that the agreement has the object or effect of preventing, restricting or distorting competition.

Section 45. Other vertical agreements

A vertical agreement that does not involve resale price maintenance may be reviewed where the Commission has reasonable grounds to believe that one or more parties to the agreement is or are in a monopoly situation that is subject to review under section 46.

123. Having regard to the above provisions of the Competition Act and the Appellant's averments set out at paragraph 121 above, we are of the view that the Appellant had an available remedy under the Competition Act of Mauritius. What remains is for us to examine the effectiveness of the remedy under the Competition Act, i.e., whether the remedy offered a prospect of success.

124. We are of the view that the facts and circumstances relied upon by the Appellant at paragraphs 20, 21, 24 and 25 of Reference No.2 of 2022, referred to above, would bring the impugned measure within the reach of section 40 (1)(b)(i) and (c) and section 44 (b) of the Competition Act and hence might very well have formed a ground for complaining to the Mauritian Competition Commission for investigation. According to us, this presented the Appellant with an effective remedy as it was within the mandate of the Competition Commission of Mauritius to investigate and put a stop to the alleged anti-competitive practice between Co-Respondent No.3 and MOROIL.

125. For the reasons given above, we find that the FID was right in upholding the preliminary objection of the Respondent and Co-Respondents and in finding that the Appellant had failed to exhaust local remedies, as required by Article 26 of the Treaty. On the Appellant's own averments, there were in fact effective local remedies which were available to the Appellant. We are also of the view that Reference No.2 of 2022 and Interim Application No.1 of 2022 do not disclose any Treaty related issue. The FID was accordingly right in declining jurisdiction. We therefore find no merit in Appeal No.2 of 2022 which is dismissed.

F. FINAL CONCLUSIONS

Appeal No.1 of 2022

126. We find that the Appellant has established that there were exceptional circumstances in Mauritius which relieved it from the need to comply with the rule on exhaustion of local remedies pursuant to Article 26 of the Treaty. We also find that although judicial review and injunctive relief were available remedies to the Appellant, the Respondent has failed to prove that they were effective remedies.

127. We, therefore, hold that the FID erred when it concluded that the Appellant had failed to exhaust available and effective local remedies before the domestic Courts prior to seizing the CCJ pursuant to Article 26 of the Treaty and upheld the preliminary objection of the Respondent and Co-Respondents. We, accordingly, allow Appeal No.1 of 2022 and quash the judgment of the FID dated 31 August 2022. Reference No.1 of 2019 is remitted back to the FID to be heard on the merits.

Appeal No.2 of 2022

128. We find that the FID was right in upholding the preliminary objection of the Respondent and Co-Respondents and in finding that the Appellant had failed to exhaust local remedies, as required by Article 26 of the Treaty. On the Appellant's own averments, there were in fact effective local remedies which were available to the Appellant. We are also of the view that Reference No.2 of 2022 and Interim Application No.1 of 2022 do not disclose any Treaty related issue. The FID was accordingly right in declining jurisdiction. We therefore find no merit in Appeal No.2 of 2022 which is dismissed.

129. The interim order suspending the Respondent's decision to grant a subsidy to Co-Respondent no.3 pending the hearing of the present appeal issued by this Court on 2 March 2023 is hereby discharged.

130. In the particular circumstances of these appeals, there shall be no order as to costs.

DATED this 14th Day of August 2023

COMESA COURT OF JUSTICE
REGISTRAR
P.O. Box 12222 KHARTOUM, SUDAN

.....

HON. LADY JUSTICE LOMBE P. CHIBESAKUNDA – Judge President

.....

HON. DR. JUSTICE. LOMBE MICHAEL C. MTAMBO – Judge

.....

HON. MR. JUSTICE DAVID CHAN KHAN CHEONG – Judge

.....

HON. DR. WAEL RADY – Judge

.....

HON. LADY JUSTICE SALOHY RAKATONDRAJERY RANDRIANARISOA – Judge