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KENYA NATIONAL ASSEMBLY

NINTH PARLIAMENT - FIFTH SESSION - 2006

PUBLIC INVESTMENTS COMMITTEE

REPORT OF THE PUBLIC INVESTMENTS COMMITTEE ON THE KENYA SUGAR BOARD - LOSS ON EXPORT & IMPORT OF RAW SUGAR AND IMPORTATION OF SUGAR PURSUANT TO LEGAL NOTICE NO. 2 OF 2006.

June 2006

Report of the Public Investments Committee

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PREAMBLE

Hon. Speaker,

On behalf of the Members of the Public Investments Committee and pursuant to standing Order no. 162(2), I take this opportunity to present to the House the Report of the Public Investments Committee on the Kenya Sugar Board - Loss on Export & Import of Raw Sugar and Importation of Sugar Pursuant to Legal Notice No. 2 of 2006.

Mandate.

The Public Investments Committee is a select committee established under Standing Order No. 148 as follows: -

148 (1) There shall be a select committee to be designated the Public Investments Committee for the examination of the workings of the public investments. The Public Investments Committee shall consist of a Chairman who shall be a Member who does not belong to the parliamentary party which is the ruling party and not more than ten Members who shall be nominated by the House Business Committee to reflect the relative majorities of the seats held by each of the parliamentary parties in the National Assembly.

Provided that, the ruling party shall have a majority of not more than two.

(2) The Public Investments Committee shall elect its own Chairman.

(3) The Chairman and four other Members of the Public Investments Committee shall constitute a quorum.

(4) In the absence of the Chairman, a Member designated by him shall take the Chair and in their absence, the Members present shall elect one of them to act in his stead.

(5) The functions of the Public Investments Committee shall be:-

- (a) to examine the reports and accounts of the public investments;
- (b) to examine the reports, if any, of the Controller Auditor General on the public investments; and
- (c) to examine, in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments are being managed in accordance with sound business principles and prudent commercial practices;

Provided that the Public Investments Committee shall not examine or investigate any of the following, namely:-

- (i) matters of major Government policy as distinct from business or commercial functions of the public investments;
- (ii) matters of day-to-day administration; and
- (iii) matters for the consideration of which machinery is established by any statute under which a particular public investment is established.

Committee Members

The Committee consisted of the following Members:

- (i) The Hon. J.B.N. Muturi, MP - **Chairman**
- (ii) The Hon. Wafula Wamunyinyi, M.P.
- (iii) The Hon. Jimmy Angwenyi, MP
- (iv) The Hon. Peter G. Munya, M.P.
- (v) The Hon. K.M. Sang, M.P.
- (vi) The Hon. (Dr.) Enoch Kibunguchy, M.P.*

- (vii) The Hon. Geoffrey Gachara Muchiri, M.P.
- (viii) The Hon. Gitau Kabogo, MP
- (ix) The Hon. Abdirahman Ali Hassan, MP*
- (x) The Hon. Ali Bahari, MP
- (xi) The Hon. (Dr.) Sammy Rutto, MP

* The Hon. Abdirahman Ali Hassan, MP, and Hon. (Dr.) Enoch Kibunguchy, M.P., ceased being Members of the Committee on December 7, 2005 and January, 2006, respectively upon being appointed Assistant Ministers.

Committee Sittings

The Committee held seven sittings where it examined broadly the reservations raised by the Controller and Auditor General in **Paragraph 1 of the Accounts of the Sugar Development Fund for the year ended 30 June 2001**. In its bid to address the matter to its current status and in furtherance to its mandate as contained in Standing Order No.148 5 (b) and (c), the Committee deliberated on the contents of *Legal Notice No. 2 (Legislative Supplement)* of January 13, 2006 and the role of the Board as vested in it by Section 27 of the Sugar Act, 2001.

The Committee, in its meeting of February 22, 2006 noting the gravity of the matter of sugar importations in as far as it related to Kenya Sugar Board, resolved to compile this Report for consideration by the House.

Witnesses and taking of evidence

The procedure of a Select Committee and other related matters thereto is covered under Standing Order Nos. 151-162. The Committee has powers, under the provisions of the National Assembly (Powers and Privileges) Act (Cap. 6), the State Corporations Act (Cap. 446) and the Exchequer and Audit Act (Cap 412), to summon witnesses and receive evidence.

The Committee took evidence from Hon. Kipruto Arap Kirwa, MP, Minister for Agriculture; Mr. Wilson Songa, Agriculture

Secretary Ministry of Agriculture; Mr. Joseph Mbai, Chairman, Kenya Sugar Board; Mr. Andrew Otieno, Chief Executive, Kenya Sugar Board; Ms. Rosemary Mkok, Company Secretary (Legal), and Mr. Yufualis Okub, Legal Officer at the Board. Excerpts of their evidence are contained in this Report. The evidence adduced made the production of this Report possible.

Contempt of the Committee

In the course of taking evidence, the Committee observed with concern that the Chief Executive of the Board, Mr. Andrew Otieno was deliberately giving conflicting evidence and on several instances attempted to mislead the Committee. Later in their evidence, the Board Chairman and the Company Legal Secretary confirmed this misconduct of the Chief Executive.

Conclusion

All the decisions made by the Committee were arrived at by consensus. In presenting this Report to the House for debate and adoption, the Committee urges the Government to implement the recommendation contained herein as adopted by a resolution of the House.

Acknowledgement

Mr. Speaker, I take this opportunity to express and record my gratitude to the members of Public Investments Committee for their devotion and zeal. Further, the Committee is grateful to all witnesses who appeared before it. It is evidence adduced from them that made this Report possible. The Committee also wishes to record its appreciation for the assistance accorded by your Office and that of the Clerk of the National Assembly. A plethora of thanks goes to the Office of the Controller & Auditor General, the Department of Government Investment, and Public Enterprises and the Inspectorate of State Corporations. Their devotion to duty has contributed a great deal in the production of this Report.

Mr. Speaker,

It is now my duty and pleasure to present and commend this Report to the House.


HON. JUSTIN B.N. MUTURI, MP

SIGNED.....
(Chairman)

DATE..... 26TH JUNE, 2006. **.....**

INTRODUCTION.

1. In examining the Report of the Controller and Auditor General on the Accounts of Sugar Development Fund for the year ended 30th June 2001, the Committee's attention was drawn to reservations raised by the Controller and Auditor General in Paragraph 1 of the Accounts with regard to losses made by the Fund in respect to importations of sugar.
2. In Part I of this Report, the Committee broadly examined the reservations raised by the Controller and Auditor General, wherein, in bid to address the matter to its current status and in furtherance to its mandate as contained in Standing Order No.148, 5 (b) and (c), it deliberated on the contents of *Legal Notice No. 2 (Legislative Supplement)* of January 13, 2006 and the role of the Board as vested in it by Section 27 of the Sugar Act, 2001.

Accordingly, the Committee examined the **Execution of Sugar Imports by the Kenya Sugar Board under the COMESA FTA arrangements pursuant to Legal Notice No. 2 of January 13, 2006**, in relation to sound business principles and prudent commercial practices. Part II of this Report therefore examines the execution of importation of sugar as stipulated by Legal Notice No. 2 of January 13, 2006, (*Legislative Supplement*) vis-à-vis the statutory role of Kenya Sugar Board.

Arising from the evidence adduced and the impact of the *Legal Notice No.2* on the statutory role of Kenya Sugar Board as a regulator and controller of sugar importations, the Committee resolved to compile this Report for consideration by the House.

3. This Report therefore contains the deliberations and recommendations of the Committee on Paragraph I of the Accounts of the Sugar Development Fund for the year ended 30th June 2001, in one part and the matter of Sugar Importations pursuant to Legal Notice No. 2 of January 13, 2006 in the other.
4. The minutes of the proceedings of the Committee are attached as Appendix I in this Report. It is pertinent to note that the Committee took evidence on the matter of Kenya Sugar Board and Importation of Sugar vide Legal Notice No. 2 of 2006 whilst examining Reports of the Controller and Auditor General on Accounts of various other State Corporations. The minutes of the proceedings of the

Committee in this report therefore are excerpts of the Sittings of the Committee on the subject matter.

5. The HANSARD records of the proceedings of the Committee are available in the National Assembly Library.

PART I

REPORT OF THE CONTROLLER AND AUDITOR GENERAL ON THE ACCOUNTS OF SUGAR DEVELOPMENT FUND FOR THE YEAR ENDED 30 JUNE 2001. (Paragraph 1)

The paragraph read as herebelow:-

LOSS ON EXPORT AND IMPORT OF RAW SUGAR

6. During the year ended 30th June 2001, the Fund incurred losses totalling Kshs.54,843,925 on the export of sugar, procured from Nzoia and Chemelil sugar companies, on the grounds that in order to secure the EU market it was in the national interest and unavoidable to incur such losses. However no evidence has been provided to confirm that the EU sugar market was secured through this action. The Fund further imported 2000 MT of sugar from the third lowest tenderer, ED and F Man Sugar limited of South Africa, at US\$330 PER metric tonne, all valued at US\$660,000 or Kshs 52,000,000. However, Records show that Hira Enterprises of Brazil and Gulf-U Flex CC of South Africa had quoted to supply and deliver sugar at US\$160 and US\$188 per metric tonne respectively. Had the Fund purchased the sugar from the lowest bidder at US\$160 per metric tonne, there would have been a saving of Kshs.26,787,880. Although the sole aim for the importation was to stabilize the availability of sugar in the local markets, the consignment was released into the market six months after it arrived in the port of Mombasa when other COMESA countries had gained access to Kenya market with cheap sugar. The purpose for importation was, therefore,

defeated and resulted into over-flooding the market for local sugar companies. Under the circumstances, and in absence of any plausible explanations for these imprudent decisions there would appear to have been no justification for the total loss of kshs.81,631,805 made by the Fund comprising of export loss of Kshs.54,843,925 and import loss of Kshs.26,787,880.

7. In his the evidence, the Chief Executive of KSB informed the Committee that during the year under review, the Fund incurred losses totalling Kshs.54,843,925 on the export of sugar procured from Nzoia and Chemilil Sugar Companies in its bid to secure a quota in the European Union Market.
8. The Committee was further informed: -
 - (i) that, in the period 1985/86, Kenya lost its Sugar Protocol Quota of 5,000 Metric Tonnes per annum in the European Union Market, during which period the price of sugar was government regulated and soon after having realized the losses associated with losing the quota, Kenya started lobbying to re-enter the sugar protocol, culminating in the temporary allocation of 2,033 Metric Tonnes in the years 1999-2001 and the six-year allocation of 10,186 Metric Tonnes (MT) for the years 2001/2002 to 2006;
 - (ii) that, by the time the lobbying efforts bore fruits and Kenya allocated 2,033 Metric Tonnes Quota, the ex-factory price of sugar was approximately Ksh. 38,000 per MT, making the domestic market more lucrative for local producers than the European Market;
 - (iii) that, in the year 2000/2001, Kenya's allocation was under the Preferential Sugar Quota priced at Kshs.29,660.90 per MT (442.70 Euro) which was an even less attractive option, making it difficult to interest local producers to supply the raw sugar to meet the EU quota;

- (iv) that, considering that the 1999/2000 and 2000/2001 African Caribbean Pacific –European Union (ACP-EU) allocation resulted from failure by some member states to deliver, Kenya had to prove its ability to deliver its quota at a short notice in order to gain consideration in the restoration and maintenance of the subsequent Protocol Quota in the European Union Market; and
- (v) that, the loss was envisaged in the early stages of membership to the Protocol due to the initial uneconomically small allocations and the prevailing high costs of production. By this time, COMESA FTA arrangements had not been concluded and the most economic place to source sugar was outside the COMESA.

9. Regarding procurement of the 2000 MT of sugar, the Committee heard: -

- (i) that, M/s. Hira Enterprises and Gulf-U Flex CC allegedly from Brazil and South Africa respectively, quoted via e-mail to deliver the sugar at US\$160 and US\$188 per MT respectively. On pursuit of the offers, the two companies turned out to be fictitious and could not provide information necessary to pursue the transactions;
- (ii) that, three companies M/s. Golden Sparrow, Holbud Ltd. and ED & F Man Sugar Ltd of South Africa submitted bids for the supply subsequent to which the latter's bid was found to be favourable in that it was the lowest at US\$ 330 per MT, and the company had reliable and extensive network in the ACP-EU and that the price quoted was the price trading at the London Futures Market at the time therefore guarantying competitiveness;
- (iii) that, the Board therefore contracted ED&F Man Sugar Ltd. of South Africa to supply the 2000 MT of sugar at the quoted price totalling Kshs.52,000,000 and that the quote of US\$330 /MT was broken down as: Freight (US\$ 23/MT); Stevedoring and Linear Charges (US\$10/MT) and FOB prices (US\$297/MT);
- (iv) that by the time the sugar reached the port of Mombasa, large amounts of COMESA sugar had gained access to the

Kenyan Market under the Free Trade Agreement (FTA) before the 100% import duty had been imposed subsequent to which there was over supply of sugar in the country, resulting to unfair competitive advantage of the COMESA sugar over the one sourced from South Africa. During this time (around September 2000) wholesale and retail prices of sugar dropped by almost 61%;

- (v) considering the declining domestic prices quoted, which were below the cost of importing the sugar, the Board had to sell the sugar in Mombasa at a price of Kshs.80 per kg in order to break even, a price which could not attract any trader. The Board therefore spent time shopping for buyers; and
- (vi) in the meantime, demurrage, port charges, duties and levies had accumulated to Kshs.125,861,132. The Board spent considerable time seeking waiver on Import Duty, V.A.T. and demurrage charges, which was eventually granted albeit five months after the sugar landed at the port.

10. The Committee noted that the Board has since sought subvention from the Treasury for the loss incurred by the Board as a result of the importation, which has had considerable negative impact on the financial position of the Board. Further, the Committee took cognisance of the provision of the section 4 of the Sugar Act, 2001, which mandates the Kenya Sugar Board to regulate and control the exercise of Sugar Importation. The Committee observed that the process of sugar importation has been continuously and extensively abused to the detriment of the Board, Industry and the nation at large.

11. The Committee observed with concern that:-

- (i) **much as the importation was intended to meet and secure the European Union quota, this justification eventually did not hold water as the sugar was not only sold in the local market, defeating the sole purpose for the importation, but also deteriorated the already flooded local sugar market;**

- (ii) the Sugar Development Fund made an import loss of Kshs.26,787,880;
- (iii) even though the Board, the parent Ministry and the Ministry of Trade viewed the justification of meeting the European Market as urgent, government procurement, procedures were nevertheless flouted in that the approval of the Directorate of Public Procurement not to employ international open tendering in procuring the sugar was not sought; and
- (iv) the Board would seem to have been used by the parent Ministry and the Ministry of Trade as a conduit of delivering sugar into the country at zero rated import duty in the guise of meeting the European Union Market.

12. In view of the foregoing and arising from the evidence adduced before it, the Committee **recommends that:-**

- (i) the Director of Criminal Investigations Department urgently institutes investigation into the manner in which the 2000 metric tonnes of sugar was imported from South Africa through m/s. ED&F Man Sugar Ltd (S.A) with a view to preferring charges against any persons found culpable in the irregular transaction which caused the Sugar Development Fund to incur a loss of Kshs.26,787,880; and
- (ii) the Treasury grants a subvention to the Board for the loss of Kshs.26,787,880.

13. The Committee also, acknowledging that it had deliberated on a similar matter of Sugar Importation vide Legal Notice No. 1405 of February 25, 2005 vis-à-vis the statutory role of the Kenya Sugar Board in its 13th Report at page 331 and pursuant to its mandate, resolved to address the matter as it relates to the year 2006 which forms the basis of Part II of this Report.

PART II

EXECUTION OF IMPORTATION OF SUGAR PURSUANT TO LEGAL NOTICE NO. 2 OF 2006 (LEGISLATIVE SUPPLEMENT)

14. The attention of the Committee was drawn to Legal Notice No. 2 of 2006 which read as herebelow:-

Legal Notice No. 2

(13th January ,2006)

**THE SUGAR ACT
(No. 10 of 2001)**

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

**THE SUGAR (IMPORTS, EXPORTS AND BY PRODUCTS)
(AMENDMENT) REGULATIONS, 2006**

- (1) These Regulations may be cited as the Sugar (Imports, Exports and By-Products)(Amendment) Regulations, 2006.*
- (2) The Sugar (Imports, Exports and By-Products) Regulations are amended by deleting regulation 6 and substituting therefore the following new regulation-*

“6 The Board shall facilitate the importation of raw or mill white and refined sugar by registered importers and millers on a non-discriminatory and liberalized basis”

Made on the 12th January 2006

**KIPRUTO ARAP KIRWA
MINISTER for Agriculture**

15. Having deliberated at length on a similar matter during preparation of its 13th Report which is before this House and in light of the contents of the *Legal Notice*, the Committee noted that: -

- (i) the Board would appear to have, yet again, surrendered its statutory powers of regulating and controlling importations of sugar as conferred on it by Section 27 of the Sugar Act, 2001;
- (ii) since the *Notice* amended the Sugar (Imports, Exports and By-Products) Regulations, 2003, as contained in Legal

Notice No. 39 of 2003, it would appear that the Board's role had been reduced to mere facilitation of the intended importations, which is contrary to the spirit and objectives of the Kenya Sugar Board as established by the Sugar Act, 2001; and,

- (iii) the effects of (i) and (ii) above may, in the long-term, bring forth far reaching and adverse financial implications on the Board similar to those highlighted by the Controller and Auditor General in Paragraph 1 of the Accounts of SDF for the year ended June 30, 2001.

16. Arising from the foregoing and noting that pursuant to the notice, importers were expected to bring sugar into the country between March 1, 2006 and February 28, 2007, except for Raw/Mill White sugar which was to be imported by September 1, 2006, the Committee observed that the matter required to be addressed urgently. Subsequently, the Committee on diverse dates summoned and took evidence from the management of Kenya Sugar Board (KSB) on the execution of the importations by the KSB.
17. In its sitting of February 8, 2006, the Committee heard that contrary to Section 33 of the Sugar Act, 2001, the KSB Board **was not consulted** prior to making the *Legal Notice No. 2* of January 13, 2006, which allowed for a free for all based on a first-come-first served criteria for the 2006 importations. In this in execution of its powers, the Board had sat at its 60th sitting to deliberate on the criteria to be used in adjudicating the importations where it had had just considered and adopted criteria to be employed in regulating and controlling the importations subsequent to which the resolution was to be communicated to the Ministry of Agriculture. The Committee also heard that contents of the *Notice* were contrary to the resolution of the Board in its 60th Sitting.
18. Noting that the Notice stated that the Board had been consulted, the Committee resolved to take further evidence from the management of KSB, the Board Chairman and the Minister for Agriculture.

EVIDENCE BY WITNESSES

Evidence of Mr. Andrew Otieno, Chief Executive, Kenya Sugar Board;

19. The Chief Executive of the Board appeared before the Committee on three occasions. In the course of taking evidence, the Committee observed with concern that the Chief Executive was deliberately giving conflicting evidence and on several instances attempted to mislead the Committee. Later in their evidence, the Board Chairman and the Company Secretary (Legal) confirmed this misconduct of the Chief Executive.
20. The Committee therefore, pursuant to Section 16 of National Assembly (Powers and Privileges) Act, Cap 6 of Laws of Kenya examined the Chief Executive on Oath who informed the Committee: -
- (i) that, during its meeting of 31st October, 2005 the Board, addressing itself to the 2006 Sugar Importation Quota resolved to review legal Notice No. 39 of 2003. The Board directed the Management to prepare a Board Paper, based on correspondences between itself, COMESA and the parent Ministry. Further, the Permanent Secretaries, Ministries of Finance, Trade and Agriculture be invited and consulted prior to preparing the Board Paper;
 - (ii) that, preliminary informal consultations took place between himself and the then Permanent Secretary, Ministry of Agriculture;
 - (iii) that, an informal and exploratory meeting was held in mid November 2005, at Kilimo House on instructions of the then Permanent Secretary, Ministry of Agriculture, Mr. James E. Ongwae.
 - (iv) that, the Kilimo House meeting recommended that the Sugar (Imports, Exports & By-Products) Regulations, 2003 (Legal Notice No. 39 of 2003) be amended in Regulation 6 (2),(3) and (4) to remove the three existing options for the administration of imports by way of quota allocation, tenders and auctions. **Though a resolution was not**

reached, the meeting recommended that the Regulation be amended.

- (v) that, to formalise the resolutions of the Kilimo House Meeting and instruction of the then Permanent Secretary, Ministry of Agriculture, the Board's management wrote to the latter on November 14, 2005 vide letter REF KSB/COM/1A/A (**See Appendix IV**) which conveyed that "the consensus and recommendation of the members was that Regulation 6 (2),(3) and (4) be amended to remove the three existing options for the administration of imports by way of quota allocation, tenders and auction as these go against the spirit of free trade and a liberalized market".
- (vi) that, in their submission to the Ministry of Agriculture they communicated that the Kilimo House meeting had recommended that Regulation 6 be replaced with a new sub-regulation 6(2) that reads: "*The Board shall facilitate the importation of raw/mill white and white refined sugar by registered importers/millers on a non-discriminatory and liberalized basis*";
- (vii) that, though he was instructed by the Board, he did not hold consultative meetings with the Office of the Attorney-General to iron-out legal matters prior to and in order to facilitate the making of a Legal Notice that would reflect a resolution of the Board;
- (viii) that, the Board held its Sixtieth (60) sitting on 13th January, 2006 where in furtherance to its statutory powers conferred on it by the Sugar Act, 2001, it deliberated and made a resolution on the intended contents of a Legal Notice. The Management was directed to communicate this resolution in writing to the Ministry of Agriculture, which resolution was to constitute the contents of the Gazette Notice; and,
- (ix) that, in accordance with the above-mentioned directive of the Board, the Chief Executive wrote to the Permanent Secretary, Ministry of Agriculture on the same day (January 13, 2006) (**See Appendix V**)

Evidence of the Board Chairman, Mr. Joseph Mbai

21. Appearing before the Committee on February 8 and 9, 2006, the Board Chairman Mr. Joseph Mbai, on Oath informed the Committee: -

- (i) that, he was invited to a meeting at Kilimo House, to deliberate on sugar importation matters in preparation of a subsequent meeting of the Board which was to deliberate on a way-forward;
- (ii) that, by the time he left the Kilimo House meeting on November 10, 2005 the meeting had not made a resolution on the matter;
- (iii) that, the Kilimo House meeting which was held on instructions of the then Permanent Secretary Ministry of Agriculture, Mr. James E. Ongwae was an exploratory one and not a meeting of the Board. It's deliberations were therefore not those of the Board;
- (iv) that, the recommendation of this meeting (Kilimo House) were not brought before the Board for consideration;
- (v) that, the Board was not privy to the contents of the letter REF: KSB/COM/1A/A of November 14, 2005 by the Board Secretary (**Appendix IV**) ;
- (vi) that, the Board held its Sixtieth (60) sitting on 13th January, 2006 where it deliberated and made a resolution on the intended contents of a Legal Notice which was to, among other issues, take cognisance of the resolution of the Board and provide that, the Kenya Sugar Board would vet the intended importers under parameters of importer qualification, importer capability/resources, past performance, storage and tax compliance.
- (vii) that, the management was directed to communicate this resolution to the Ministry of Agriculture, which was to constitute the contents of the Gazette Notice. Ordinarily, the Notice was to come out after this date;

- (viii) that, the *Legal Notice* (No. 2 of January 13, 2006), which appeared on Gazette Notice of January 13, 2006 was brought to the attention of the Board on conclusion of its meeting of 13th January, 2006 at 2.15 p.m, thus the Board felt that the Minister had usurped its statutory powers to regulate and control sugar importations;
- (ix) that, by issuing the *Legal Notice* without due consultations, the Minister had seized its statutory powers. Consequently, the Board resolved to put up a paid press statement stating its position on the matter (**See Appendix VI**);
- (x) that, concerned that the Notice was irregular to the extent that the powers to regulate and control the importation vested on the Board by the Sugar Act, 2001 had been seized and that the *Notice* was bound to have adverse financial effects on the Board, cane farmers and subsequently on the prices of sugar in the country, the Board intended to meet the Minister and prevail upon him to withdraw the Notice. Later, in order to avoid a confrontational approach, the Board mandated the Chairman to request for a meeting with the Minister and to press for another meeting with the full Board in order to prevail upon him to withdraw the Legal Notice and put up a fresh one incorporating the resolution of the Board in its 60th meeting;
- (xi) that, the Board met again on 18th January, 2006 when it deliberated implications of the Notice. In that meeting that Board became privy to information that the Minister had publicly alleged that some members of the Board had been bribed to manipulate the intended importations;
- (xii) that, he met the Minister in his office in order to inform him of the concerns of the Board and prevail upon him to withdraw the *Notice*. In their meeting, the Minister, declined to accede to the Board's request asserting that he would only leave minimal regulatory powers on it in respect of the intended importations. He affirmed that the *Notice* would stay.

- (xiii) that, the Board, in consultation with the office of the Attorney General was of the opinion that, with the Notice in place, any attempt to exercise its regulatory and/or control powers as conferred by the Sugar Act, 2001 would attract litigations since those powers had been taken away by the *Notice*; and,
- (xiv) that, contrary to the submission by the Board's Chief Executive to the Committee and by the Minister in the *Notice*, it **was not done** in consultation with the Board;

Evidence of the Minister for Agriculture, Hon. Kipruto Arap Kirwa, MP.

22. Appearing before the Committee on February 22, 2006, the Hon. Minister informed the Committee:-
- (i) that, most litigations in the past three years on sugar importations emanated from Regulation 6 under Legal Notice No. 39 of 2003;
 - (ii) that, the Board has spent close to Ksh. 200 million in litigations of cases emanating from the Notice No. 39 of 2003;
 - (iii) that, it is the section 6(2), (3) and (4) of the Regulation that advocated for auctioning of sugar, allocating quotas and tendering for the same that led to the litigations;
 - (iv) that, allocation of quotas was a restriction on the FTA and was against Articles 49 (Elimination of Non-Tariff Barriers), 55 (Competition), 57 (National Treatment) and 61 (Safeguard Clause) of the COMESA FTA Regulations;
 - (v) that, in his view, **consultation** as contained in Section 33 of the Sugar Act, does not have to be written, "when the Chairman and the Vice-Chairman of the Board come to see me, it is adequate";
 - (vi) that, further, his interpretation of Section 33 which says that "*the Minister may, in consultation with the Board, make regulations generally for the better carrying*

out of the provisions of this Act and without prejudice to the generality of the foregoing” was that such **“consultation” is discretionary;**

- (vii) that, by Legal Notice No. 2 of 2006, he only took away the powers of the Board to pretend that they were procuring sugar when KSB was not supposed to do so as the sugar is supposed to enter into the local market just like any other product. Further, contrary to provision of Legal Notice No. 6 of 2003, the Board could not determine the quantities to be imported as this was the mandate of the Council of Ministers (in COMESA) and the Ministry of Finance; and,
- (viii) that, prior to the *Notice*, the Chairman and the Vice-Chairman of KSB went to see him in his office where they, among other issues, discussed the modalities of handling the intended importations. The Minister found their input adequate and as such there was no need for further recourse to the Board in this respect.

23. After protracted deliberation between the Minister and the Committee and concerns that Legal Notice No.2 of 2006 was not only inadequate but was also irregular to the extent that the Board was not consulted, it was agreed that, in light of the short time available before March 1, 2006 in which date the intended importation was to commence, the Minister re-looks at the Legal Notice No. 2, 2006. The Committee implored upon the Minister to consult with the Board with a view to reviewing its contents and incorporating the resolution of the Board’s 60th meeting in a subsequent Legal Notice.
24. In this regard, the Minister affirmed that he would only annul the notice after consultation with the Board in order to establish their views on the *Notice* and thereafter seek legal advice on modalities and effects of annulling a legal notice.

DELIBERATIONS BY THE KSB BOARD ON THE EXECUTION OF IMPORTATIONS OF THE 2006 QUOTA

25. From the evidence adduced, the Committee noted that, in execution of its mandate, the KSB Board sat on diverse dates to deliberate on the matter as follows: -
26. **At the 55th meeting held on 31st October 2005**, KSB management re-tabled the proposal for an amendment to the Legal Notice to enable the Board meet its set target under the Performance Contract. During this meeting:
- discussion on the draft Notice presented by the Management was deferred to a meeting scheduled for Thursday 10th November 2005;
 - the Board observed that while this proposal advocated for a "First Come First Serve" mode of administering imports from COMESA, this was not provided for within the Sugar (Imports, Exports and By-Products) Regulations as gazetted under Legal Notice No.39 of 2003. There was, as a result, a general consensus that the prevailing regulations needed to be reviewed to accommodate the spirit of the trade protocols to which Kenya is a party. It was agreed that a meeting be convened to consider the regulations with a view to avoiding previous challenges and resultant costly litigation;
 - the Board requested that the three Permanent Secretaries from the Ministries of Finance, Agriculture and Trade be invited in their individual capacities to the meeting to be held on 10th November 2005. Once agreed upon, an appropriate Gazette Notice was to be approved for publication not later than 31st November 2005.
27. **At the 56th meeting held on 23rd November 2005**, both Permanent Secretaries in the Ministries of Agriculture and Trade were personally in-attendance and the Board revisited Managements proposal for the amendment of the Sugar (Imports, Exports and By-Products) Regulations when the following were highlighted; the COMESA requirements; efforts so far made towards the domestic administration of safeguard measure;

attendant Litigation; options provided in the current regulations and their pros and cons; comparatives with other importation regimes; proposals and recommendations for the future. In the meeting:-

- the Board recognized that Kenya was a net beneficiary under COMESA and underscored the need to observe the treaty to its fullest extent. It was observed that the domestic administration of the Safeguard was therefore very important and care needed to be taken not to confuse this with the broader technical issues of the signed treaty;
- the Board deferred its decision on the way forward and requested that the paper be enriched along the following lines:
 - obtaining legal opinion from the Attorney General on the four options of "Tender", "Quota Allocation", "Auction" and "Free For All" with 30% exclusively reserved to millers;
 - clearly tabulate the guiding principles and instruments that will be applied in the process in each one of the four and how the identified challenges will be obviated;
 - provide a report on the previous importation process particularly on the 30% allocated to millers in the last exercise clearly itemizing;
- the Board directed that the Hansard record and specific recommendations by PIC on future administration of the safeguard measure be sought;
- the Board resolved that consultations with the Ministry of Agriculture, Attorney General, Treasury and Director General (Procurement) be sought on the proposed way forward;
- the Board agreed that the meeting to consider the revised paper be convened on 13th December 2005 where a representative of the Attorney General should be invited and be in attendance to give guidance. Management was

requested to develop a draft paper as a priority for initial discussions with the Permanent Secretary, Ministry of Agriculture and the Solicitor General.

28. **On 20th December 2005, during the 58th meeting**, management presented Board paper No.35/2005 along the lines requested by the Board. Based on this, the Board resolved:

- (i) that, the status quo on the administration of imports and exports as contained in Legal Notice No.39 of 2003 and which was communicated to the parent Ministry, be maintained as earlier resolved.
- (ii) that, due to the steady build up of stocks in the sugar factories that is likely to result in a glut in the domestic market, the need for the Board to regulate the timing of sugar in-flows was more urgent now.
- (iii) that, following the adjustment of the profit made by Chemelil on behalf of millers in the year 2005 import exercise, from 78 million to approximately 40 million, there was no economic justification in the setting aside of 30% of the available COMESA quota to millers.**
- (iv) that, the year 2006 import process be administered by way of invitation of tenders provided in paragraph 6 of Legal Notice No.39 of 2003 i.e. the current Sugar (Imports, Exports and By-Products) Regulations.
- (v) that, provision be made in the Sugar Bill that makes the Board as effective as KRA in the regulation of imports.

In support of the above resolution, it was decided that:

- Management develops a process that sets out the conditions of tender and criterion for the selection of importers for consideration by the Board Tender Committee.
- specific recommendations be made by the Tender Committee to the full Board for adoption and approval on who brings in how much and when.

- written concurrence be obtained from the Attorney General, Treasury, KRA and the Ministry of Trade before the final gazette notice is issued.
 - the statement on page 2 of Board Paper No.35/2005 to the effect that the Board issued Gazette Notice No.1405 dated February 2005 be expunged from the records as it was not a Board resolution.
 - that the figure of 78 million stated at paragraph 4 on page 7 of Board Paper No.35/2005 as profit made by Chemelil be amended to read approximately 40 million.
29. In the same meeting, serious concern was expressed over the apparent glut that was building in the market. Management was requested to re-examine the Board's policing function, which did not seem to be working to expectation. The Board was informed that there was suspicion of instances of under-declaration of tax values with some sugar from non-COMESA origins was being re-packaged to reflect that it is Kenya's domestic mills.
30. **During the 59th meeting held on 11th January 2006**, the Board referred paper No.1/2006 to the Tender Committee to consider and make specific recommendations to the full Board on the modalities for quota allocation under a regulated regime. This was concluded at the 38th meeting of the Tender Committee held on 12th January 2006 and detailed recommendations made for the Board's adoption.
31. **At the 60th meeting held on 13th January 2006**, the Board, having considered the recommendations of the Tender Committee, adopted the following procedure:-
- (i) that, it would determine and make public vide a gazette notice, our domestic needs, both refined and mill white sugar, having taken into account our shortfall;
 - (ii) that, it would make an application to Treasury seeking exemption from the 28-day period requirement for advertisement of tenders as it is constrained by time;

(iii) that, it would then issue a notice on or before 30th January 2006 in the three main local dailies (the Standard, Daily Nation and Kenya Times) inviting all “Registered Importers” to come forward and apply for quotas specifying the quantities and timings of actual entry by month with regard to Treasury’s approved advert time limit.

(iv) that, immediately the applications are closed, evaluation be undertaken using the below listed criteria and the tender committee be convened to adjudicate accordingly. The results be made public within 24 hours to avoid interference and lobbying:-

- Importer Qualification (Mandatory)

Verify the applicant against the Register of Importers to confirm that the candidate qualifies as such, and eliminate any applicant who does not hold a valid imports certificate.

- Importer Capability / Resources (50%)

To eliminate briefcase importers, examine and confirm that the applicant has the ability to import. Peruse Tender Security, Bank Statements, Audited Accounts and establish ability to raise required funds to import within a specified period.

- Past Performance (20%)

The conduct of the applicant in the last quota to determine whether they followed the laid down rules or not. e.g. whether one used the license to import the wrong type of sugar, whether one imported without a valid import licence. For those who benefited from the quota last year, examine:-

- *how much the applicant imported in the last quota.*
- *their returns to confirm that they satisfactorily complied with the provisions of Regulation 7 of the*

*Sugar (Imports, Exports and Buy-Products)
Regulations on filing of returns.*

- Storage (20%)

Evidence of adequate storage facility. Whether own go-down or hired go-down and their capacity vis-à-vis quantity the applicant wants to import.

- Tax Compliance (10%)

Certificate of Tax Compliance from KRA. Since the applicants are benefiting from Tax-free imports, they must prove that they have always paid their taxes as required.

The Board in their deliberations decided that for those who will qualify and in the interest of equity, a maximum allocation of 5,000 MT be applied. However, this quantity can be varied depending on total number of applicants qualifying for the importation exercise. Based on the foregoing, the Board resolved that it shall:

- *Prepare and sell the tender documents at a non-refundable fee of Kshs.10,000.*
- *Communicate the outcome to each applicant both successful and unsuccessful.*
- *Communicate to the successful applicants stating the quantity and month of importation and consequences of non-compliance.*
- *Submit to KRA a list of successful applicants after publishing the same in the Kenya Gazette. Thereafter, strict surveillance and monitoring by KSB be done at the Port of Mombasa and other designated port of entries to guard against paper clearance. Only the quantities allocated to arrive at a particular time should be cleared.*

32. During its 60th meeting, the Board further resolved that the importation of the sugar quota be spread throughout the year i.e. from March 2006 to February 2007 and that only Sugar Importers / Exporters whose registration has been issued as at 11th January 2006 be considered for allocations.
33. Further, the management was requested to formally communicate the Board's decision to the parent Ministry and work in close consultation with other arms of Government to ensure effective administration of the quota as approved.
34. **At adjournment of its 60th meeting, the Board was presented with copies of the Legal Notice No.2 signed by the Minister for Agriculture.**
35. **During its 61st meeting held on January 18, 2006,** the Board considered the contents of Legal Notice No. 2 dated 13th January 2006 issued by the Hon. Minister for Agriculture and noted that it was inconsistent with their resolution at MIN.1/2006. The Board reiterated its earlier resolution and rejected the Legal Notice in its entirety and observed as follows:
- (i) that, in order to regulate the inflow of imports into the already saturated domestic market they had resolved and maintained that the administration of imports be by way of a regulated, transparent and predictable process that conforms to the laid down Public Procurement Regulations;
 - (ii) **that, Legal Notice No.2 of 2006 was a unilateral decision by the Minister for Agriculture and at no material time was it issued in consultation with the Kenya Sugar Board as stated therein;**
 - (iii) that, its contents clearly contradicts the Board's resolution on the administration of imports through a quota system;
 - (iv) that, the notice goes against the spirit of section 27 of the Sugar Act, which provides that all sugar imports shall be controlled by the Board;
 - (v) that, in view of the fact that, 29,120.21, Metric Tonnes of domestic sugar worth approximately Ksh. 72,800,525.00 was

being held by local factories as stocks as at Monday 16th January 2006, the imports for the current year be staggered throughout the year from March 2006 to February 2007 to allow the disposal of the evidently high factory stocks and facilitate timely payment to farmers for their cane delivered;

(vi) that, the *Legal Notice* in its current form does not support (v) above as it provides for a free and liberalized market without the above stated regulation. **It is therefore neither in the interest of the farmers nor wider Kenyan public.** It is for this reason that the Board stands by its earlier resolution to regulate inflows and not go for the "Free for All". *Legal Notice No.2* dated 13th January 2006 is therefore rejected by the Kenya Sugar Board; and,

(vii) that, in the interest of the sugar industry and as the custodians of the stake holder's interests, the Board should seek an appointment with the Minister for Agriculture to prevail upon him **to revoke the Legal Notice forthwith.**

36. Further, at the conclusion of the 61st meeting, the Board's attention was drawn to allegations in both the print and electronic media alluding that some of its members may have been compromised to support the quota allocations hence the decision to go "Free and Liberalized" route. The Board took grave exception to this and demanded that a press statement be released under the signature of the chairman to confirm to all stake holders that none of the members have been so compromised and also making public the resolution of the Board disclaiming the *Legal Notice No. 2* of 13th January 2006.

37. Further, in this meeting, the management circulated a draft Gazette Notice to be issued to compliment *Legal Notice No. 2*. in the administration of COMESA imports. Given that the Board did not agree with the contents of the *Legal Notice* they directed management not to publish the Gazette Notice whose draft was circulated in the meeting.

COMMITTEE OBSERVATIONS AND CONCERNS

What had the KSB Board resolved on the intended importations and contents of Legal Notice?

38. As detailed elsewhere in this Report, the Committee heard that at the 60th meeting held on 13th January 2006, the Board having considered the recommendations of its Tender Committee, adopted a procedure on the intended importations, which would involve evaluating the interested importers based on the parameters of Qualification; Capability/Resources; Past performance, Storage and Tax Compliance. The Board was to sell the tender documents at a non-refundable fee of Kshs.10,000 and thereafter:-
- (i) communicate the outcome to each applicant both successful and unsuccessful;
 - (ii) communicate to the successful applicants stating the quantity and month of importation and consequences of non-compliance; and
 - (iii) submit to KRA a list of successful applicants after publishing the same in the Kenya Gazette. Thereafter, strict surveillance and monitoring by KSB be done at the Port of Mombasa and other designated ports of entry to guard against "paper clearance". Only the quantities allocated to arrive at a particular time should be cleared.
39. The importation of the sugar quota was to be spread throughout the year i.e. from March 2006 to February 2007 and only Sugar Importers/ Exporters whose registration has been issued as at 11th January 2006 were to be considered for allocations.
40. The above resolution of the Board was communicated to the Ministry of Agriculture vide Letter Ref. KSB/C/25/(B)VOL.111 of January (**Appendix V**). In part, the letter conveyed that:-

"....The Kenya Sugar Board has finalized its deliberations on the administration of imports from COMESA at their 60th meeting held today 13th January 2006. The Following is an outline of the criteria that it has adopted for the process and which it intends to publicize to all stakeholders.

- (i) Determine and make public vide a gazette notice our domestic needs, both refined and mill white sugar taking into account our shortfall.
- (ii) Application be made to Treasury seeking exemption form the 28 day period required for advertisement of tenders as we are constrained by time.
- (iii) Kenya Sugar Board issues a notice in the three main local dailies (the Standard, Daily Nation and Kenya Times) inviting all "Registered Importers" to come forward and apply for quotas specifying the quantities and timings of actual entry by month with regard to Treasury's approved advert time limit.
- (iv) Immediately the applications are closed, evaluations be undertaken using the below stated criteria and the tender committee be convened to adjudicate accordingly. The results be made public within 24 hours to avoid interference and lobbying.

The suggested parameters for evaluation and scoring the applicant are: importer qualification, importer capability/resources, past performance, storage and tax compliance..... the Board resolved that it shall:... submit to KRA a list of successful applicants after publishing the same in the Kenya Gazette. Thereafter, strict surveillance and monitoring by KSB be done at the Port of Mombasa and other designated port of entries to guard against paper clearance. Only the quantities allocated to arrive at a particular time should be cleared.....The purpose of this letter is to communicate this resolution and the approved modalities for the administration of the sugar imports under COMESA arrangement for the year 2006/07..."

41. The resolutions of the 60th meeting of the Board held on 13th January 2006 were to form the contents of the intended Legal Notice.

Was the Board consulted prior to publication of the Legal Notice?

42. During his appearance before the Committee, the Minister for Agriculture, Hon. Kipruto arap Kirwa, MP alluded that:-
- (i) in his understanding of Section 33 of the Sugar Act, **“consultation” is discretionary;**
 - (ii) nevertheless, consultations **with the Board** were held in the following occasions:-
 - (a) during the meeting held at Kilimo House on November 10, 2005; and,
 - (b) when the Board Chairman and the Vice-Chairman visited him in his office.
43. The Committee draws its observations from the evidence adduced and papers laid before it *vis-à-vis* the provisions of the Sugar Act, 2001 as follows: -.
44. **Section 5 of the Sugar Act, 2001** details the composition of the Board as follows:-
- (a) a non-executive Chairman elected by the Board from among the representatives of the growers representatives on the Board and appointed by the Minister;*
 - (b) seven representatives elected by growers and appointed by the Minister;*
 - (c) three representatives elected by millers and appointed by the Minister;*
 - (d) the Permanent secretary in the Ministry for the time being responsible for matters relating to agriculture;*
 - (e) the Permanent Secretary to the Treasury;*
 - (f) the Director of Agriculture; and*

(g) the Chief Executive of the Board appointed under section 10 who shall be an ex-officio member and secretary to the Board.

45. **Paragraph 2(1) and (2) of the First Schedule** of the Act provides that;

“ the Board shall meet not less than four times in every financial year and not more than four months shall elapse between the date of one meeting and the date of the next meeting. (2) notwithstanding the provision of subparagraph (1), the chairman, and upon requisition in writing by at least five members shall, convene a meeting of the Board at any time for the transaction of the business of the Board”

46. **Subparagraph (4) of the First Schedule** of the Act provides that *“the Quorum for the conduct of the business of the Board shall be seven members”*.

47. **Subparagraph (5) and (6) of the First Schedule** gives the chairing of the Boards meetings to the Board Chairman, or, in his absence, the Vice-chairman, or, in absence of the two, any other member elected by the members.

48. From the foregoing, the Committee observed that contrary to the Minister's opinion, the Board **must** be consulted prior to making regulations relating to importations of sugar. This is provided for under Section 33 of the Sugar Act, 2001, as follows;

“the Minister may, in consultation with the Board, make regulations generally for the better carrying out of the provisions of this Act and without prejudice to the generality of the foregoing, such regulations shall provide for-
(a) the regulation and control of the production, manufacturing, marketing, importation or exportation of sugar and its by-products”

49. The Committee also observed that Section 4 of the Sugar Act, 2001 vests the function of regulating, developing and promoting the sugar industry in the Kenya Sugar Board. It therefore follows that the Minister **must** consult the statutory regulator of the industry in the event that he is to make regulations that affect the industry. In this case, regulations governing importations of sugar are matters that relate to the Industry.

50. The Committee further observed that, if the **objects and functions of the Board** as stipulated in Section 4 of the Act are to be achieved, the Board must be consulted on such matters as making of regulations concerning sugar importation.

51. Further, the Committee noted that the Kilimo House meeting was not a meeting of the Board:-

- (i) since, it was instigated by the Permanent Secretary, Ministry of Agriculture. Meetings of the Board are called in the manner stipulated under subparagraph 2(1) of the First Schedule of the Act;
- (ii) as out of the eleven (11) persons present, only two were members of the Board (Permanent Secretary, Ministry of Agriculture and the Board Chairman) one was an *ex-officio* member (Chief Executive, KSB). The meeting therefore did not form the statutory quorum to constitute a meeting of the KSB Board;
- (iii) since it was chaired by the Permanent Secretary, Ministry of Agriculture. Meetings of the Board can be chaired only as stipulated in subparagraphs (5) and (6) of the First Schedule of the Sugar Act;
- (iv) Section 8(1)(e) & (f) of the State Corporations Act expressly stipulates on the chairing and quorum of Board sittings of a state corporation. In this context, the Kilimo House meeting and the meeting(s) between Minister for Agriculture and the Board's chair cannot be construed to be meetings of the Board;

52. In Addition,

- (i) the deliberations of the consultative meeting at Kilimo House were not communicated to the Board;
- (ii) the Chairman of the Board informed the Committee that, by the time he left the meeting, a consensus/way forward on the intended importations had not been reached;

- (iii) neither the Board nor its Chairman was privy to the contents of the letter REF: KSB/COM/1A/A of November 14, 2005 (**Appendix IV**) which was written by the management to communicate and formalise the resolution of the meeting to the Permanent Secretary, Ministry of Agriculture. The Chief Executive, KSB denied having knowledge of the letter prior to February 7, 2006 when it was brought before the Committee. In this regard, the Committee was informed that the said letter was done on instructions of the then Permanent Secretary, Ministry of Agriculture Mr. Ongwae;

53. The Committee held that, pursuant to Section 5 and subparagraph (4) of the First Schedule of the Act, meetings between the Minister and KSB's Board Chairman and/or Vice-chairman cannot be construed to be meetings of the Board. Decisions and proposals reached at such meetings are not binding on the Board, unless the properly constituted Board ratifies them. At no time did the KSB Board consider or ratify proposals advanced by the Minister after his alleged meeting with the Board Chairman and Vice-chairman.

After the Legal Notice, what did the Board resolve?

54. As stated elsewhere in this Report, the Committee heard that the Board, in its 61st meeting of January 18, 2006:-
- (i) noted that the Notice was inconsistent with their resolution under MIN. No. 1/2006,
 - (ii) rejected the Legal Notice in its entirety as it was a "unilateral decision by the Minister for Agriculture and at no material time was it issued **in consultation** with the Kenya Sugar Board",
 - (iii) resolved to issue a Press Statement signed by its Chairman to confirm to its stakeholders that "none of its members had been so compromised and make public the resolution of its members disclaiming the Legal Notice (**See appendix VI**)

Was the action of Minister illegal?

55. Arising from the foregoing, the Committee held that:-

- (i) by failing to consult the Board, the Minister violated Section 33 of the Sugar Act;
- (ii) the words "in consultation with the Board" as contained in the Legal Notice No. 2 of 2006 were therefore misrepresentation of the truth;
- (iii) to the extent that the Minister failed to consult the Board prior to releasing the Legal Notice No. 2 of 2006 consequent to which the Notice failed to incorporate the resolutions of its 60th Meeting, the Notice is irregular and illegal; and
- (iv) by failing to consult the Board as stipulated in section 33 of the Sugar Act, the Minister offended Sections 10 and 19 of the Public Officers Ethics Act, 2003.

In light of the COMESA FTA Regulations, what is the role of KSB in allocation of sugar import Quotas?

56. The Sugar Act, 2001 vests the functions of regulating, developing and promoting the sugar industry in the Kenya Sugar Board. From the evidence adduced, the Committee heard that, Kenya acceded to COMESA Free Trade Agreement on October 31, 2000, pursuant to which there was a marked surge of sugar imports from the region, with dire effects on the domestic sugar market. Kenya subsequently invoked and was granted a COMESA FTA Safeguard window in the year 2002 which was renewed in 2003 for a four-year term commencing in 2004. It is on this window that the prevailing sugar importations are based.

57. The Committee noted that, in the year 2003, under Section 33 of the Sugar Act 2001, the Ministry of Agriculture issued Legal Notice No. 39 being the Sugar (Imports, Exports and By-Products) Regulations which were put into effect for the first time in 2004 consequent to which the Board, vide gazette Notice No. 2127 of March 19, 2004 elected to allocate quotas to eighteen traders to import sugar in the period March to July 2004.

58. The Committee also heard that, the legality of the Gazette Notice No. 2127 was questioned by certain importers who had not been allocated quotas, who ignored it and applied Notice No. 12 of March 1, 2004. The effect of this was that most of the 18 traders allocated quotas were locked out of the 2004 quota for mill white sugar and proceeded to institute legal proceedings against the Board and Kenya Revenue Authority seeking claims for lost business.
59. The Committee further heard that almost at the same period, during the 14th meeting of COMESA Trade and Customs Committee in May 2004, a complaint was raised that Kenya was engaging in Non-Tariff Barriers (NTBs) through the quota allocation system which, ostensibly, was in breach of Articles 49 (Elimination of NTBs), 55 (Competition), 57 (National Treatment) and 61 (Safeguard Clause) of COMESA Treaty. Kenya gave an assurance to harmonise its trade systems with the trading policy within the COMESA trading block.
60. The Committee took cognisance of the fact that, in the 2005 quota and in line with the COMESA FTA Regulations, the Board issued Gazette Notice no. 1405 of February 25, 2005 (*whose contents were subjected to examination by the Committee as they contravened the KSB's Board resolution*), providing for importation of mill white sugar by traders and millers in the ratio of 70 to 30 respectively, on first come-first served basis in the spirit of liberalized and free trade. Again the Board was sued by importers who preferred quota allocation to the free for all system, arguing that KSB was contravening Section 6(2) Sugar (Imports, Exports and By-Products) Regulations (Legal Notice No. 39). The Courts ruled in favour of KSB.
61. The Committee also noted that the Board has had various correspondences with the office of the Secretary General of Comesa with a view to establishing and adopting a sugar import policy that is in tandem with national statutes and the Comesa Treaty.
62. Further, the Committee noted that, even though the Board had resolved that written concurrence be sought from the Ministries of Trade and Agriculture, the Treasury, Kenya Revenue Authority and the Attorney-General prior to putting the *Legal Notice*, this was not done.

63. From the foregoing, the Committee observed that, much as the Board and the Ministry felt that the Regulations initially offended Articles 4,5,49,55 57 and 61 (**See Appendix VIII**) and Article 27 of Vienna Protocol on Treaties, the Chief Executive of the Board failed to get the opinion of the Office of the Attorney-General before putting forth the Notice as directed by the Board.
64. Further, taking cognisance of the relevant Articles of the Vienna Convention on International Treaties, having carefully examined Articles 49, 55, 56, 57 and 61 of the Comesa Treaty (**See Appendix VIII**) *vis-à-vis* the role of Kenya Sugar Board as provided for in the Sugar Act, the Committee held that, once COMESA has allocated a quota to its member state under the FTA and the extended Safeguard window, it is up to the member state to determine how the quota will be exhausted. The mechanism(s) of determining how Kenya's quota would be achieved is a statutory preserve of the Kenya Sugar Board. Invariably, KSB is expected to advice the government in this regard.

At the same time, the Committee expressed concern on conflicting information and uncertainty in the profits made by Chemelil Sugar Company on behalf of millers in the year 2005 importation exercise. In a submission to the Committee last year, the Minister for Agriculture alluded that the company realized Ksh. 600 million from the importations. The figure was later reduced to Ksh. 78 million and then adjusted to Ksh. 40 million.

RECOMMENDATIONS

65. It is important to note that: -

- (a) the Committee had deliberated at length on a similar matter during preparation of its 13th Report which has since been laid before this House. In preparation of the 13th Report, and in connection with running of State Corporations by parent Ministries, the Attorney-General advised and asserted that unless expressly provided for in a state corporation's enabling statute, the role of a parent Ministry is chiefly advisory as they are normally and adequately represented in the boards of state corporation under them and as such should ventilate their views in board meetings of those corporations; and,
- (b) in its 13th Report, the Committee took great exception to the finding that, in execution of sugar importations for the 2005 quota under the COMESA FTA arrangements, KSB had been disregarded in making Gazette Notice No. 1405 of February 25, 2005. The Notice failed to reflect the resolutions of the Board on the then intended sugar importations. The Chief Executive of the Board, Mr. A. Otieno had informed the Committee that he made the Notice after consultation only with the Minister for Agriculture Hon. Kipruto arap Kirwa, MP.

66. Arising from the evidence adduced, papers laid and the foregoing deliberations by the Board, the Committee makes the following specific observations:-

- (i) that, by instructing the management of the Board to attend and draw the letter REF: KSB/COM/1A/A of November 14, 2005 (**Appendix IV**) to the Permanent Secretary, Ministry of Agriculture at the meeting at Kilimo House and issuing other instructions to the Chief Executive, who is only answerable to the Board (**Section 10 of the Sugar Act, 2001**), the Ministry of Agriculture usurped the powers of the Board; The Committee expresses the view that it was on the strength of this letter that the Kilimo House meeting was formalised and the contentious *Legal Notice* issued;

- (ii) that, continued usurping of the statutory powers of the Board is not only irregular and illegal but also renders the regulatory & control functions of the Board futile therefore negating its very existence;
- (iii) that, the continued usurping of the regulatory and control powers of the Board on sugar importations would have direct negative implications on its financial performance;
- (iv) that, considering that prior to February 8, 2006, the Board was not privy to the management's letter REF: KSB/COM/1A/A of November 14, 2005 to the then Permanent Secretary, Ministry of Agriculture, there was deliberate action by the KSB management to conceal its dealings with the Ministry in respect of the intended importations and as such the Board was not aware of such dealings, and;
- (v) that, the Board was not consulted prior to releasing Legal Notice No. 2 of 2006.

67. The Committee recommends that:-

- (i) **the Director of Kenya Anti-Corruption Commission institutes investigations into the execution of sugar importations into the country under the COMESA FTA arrangements for the periods 2004, 2005 and 2006 particularly on the roles played by officers in the Ministries of Agriculture, Trade & Industry, the Kenya Revenue Authority and the Kenya Sugar Board (including Board members) with view to preferring appropriate charges against any person(s) found culpable;**
- (ii) **the Director of Kenya Anti-Corruption Commission institutes investigations into to the role of the Hon. Kipruto arap Kirwa, MP, Mr. James E. Ongwae and Mr. Andrew Otieno in the execution of sugar importations into the country under the COMESA FTA arrangements for the periods 2004, 2005 and 2006;**
- (iii) **pursuant to sections 10, 35 and 36 of the Anti-Corruption and Economic Crimes Act, 2003, the**

findings and recommendations of the Director of Kenya Anti-Corruption Commission in respect of (i) and (ii) above be included in report of the fourth quota of the year 2006;

- (iv) the Hon. Kipruto arap Kirwa and Mr. Andrew Otieno, Chief Executive of the Kenya Sugar Board immediately steps aside to allow the Kenya Anti-Corruption Commission carry out the above-mentioned investigations;
- (v) without compromising the autonomy of the Kenya Sugar Board and in order to streamline the sector and safeguard national interests in the importation of sugar, an Inter-Ministerial Committee be formed comprising and not limited to, representatives of Kenya Revenue Authority, the Office of the Attorney General, Ministry of Agriculture, the Kenya Sugar Board and the Ministry of Trade & Industry (all not below the level of a Deputy Secretary) to set guidelines for sugar importations by 31st December, 2006 and make public the resultant regulations and guidelines, which would then be employed for all sugar imports under the COMESA FTA Safeguard window for the period up to the year 2008;
- (vi) the Minister for Agriculture, now and in the future, refrains from interfering with the day-to-day activities of the Board; and
- (vii) where the parent Ministry has, in the past, irregularly negated administrative decision(s) made by the Board in exercise of its statutory powers, the Board should be at liberty to revisit the matter(s) and make appropriate decision(s).

APPENDIX I

**MINUTES OF THE PROCEEDINGS OF THE
COMMITTEE**

MINUTES OF THE FIRST SITTING OF THE PUBLIC INVESTMENTS COMMITTEE ON MATTERS OF KENYA SUGAR BOARD ACCOUNTS AND IMPORTATION OF SUGAR HELD IN COMMITTEE ROOM NO. 7, PARLIAMENT BUILDINGS, ON THURSDAY, 15TH DECEMBER, 2005 AT 10:00 A.M.

PRESENT

The Hon. J.B.N. Muturi, MP - (Chairman)
The Hon. Wafula Wamunyinyi, MP
The Hon. Gachara Muchiri, MP
The Hon. Ali Bahari, MP
The Hon. K.M. Sang, MP
The Hon. (Dr.) Sammy Rutto, M.P.

ABSENT WITH APOLOGY

The Hon. Jimmy Angwenyi, MP
The Hon. Peter G. Munya, MP
The Hon. Gitau Kabogo, MP

IN ATTENDANCE

NATIONAL ASSEMBLY

MS. Phylis Mirungu - Senior Clerk Assistant
Mr. S.J. Njoroge - Third Clerk Assistant

MINISTRY OF FINANCE (DGIPE)

Mrs. T. N. Gathaara - Under Secretary

CONTROLLER AND AUDITOR GENERAL

Mr. Sylvester N. Kiini - Deputy Director of Audit
Mr. Charles N. Nyanyuki - Principal Auditor

INSPECTORATE OF STATE CORPORATIONS

Mrs. T. K. Gichana - Inspector I

MINISTRY OF AGRICULTURE

Mrs. Emily M. Gatuguta - Senior Deputy Secretary/SC

MIN. NO. 001/2005/2006 (2)

EVIDENCE

Report and Accounts of the Kenya Sugar Board and Sugar Development Fund for the years 2000/2001 and the Certificate thereon by the Controller and Auditor General.

Mr. Andrew O. Otieno, Chief Executive, Kenya Sugar Board, accompanied by Messrs Rosemary Mkok Company Secretary and Zacheus Kivindu, Management Accountant appeared before the Committee and gave evidence on the Accounts of the Board and those of the Sugar Development Fund for the year 2000/20001.

MIN. NO. 002/2005/2006(002): EVIDENCE: PARAGRAPH 1 OF 2000/2001 ACCOUNTS- OPERATING RESULTS.

The Committee was informed that the difference in the Operating Results figure was due to decreased levy collections, loan repayments and increase in employment costs.

The Committee Concluded taking evidence on the paragraph.

MIN. NO. 003/2005/2006(2): EVIDENCE: PARAGRAPH 2- FORMER CHAIRMAN'S IMPREST

The Committee heard that the Board has since forwarded the matter to the Inspectorate Corporations for necessary action and recovery.

Having taken evidence on the paragraph, the Committee directed that: the Chief Executive;-

- (i) and the Inspectorate of State Corporations (ISC) pursues the matter expeditiously and report progress within 30 days period. (Action:- ISC); and,
- (ii) to provide breakdown information on amounts and the diverse date and, which the Imprests were issued.

The Committee resolved to treat the paragraph as concluded save for the above-mentioned directives

MIN. NO.004/2005/2006(2): EVIDENCE: PARAGRAPH 3- RETIREMENT BENEFITS

The Committee directed the Chief Executive to pursue the matter expeditiously and inform Mr. Francis M. Chahonyo of the full amount claimable from himself and the amount claimable from the National Bank and progress report be made to the Committee in 30 day's time.

The Committee treated the paragraph concluded save for the above-mentioned directive.

MIN. NO.005/2005/2006(2): EVIDENCE: PARAGRAPH 4 MEDICAL SCHEME AND ALLOWANCES

The Committee directed the Chief Executive to seek *post-facto* approval from the State Corporations Advisory Committee for those allowances paid to members of staff without approval and provide evidence on progress in 30 days.

The Committee treated the paragraph concluded save for the above-mentioned directive.

MIN. NO.006/2005/2006(2): EVIDENCE: PARAGRAPH 5 UNSUPPORTED AMOUNTS

The Committee directed the Chief Executive to liaise with the Kenya National Audit Office with a view to resolving the matter by providing all supporting vouchers/documents in respect of the expenditures to KENAO and provide progress report in three weeks' time

The Committee treated the paragraph as concluded save for the above-mentioned directive.

MIN. NO. 007/2005/2006(2): DEFERRED EVIDENCE: ACCOUNTS OF SUGAR DEVELOPMENT FUND: PARAGRAPH 1- LOSS ON EXPORT AND IMPORT OF RAW SUGAR

The Committee heard that the Board was in the process of seeking subvention from the Treasury for the losses incurred. Further the Committee was informed that there is no evidence to show whether the Board (then Authority) sought and was granted leave not to employ international tendering procedures prior to importing the sugar.

The Committee directed the Chief Executive to provide copies of evidence, if any, that other firms tendered via Email.

Further, taking cognisance of the fact that during compilation of its 13th Report, it had exhaustively deliberated on the year 2005 importations of sugar under the COMESA FTA arrangements, the Committee advised the management to uphold principles of prudent commercial practices in the 2006 quota and be more stringent in exercise of its statutory powers of regulating and controlling the sugar industry as vested on the Kenya Sugar Board by the Sugar Act, 2001.

The Committee deferred taking evidence on the paragraph.

MIN. NO. 008/2005/2006(2):

**DEFERRED: EVIDENCE: ACCOUNTS
OF SUGAR DEVELOPMENT FUND:**

The Committee deferred taking evidence on the subsequent paragraphs in the Accounts of Sugar Development Fund until a later date.

MIN. NO. 009/2005/2006(2):

ADJOURNMENT

And there being no other business, the Chairman adjourned the Sitting at 1.15:00 p.m. until Friday, August 19, 2005 at 10:00 a.m.

Hon. J. B. N. Muturi, MP

Signed:.....
(Chairman)

March 7, 2006

Date:.....

MINUTES OF THE SECOND SITTING OF THE PUBLIC INVESTMENTS COMMITTEE ON MATTERS OF KENYA SUGAR BOARD ACCOUNTS AND IMPORTATION OF SUGAR HELD IN COMMITTEE ROOM NO. 7, PARLIAMENT BUILDINGS, ON THURSDAY, FEBRUARY 2, 2006 AT 10:00 A.M.

PRESENT

The Hon. J.B.N. Muturi, MP - (Chairman)
The Hon. Gachara Muchiri, MP
The Hon. Ali Bahari, MP
The Hon. K.M. Sang, MP
The Hon. Jimmy Angwenyi, MP

ABSENT WITH APOLOGY

The Hon. (Dr.) Sammy Rutto, M.P.
The Hon. Peter G. Munya, MP
The Hon. Gitau Kabogo, MP
The Hon. Wafula Wamunyinyi, MP

IN ATTENDANCE

NATIONAL ASSEMBLY

Ms. Phylis Mirungu - Senior Clerk Assistant
Mr. S.J. Njoroge - Third Clerk Assistant

MINISTRY OF FINANCE (DGIPE)

Mrs. T. N. Gathaara - Under Secretary

CONTROLLER AND AUDITOR GENERAL

Mr. Sylvester N. Kiini - Deputy Director of Audit
Mr. Charles N. Nyanyuki - Principal Auditor

INSPECTORATE OF STATE CORPORATIONS

Mrs. T. K. Gichana - Inspector I
Mr. Patrick Wandaka - Inspector

MINISTRY OF AGRICULTURE

Mrs. Emily M. Gatuguta - Senior Deputy Secretary/SC

MIN. NO. 010/2005/2006(2) EVIDENCE

Report and Accounts of the Kenya Sugar Board and Sugar Development Fund for the years 2000/2001 and the Certificate thereon by the Controller and Auditor General.

Mr. Andrew O. Otieno, Chief Executive, Kenya Sugar Board, accompanied by Messrs; Yufualis Okubo, Legal Officer; Emma Malianda, Ag. Head of Internal Audit; P. Njeru, Ag. Head of Planning and Zacheus Kivindu, Management Accountant appeared before the Committee to give evidence on intended importation of Sugar as stipulated on Legal Notice No. 2 of 2006, the Accounts of the Board and those of the Sugar Development Fund for the year 2000/2001.

MIN. NO. 011/2005/2006(2): DEFERMENT OF TAKING OF EVIDENCE.

The Committee expressed concern that the Board was not competently represented as the substantive office holders in the Management and the parent Ministry had not attended the sitting. The Chief Executive informed the Committee that the substantive Company Secretary was held up in an official function of the Board.

In the circumstance, the Committee deferred taking evidence on the accounts of SDF until Wednesday, February 08, 2006 when the Chief Executive will be expected to appear before the Committee alongside the substantive office holders.

Further, the Committee noted that it had earlier in December 2005 expressed itself on the matter of importation of sugar where it encouraged the Board to avoid situations where its powers as vested on it by the Sugar Act, 2001 would be diluted. Noting that the Act may have envisaged the Board to make profits in regulation and control of sugar importations, the Committee observed that such approaches as the one put forward under the *Legal Notice No. 2 of 2006* may have adverse financial implications on the Board and may usurp the regulatory and control roles of the Board. **In this respect, the Committee resolved to invite the Chairman of the Board in its meeting of Wednesday, February 15, 2006 to appear alongside the Management and the Permanent Secretary, parent Ministry to give evidence on the implications of the *Legal Notice* on the powers of the Board as vested on it by the Sugar Act, 2001.**

MIN. NO. 012/2005/2006(2): ADJOURNMENT

And there being no other business, the Chairman adjourned the Sitting at 11:00 a.m. until Wednesday, February 8, 2006 at 10:00 a.m.

Hon. J. B. N. Muturi, MP

Signed:.....

(Chairman)

March 7, 2006

Date:.....

MINUTES OF THE THIRD SITTING OF THE PUBLIC INVESTMENTS COMMITTEE ON MATTERS OF KENYA SUGAR BOARD ACCOUNTS AND IMPORTATION OF SUGAR HELD IN COMMITTEE ROOM NO. 7, PARLIAMENT BUILDINGS, ON WEDNESDAY, FEBRUARY 8, 2006 AT 10:00 A.M.

PRESENT

The Hon. J.B.N. Muturi, MP - (Chairman)
The Hon. Wafula Wamunyinyi, MP
The Hon. Gachara Muchiri, MP
The Hon. Ali Bahari, MP
The Hon. K.M. Sang, MP
The Hon. (Dr.) Sammy Rutto, M.P.
The Hon. Jimmy Angwenyi, MP

ABSENT WITH APOLOGY

The Hon. Peter G. Munya, MP
The Hon. Gitau Kabogo, MP

IN ATTENDANCE

NATIONAL ASSEMBLY

Ms. Phyllis Mirungu - Senior Clerk Assistant
Mr. Samuel J. Njoroge - Third Clerk Assistant

MINISTRY OF FINANCE (DGIPE)

Mrs. T. N. Gathaara - Under Secretary

CONTROLLER AND AUDITOR GENERAL

Mr. Sylvester N. Kiini - Deputy Director of Audit
Mr. Charles N. Nyanyuki - Principal Auditor

INSPECTORATE OF STATE CORPORATIONS

Mrs. T. K. Gichana - Inspector I
Mr. Patrick Wandaka - Inspector

MINISTRY OF AGRICULTURE

Mr. Wilson Songa - Agriculture Secretary
Mr. J. K. K. Gichuru - Principal State Council

MIN. NO. 013/2005/2006(2) EVIDENCE

Report and Accounts of the Kenya Sugar Board and Sugar Development Fund for the years 2000/2001 and the Certificate thereon by the Controller and Auditor General.

Mr. Andrew O. Otieno, Chief Executive, Kenya Sugar Board, accompanied by Messrs; Joseph Mbai, Board Chairman and Thomas Mamken, Head of Finance appeared before the Committee and gave evidence on the Accounts of the Board and those of the Sugar Development Fund for the years 2000/20001 and on the implications of the *Legal Notice* on the powers of the Board as vested on it by the Sugar Act, 2001.

MIN. NO. 014/2005/2006(2): EVIDENCE: ACCOUNTS OF SUGAR DEVELOPMENT FUND: PARAGRAPH 1-LOSS ON EXPORT AND IMPORT OF RAW SUGAR.

The Chief Executive informed the Committee the Board was in the process of seeking subvention from the Treasury for the losses incurred. Further the Committee was informed that there is no evidence to show whether the Board (then Authority) sought and was granted leave not to employ international tendering procedures prior to importing the sugar while some firms were discovered to be non-existent.

The Committee observed that evidence given by the management touched on the contents of Legal Notice No. 2 of 2006, which was bound to bring forth financial implications on the Board. In the Circumstances and in furtherance to its mandate, the Committee reiterated its earlier decision to continue taking evidence on the matter of intended sugar importations as envisaged by the *Notice*.

MIN. NO. 015/2005/2006(2):EVIDENCE: IMPORTATION OF SUGAR AS ENVISAGED BY LEGAL NOTICE NO. 2 OF 2006 VIS-À-VIS POWERS OF THE BOARD AS VESTED ON IT BY SUGAR ACT, 2001.

Pursuant to Section 16 of National Assembly Powers and Privileges) Act, Cap 6 of Laws of Kenya, the Committee resolved to examine the Chief Executive, Kenya Sugar Board, on Oath.

On Oath, the Chief Executive informed the Committee:-

- (i) that, during its meeting of 31st October, 2005 the Board resolved to review legal Notice No. 39 of 2003 so as to incorporate a free for all system on first come first for the tariff basis. The Board also directed the Management to prepare a report considering the correspondences between itself Comesa and the Ministry. Further,

the Permanent Secretaries, Finance, Trade and Agriculture be invited and consulted prior to preparing the Board Paper;

- (ii) that, preliminary informal consultation took place between the Chief Executive, Board Chairman and the Permanent Secretary, Ministry of Agriculture;
- (iii) that, the Meeting of November 2005, which took place in Kilimo House, was at the instigation of the then Permanent Secretary, Ministry of Agriculture. The meeting recommended that the Sugar (Imports, Exports & By-Products) Regulations, 2003 be amended in Regulation 6 (2),(3) and (4) to remove the three existing options for the administration of imports by way of quota allocation, tenders and auctions. The meeting recommended that the section be replaced by a new section that read;

The Board shall facilitate the importation of raw/mill white and white refined sugar by registered importers/millers on a non-discriminatory and liberalized basis”

This recommendation was not presented to the Board for ratification.

- (iv) that, the Board’s management formalised the resolutions of the Kilimo House Meeting and instruction of the P.S Agriculture by writing to the P.S. on November 14, 2005.
- (v) that, the KSB Board in its subsequent sittings affirmed its resolution to adopt the non-discriminatory approach in the importations;
- (vi) that, though he was instructed by the Board, he did not hold consultative meetings with the Office of the Attorney-General to iron-out legal matters prior to making the *Notice*; and,
- (vii) that, he was not privy to the contents of the letter REF: KSB/COM/1A/A of November 14, 2005 signed by the KSB Secretary, R. Mkok, until February 7, 2006;

MIN. NO. 016/2005/2006(2): ADJOURNMENT

And there being no other business, the Chairman adjourned the Sitting at 1.50 p.m. until afternoon.

AFTERNOON SITTING:

PRESENT

The Hon. J.B.N. Muturi, MP - (Chairman)
The Hon. Wafula Wamunyinyi, MP
The Hon. Gachara Muchiri, MP
The Hon. Ali Bahari, MP
The Hon. K.M. Sang, MP
The Hon. (Dr.) Sammy Rutto, M.P.
The Hon. Jimmy Angwenyi, MP

ABSENT WITH APOLOGY

The Hon. Peter G. Munya, MP
The Hon. Gitau Kabogo, MP

IN ATTENDANCE

NATIONAL ASSEMBLY

Ms. Phyllis Mirungu - Senior Clerk Assistant
Mr. Samuel Njoroge - Third Clerk Assistant

MINISTRY OF FINANCE (DGIPE)

Mrs. T. N. Gathaara - Under Secretary

CONTROLLER AND AUDITOR GENERAL

Mr. Sylvester N. Kiini - Deputy Director of Audit
Mr. Charles N. Nyanyuki - Principal Auditor

INSPECTORATE OF STATE CORPORATIONS

Mrs. T. K. Gichana - Inspector I
Mr. Patrick Wandaka - Inspector

MINISTRY OF AGRICULTURE

Mr. Wilson Songa - Agriculture Secretary

**MIN. NO. 017/2005/2006(2): EVIDENCE: IMPORTATION OF SUGAR AS
ENVISAGED BY LEGAL NOTICE NO. 2 OF
2006 VIS-À-VIS POWERS OF THE BOARD
AS VESTED ON IT BY SUGAR ACT, 2001.**

On Oath, the Board Chairman informed the Committee: -

- (i) that, he was invited to a meeting at Kilimo House to deliberate on sugar importation matters in preparation of a subsequent meeting of the Board which was to deliberate on the legal way forward on the importations. By the time he left, the Kilimo House the meeting had not made a resolution on the matter;
- (ii) that, the Board was not privy to the contents of the letter REF: KSB/COM/1A/A of November 14, 2005 by the Board Secretary to the Permanent Secretary, Ministry of Agriculture;
- (iii) that, contrary to the submission by the Chief Executive to the Committee, the Legal Notice No. 2 of 2006 was not done in consultation with the Board;
- (iv) the Board finalised its deliberation on the intended contents of the Legal Notice on 13th January, 2006 at the end of this meeting. The Notice was to come out after this date;
- (v) that, the Legal Notice (No. 2 of January 13, 2006) was brought to the attention of the Board at its meeting on 13th January, 2006 at 2.15 p.m.;
- (vi) that, concerned that the Notice was irregular to the extent that the powers to regulate and control the importation vested on the Board and that the notice was bound to have adverse financial effects on the Board, the cane and subsequently on the prices of sugar in the country, the Board intended to meet the Minister and prevail upon him to withdraw the Notice; this is the position of the Board, to date;
- (vii) that, the Board met on 18th January, 2006 where it looked further into the implications of the Notice. It is in that meeting that Board became privy to information that the Minister had publicly alleged that some members of the Board had been bribed to manipulate the intended importations;
- (viii) that, the Board resolved to put a paid press release stating its position; later and in order to avoid a confrontational approach, the Board Chair was mandated by the Board to request for a meeting with the Minister and to press for another meeting with the full Board in order to prevail upon him to withdraw the Legal Notice; and,
- (ix) that, when the Minister met with the full Board, he declined to withdraw the notice and instructed that he would leave some regulatory powers on the Board in respect of the whole exercise; and,
- (x) that, the Board has since discerned that with the Notice in place, any attempt to exercise its regulator and/or control powers as

conferred by the Sugar Act, 2001 would attract litigations as those powers had been taken away by the *Notice*.

The Committee observed with concern that:-

- (i) much as the Board and the Ministry felt that the Regulations initially offended articles 4,5,49,55 57 and 61 and Article 27 of Vienna Protocol on Treaties, the Chief Executive of the Board failed to seek the opinion of the Office of the Attorney-General before putting forth the *Notice*;
- (ii) even though the Board had resolved that written concurrence be sought from the Ministries of Trade and Agriculture, the Treasury, Kenya Revenue Authority and the Attorney-General prior to putting the Legal *Notice*, this was not done;

Further, the Committee took great exception on assertion that prior to February 8, 2006, both the Board and the Chief Executive were not privy to the letter REF: KSB/COM/1A/A of November 14, 2005 to the Permanent Secretary, Ministry of Agriculture, which letter was signed by R. Mkok on behalf of the Chief Executive. The Committee observed that could be it is on the strength of that letter that the Kilimo House meeting was formalised and the contentious Legal *Notice* issued. In the circumstances, the Committee resolved:-

- (i) to defer taking evidence on the matter until Thursday, February 9, 2006 at 9.30 a.m. when the Management will be required to appear again alongside the Board Chairman, Ms. Rosemary Mkok (Company Secretary) who signed the letter REF: KSB/COM/1A/A of November 14, 2005 and Mr. Yufualis Okubo, management's Legal Officer; and
- (ii) that, the Minister for Agriculture appears before it on Wednesday, 22 February 2006 at 10.00 a.m. to give evidence on the matter.

MIN. NO.018/20045/2006(2): PAPERS LAID

The following papers were laid before the Committee:

- (i) Letter REF. KSB/PD/SR/VOL.111/74 dated January 4, 2006; laid by Chief Executive
- (ii) Letter REF. KSB/PD/SR/VOL.111/75 dated January 4, 2006 ; laid by Chief Executive
- (iii) Letter REF. KSB/PD/SR/VOL.111/76 dated January 13, 2006 to the P.S. Ministry of Agriculture informing him of the resolution of the Board in its 60th Sitting held on the same day; laid by Chief Executive

- (iv) Copy of *PRESS RELEASE ON SUGAR INDUSTRY*, dated 24th January 2006 by the Minister for Agriculture; laid by Board Chairman;
- (v) Copy of Minutes of the Board addressing itself on the sugar importations; and,
- (vi) Copy of intended press release by the Board titled; *Kenya Sugar Board's Position on the Comesa Sugar Imports for the year 2006 at Sukari Plaza, Nairobi* by the Chairman, Kenya Sugar Board; laid by the Board Chairman

MIN. NO. 019/2005/2006(2): ADJOURNMENT

And there being no other business, the Chairman adjourned the Sitting at 6.40 p.m. until Thursday, February 9, 2006 at 10:00 a.m.

J.B. N. Muturi, MP

Signed:.....

(Chairman)

March 7, 2006

Date:.....

MINUTES OF THE FOURTH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE ON MATTERS OF KENYA SUGAR BOARD ACCOUNTS AND IMPORTATION OF SUGAR HELD IN COMMITTEE ROOM NO. 7, PARLIAMENT BUILDINGS, ON THURSDAY, FEBRUARY 9, 2006 AT 10:30 A.M.

PRESENT

The Hon. J.B.N. Muturi, MP - (Chairman)
The Hon. Wafula Wamunyinyi, MP
The Hon. Gachara Muchiri, MP
The Hon. Ali Bahari, MP
The Hon. K.M. Sang, MP
The Hon. (Dr.) Sammy Rutto, M.P.

ABSENT WITH APOLOGY

The Hon. Peter G. Munya, MP
The Hon. Gitau Kabogo, MP
The Hon. Jimmy Angwenyi, MP

IN ATTENDANCE

NATIONAL ASSEMBLY

MS. Phylis Mirungu - Senior Clerk Assistant
Mr. S.J. Njoroge - Third Clerk Assistant

MINISTRY OF FINANCE (DGIPE)

Mrs. T. N. Gathaara - Under Secretary

CONTROLLER AND AUDITOR GENERAL

Mr. Sylvester N. Kiini - Deputy Director of Audit
Mr. Charles N. Nyanyuki - Principal Auditor

INSPECTORATE OF STATE CORPORATIONS

Mrs. T. K. Gichana - Inspector I
Mr. Patrick Wandaka - Inspector

MIN. NO. 020/2005/2006(2) EVIDENCE

Report and Accounts of the Kenya Sugar Board and Sugar Development Fund for the years 2000/2001 and the Certificate thereon by the Controller and Auditor General.

Mr. Andrew O. Otieno, Chief Executive, Kenya Sugar Board, accompanied by Messrs; Joseph Mbai, Board Chairman; Rosemary Mkok, Company Secretary; Yufualis Okubo, Legal Officer and Patricia Njeru, Ag. Head of Planning appeared before the Committee to give evidence on the Accounts of the Board and those of the Sugar Development Fund for the years 2000/20001 and on the implications of the *Legal Notice* on the powers of the Board as vested on it by the Sugar Act, 2001.

MIN. NO. 021/2005/2006(2): EVIDENCE: IMPORTATION OF SUGAR AS ENVISAGED BY LEGAL NOTICE NO. 2 OF 2006 VIS-À-VIS POWERS OF THE BOARD AS VESTED ON IT BY SUGAR ACT, 2001.

Pursuant to Section 16 of National Assembly Powers and Privileges) Act, Cap 6 of Laws of Kenya, the Committee examined the Chief Executive, Kenya Sugar Board, on Oath.

On **Oath**, the Company Secretary, Ms. Mkok informed the Committee:-

- (i) that, the Board in its 55th meeting of October 31, 2005 requested the management to do prepare a paper considering the previous litigations, reservations by the COMESA secretariat, and the existing legal framework on sugar importations in consultation with the Permanent Secretaries Ministries of Agriculture, Trade and Finance.
- (ii) that, in mid November, 2005 under the Chairmanship of the then Permanent Secretary Ministry of Agriculture, the management and the Board Chair held an informal exploratory meeting to deliberate on the importations at Kilimo House;
- (iii) that, at the Boards 56th Sitting, the Management presented a paper to the Board and after considering it, the Board refereed the paper to the Tender Committee, which on the basis of Legal Notice No. 39 developed a criteria for regulating, controlling and facilitating the importations,
- (iv) that, the paper was presented before the again Board on 13th January 2006 at its 60th sitting where the after consideration it was adopted and the Board directed the management to communicate the resolution to the Ministry.
- (v) that, the management wrote to the Permanent Secretary Ministry of Agriculture o 13th January 2006 vide letter REF: KSB/C/25/(B) VOL. 111 communicating the resolution of the Board; and,
- (vi) that, it is at the end of the sitting that the Legal Notice No. 2 of 2006 issued on Kenya Gazette Supplement No. 2 of January 13, 2006, was brought to the attention of the Board, which notice members

expressed concern that it was not in line with the Boards deliberations, and,

The Committee observed that:-

- (i) the Management did not disclose to the Board, in its subsequent sitting that an informal consultative and exploratory meeting had been held at Kilimo House to deliberate on the intended importations and that a letter had been done to the P.S. Agriculture to this effect on 14th November 2005; and,
- (ii) the Board has not, to date, adopted the Legal Notice No. 2 of 2006. as it has realised that the notice envisages a free-for-all approach which therefore compromises the powers of the Board to regulate and control the importations. This was realisation was asserted by the legal advice given to the Board's tender committee by the office of the Attorney General, Mr. Patrick Okoth.

The Committee **deferred taking evidence** on the matter until Wednesday, February 22, 2006 when the Minister for Agriculture will be expected to appear before the Committee alongside the Management.

The Chief Executive was directed to provide information on the profits made by M/s. Chemili Sugar Company in respect of the previous sugar importations.

MIN. NO. 022/2005/2006(2): DEFERRED EVIDENCE: PARAGRAPHS 2 - 5 OF 2000/2001 ACCOUNTS OF SDF.

The Committee deferred taking evidence on paragraphs 2 to 5 of the Accounts of SDF until Wednesday, February 15, 2006 at 10.00 a.m.

MIN. NO. 023/2005/2006(2): ADJOURNMENT

And there being no other business, the Chairman adjourned the Sitting at 1.30 P.M. until Wednesday, February 22, 2006 at 9.30 a.m.

J.B. N. Muturi, MP

Signed:.....
(Chairman)

March 7, 2006

Date:.....

MINUTES OF THE FIFTH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE ON MATTERS OF KENYA SUGAR BOARD ACCOUNTS AND IMPORTATION OF SUGAR HELD IN COMMITTEE ROOM NO. 7, PARLIAMENT BUILDINGS, ON WEDNESDAY, FEBRUARY 22, 2006 AT 10:00 A.M.

PRESENT

The Hon. J.B.N. Muturi, MP - (Chairman)
The Hon. Wafula Wamunyinyi, MP
The Hon. Gachara Muchiri, MP
The Hon. Ali Bahari, MP
The Hon. K.M. Sang, MP
The Hon. (Dr.) Sammy Rutto, M.P.
The Hon. Jimmy Angwenyi, MP
The Hon. Gitau Kabogo, MP

ABSENT WITH APOLOGY

The Hon. Peter G. Munya, MP

IN ATTENDANCE

NATIONAL ASSEMBLY

MS. Phylis Mirungu - Senior Clerk Assistant
Mr. S.J. Njoroge - Third Clerk Assistant

MINISTRY OF FINANCE (DGIPE)

Mrs. T. N. Gathaara - Under Secretary

CONTROLLER AND AUDITOR GENERAL

Mr. Sylvester N. Kiini - Deputy Director of Audit
Mr. Charles N. Nyanyuki - Principal Auditor

INSPECTORATE OF STATE CORPORATIONS

Mr. Patrick Wandaka - Inspector

MINISTRY OF AGRICULTURE

Dr. Romano Kiome - Permanent Secretary
Mr. Wilson Songa - Agriculture Secretary

MIN. NO. 024/2005/2006(2): EVIDENCE

Report and Accounts of the Kenya Sugar Board and Sugar Development Fund for the years 2000/2001 and the Certificate thereon by the Controller and Auditor General.

The Hon. Kipruto Arap Kirwa, MP. Minister for Agriculture; appeared before the Committee to give evidence the legality and implications of the *Legal Notice* on the powers of the Board as vested on it by the Sugar Act, 2001.

MIN. NO.025/2005/2006(2): EVIDENCE: IMPORTATION OF SUGAR AS ENVISAGED BY LEGAL NOTICE NO. 2 OF 2006 VIS-À-VIS POWERS OF THE BOARD AS VESTED ON IT BY SUGAR ACT, 2001.

Among other matters, the Minister informed the Committee that:-

- (i) the Board had spent close to Ksh. 200 million in litigations arising from procedures employed in sugar importations;
- (ii) the Regulations as set out in Legal Notice No. 29 of 2001 were superfluous to the in a liberalised market; and
- (iii) in his interpretation of the Sugar Act, consultation with the Board in connection with making of regulations that govern importations of sugar was discretionary,

MIN. NO.026/2005/2006(2): PROCEDURE

On a point of Order, the Minister objected to the representation of the Treasury (DGIPE) by the Officer present and declared that he shall not give evidence before the Committee, if the Officer continued to sit citing earlier conflict between the officer and the Minister. In the Circumstance, the Committee directed the Minister, the officers from the Kenya National Audit Office, the Inspectorate of State Corporations and the Treasury to withdraw from the sitting so as to allow it to make a ruling on the matter.

Having deliberated on the matter, and after consulting the Office of the Clerk of the National Assembly, the Committee resolved that the Officer and the Minister stays in the sitting as it is not within the powers of the Committee to deliberate on matters of conflict between ministries, neither could the Committee dictate on which officer(s) should be sent to represent the various government departments in the sitting.

The Committee therefore continued taking evidence on the matter of importation of Sugar as stipulated on gazette notice No. 2 of 2006.

MIN. NO. 027/2005/2006(2): EVIDENCE: IMPORTATION OF SUGAR AS ENVISAGED BY LEGAL NOTICE NO. 2 OF 2006 VIS-À-VIS POWERS OF THE BOARD AS VESTED ON IT BY SUGAR ACT, 2001.

The Committee observed that :-

- (i) by legal notice No. 2 of 2006, the Minister for Agriculture appear to have taken way the powers of the Board to 'control and regulate' sugar importations; and,
- (ii) that it is the within the mandate of the Board to register interested importers vetted on basis of a criteria developed by itself and regulate the quotas to be allocated to the qualified importer(s);

Having reached a consensus between the Committee and the Minister that Legal Notice No.2 of 2006 was irregular to the extent that the Board was not consulted and the that the Powers of the Board were usurped by way of the Notice, the Committee, advised that:-**In light of the short time available before March 1, 2006 in which date the intended importation was commence, the Minister revokes the Legal Notice No. 2, 2006 and that the Minister, in consultation with the Board, reviews the contents of the notice with a view to incorporating the resolution of the Board in a subsequent Notice.**

The Minister asserted that he would only revoke the notice after due consideration on legal issued involved and consultation with the Board.

The Committee took great exception to this assertion.

MIN. NO. 028/2005/2006(2): REPORT

The Committee, noting the gravity of the matter of sugar importations resolved to compile a Report on the issue for onward tabling before the House.

MIN. NO. 029/2005/2006(2): ADJOURNMENT

And there being no other business, the Chairman adjourned the Sitting at 1.30 p.m. until a later date.

J.B. N. Muturi, MP

Signed:.....

(Chairman)

March 7, 2006

Date:.....

MINUTES OF THE SIXTH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE ON MATTERS OF KENYA SUGAR BOARD ACCOUNTS AND IMPORTATION OF SUGAR HELD IN COMMITTEE ROOM NO. 7, PARLIAMENT BUILDINGS, ON TUESDAY, MARCH 7, 2006 AT 10.30 A.M.

PRESENT:

The following Members of the Committee were present:-

The Hon. J.B.N. Muturi, MP - (Chairman)
The Hon. Wafula Wamunyinyi, M.P.
The Hon. (Dr.) Sammy Rutto, M.P.
The Hon. K.M. Sang, M.P.
The Hon. Ali Bahari, MP
The Hon. Gitau Kabogo, MP
The Hon. Geoffrey Gachara Muchiri, M.P.

ABSENT WITH APOLOGY:

The Hon. Peter G. Munya, M.P.
The Hon. Jimmy Angwenyi, M.P.

IN ATTENDANCE

NATIONAL ASSEMBLY

Mr. S. J. Njoroge - Third Clerk Assistant

MIN. NO. 31/2005/2006(2): CONSIDERATION OF PROGRAMME OF BUSINESS FOR MARCH 2006.

The Committee resolved that the following Corporations should appear before it in its Programme of Business for the month of March :-

- (i) Telkom (K) Ltd - March 15, 2005
- (ii) KenGen (Issue of shares) - 16th March, 2006
- (iii) Coffee Research Foundation - 16th March, 2006
- (iv) Postal Corporation of Kenya (2001/2002) Accounts- Friday, 17th March, 2006
- (v) Kenya Pipeline Corporation - March 24, 2006

MIN. NO. 32/2005/2006(2): CONFIRMATION OF MINUTES

The Minutes of the First to Fifth sittings of the Committee deliberating on matters of Accounts of Kenya Sugar Board and Importation of Sugar

Pursuant to Legal Notice No. 2 of 2006 were confirmed by the members present and signed by the Chairman as follows:-

- (i) Minutes of the First sitting of the Committee held on ..were proposed by Hon. Ali Bahari and Seconded by Hon. K.M. Sang, MP;
- (ii) Minutes of the Second sitting of the Committee held on ..were proposed by Hon. Gachara Muchiri, MP and seconded by Hon. Ali Bahari, MP;
- (iii) Minutes of the Third sitting of the Committee held on ..were proposed by Hon. Wafula Wamunyinyi, MP and seconded by Hon. Gachara Muchiri, MP;
- (iv) Minutes of the Fourth sitting of the Committee held on ..were proposed by Hon. (Dr.) Sammy Rutto, MP and seconded by Hon. Wafula Wamunyinyi, MP; and,
- (v) Minutes of the Fifth sitting of the Committee held on ..were proposed by Hon. Gitau Kabogo, MP and seconded by Hon. (Dr.) Sammy Rutto, MP.

The Secretariat was directed to finalise the draft report on the matter of sugar importations for consideration by the Committee soonest.

MIN. NO. 33/2005/2006(2): ADJOURNMENT

And there being no other business, the Chairman adjourned the Sitting at 12.30 p.m. until a later date.

J.B. N. Muturi, MP

Signed:.....
(Chairman)

June 26, 2006

Date:.....

MINUTES OF THE SEVENTH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE ON MATTERS OF KENYA SUGAR BOARD ACCOUNTS AND IMPORTATION OF SUGAR HELD IN COMMITTEE ROOM NO. 7, PARLIAMENT BUILDINGS, ON MONDAY, JUNE 26, 2006 AT 3.30 P.M

PRESENT

The Hon. J.B.N. Muturi, MP - (Chairman)
The Hon. Gachara Muchiri, MP
The Hon. Ali Bahari, MP
The Hon. K.M. Sang, MP
The Hon. Jimmy Angwenyi, MP
The Hon. Gitau Kabogo, MP
The Hon. (Dr) Adbullahi I. Ali, MP
The Hon. M. Hussein Maalim, MP

ABSENT WITH APOLOGY

The Hon. Wafula Wamunyinyi, MP
The Hon. Peter G. Munya, MP
The Hon. (Dr.) Sammy Rutto, M.P.

IN ATTENDANCE

NATIONAL ASSEMBLY

MS. Phylis Mirungu - Senior Clerk Assistant
Mr. Samuel J. Njoroge - Third Clerk Assistant
Mr. Timothy Wahome - Parliamentary Intern

CONTROLLER AND AUDITOR GENERAL

Mr. Sylvester N. Kiini - Deputy Director of Audit

MIN. NO. 034/2005/2006(2) CONSIDERATION OF REPORT OF THE COMMITTEE ON KENYA SUGAR BOARD- LOSS ON IMPORT AND EXPORT OF SUGAR AND IMPORTATION OF SUGAR IMPORTATIONS PURSUANT TO LEGAL NOTICE NO. 2 OF JANUARY 13, 2006

The Committee considered a draft report on Kenya Sugar Board- Loss on Import And Export of Sugar And Importation of Sugar Importations Pursuant to Legal Notice No. 2 of January 13, 2006. The Report was adopted with a amendments. The Committee mandated the Chairman to table the Report before the House on Tuesday, June 27, 2006 together with the Committee's 13th Report, Volumes I and II.

MIN. NO. 35/2005/2006(2): CONFIRMATION OF MINUTES

The Minutes of the Committee's Sixth Sitting held on Tuesday, March 7, 2006 were proposed by Hon. Gitau Kabogo, MP, seconded by Hon. Gachara Muchiri as a true record of the proceedings of the Committee and signed by the Chairman.

MIN. NO. 36/2005/2006(2): PROGRAMME OF BUSINESS

The Committee resolved to consider its programme of business for the period July to December 2006 on Thursday, June 29, 2006.

MIN. NO. 37/2005/2006(2): ADJOURNMENT

And there being no other business, the Chairman adjourned the Sitting at 12.30 p.m. until a later date.

J.B. N. Muturi, MP

Signed:.....

(Chairman)

June 27, 2006

Date:.....

Appendix II

LEGAL NOTICE NO. 2 OF 2006



G

SPECIAL ISSUE

13

Kenya Gazette Supplement No. 2

13th January, 2006

(Legislative Supplement No. 2)

LEGAL NOTICE NO. 2

THE SUGAR ACT

(No. 10 of 2001)

IN EXERCISE of the powers conferred by section 33 of the Sugar Act, the Minister for Agriculture, in consultation with the Board, makes the following Regulations—

THE SUGAR (IMPORTS, EXPORTS AND BY-PRODUCTS)
(AMENDMENT) REGULATIONS, 2006.

1. These Regulations may be cited as the Sugar (Imports, Exports and By-Products) (Amendment) Regulations, 2006.
2. The Sugar (Imports, Exports and By-Products) Regulations, 2003 are amended by deleting regulation 6 and substituting therefor the following new regulation—

“6. The Board shall facilitate the importation of raw or mill white and refined sugar by registered importers and millers on a non-discriminatory and liberalized basis.”

Citation.

Sub.leg.

Board to facilitate importation.

Made on the 12th January, 2006.

KIPRUTO ARAP KIRWA,
Minister for Agriculture.

APPENDIX III

SUGAR (IMPORTS, EXPORTS AND BY-PRODUCTS) REGULATIONS, 2003, - LEGAL NOTICE NO. 39 OF 2003

LEGAL NOTICE NO. 39

THE SUGAR ACT
(No. 10 of 2001)

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

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

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

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

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

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

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

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

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

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

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

IMPORTS
REGULATIONS

2

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

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

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

Register

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

Estimates and allocations

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

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

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

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

Returns

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

Offences

8. (1) Any person who -

- (a) imports or exports sugar or its by-products without a certificate of registration; or
- (b) fails to make returns to the Board as required by these Regulations.

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

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

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

SCHEDULE

FORM A

THE SUGAR ACT

(No. 10 of 2001)

APPLICATION FOR CERTIFICATE OF REGISTRATION

(F.S.20)

1. Name of applicant
2. Address
3. Telephone Number
4. Physical Location
5. Division
6. District/Province
7. L.R. No./Nos.
8. Names of Directors and addresses
9. Name/Address and Signature
10. Name/Address and Signature
11. Name/Address and Signature
12. Warehouse Capacity Metric Tones
13. Physical Address
14. L.R. No.
15. Previous Experience
16. Quantity of sugar imported in the last 12 months (tonnes)
17. Type of sugar (specify)
18. Country of origin
19. CIF Value
20. Dates of importation
21. Last registration number by the Board or its predecessor
22. Source of Sugar/Country of origin in respect of this application

12. Intended use of sugar/by-products:
Human Consumption Industrial Manufacturing
..... Further processing Transit
13. Application is made for permission to import sugar in accordance with the particulars given above, which are hereby certified to be correct. The memorandum and articles of association and a copy of the most recent audited accounts of our company are attached.
14. I certify that the information given in this application is true and correct to the best of my belief.

Name of signatory:

Signature: Date:
(Applicant)

Decision of the Kenya Sugar Board: Approved/Not
Approved/Deferred at a meeting of the Board held on
..... (date)

Name:

Signature: Date:
Chief Executive
Kenya Sugar Board

FORM B

(r.4 (2))

THE SUGAR ACT
(No. 10 of 2001)

CERTIFICATE OF REGISTRATION OF IMPORTERS

THIS IS TO CERTIFY THAT:

Name:

Address:

Physical Location:

Division:

District/ Province:

L.R. No./ Nos: Name of Building:

..... is/are
hereby registered as an importer of sugar and by-products.

Registration Certificate No.

Date:

*Chief Executive
Kenya Sugar Board*

Signature/Seal Stamp.

FORM C

(r.3 (3))

THE SUGAR ACT
(No. 10 of 2001)

APPLICATION FOR REGISTRATION AS AN EXPORTER

1. Name of Applicant:
2. Postal Address:
3. Address of premises at which exports are to be carried out:
4. I/We hereby apply for registration as a sugar exporter in accordance with the terms of the regulations made under the Sugar Act, 2001.

Date: Signed:
(Applicant or his duly authorized Agent)

FORM D

(r. 4(2))

THE SUGAR ACT
(No. 10 of 2001)

CERTIFICATE OF REGISTRATION OF EXPORTERS

THIS IS TO CERTIFY THAT:

Name:

Address:

Physical Location:

Division:

District/ Province:

L.R. No./ Nos: Name of Building:

..... is/are
hereby registered as an exporter of sugar and by-products.

Registration Certificate No.

Date:

Chief Executive
Kenya Sugar Board

Signature/Seal Stamp

FORM E

(r.7)

THE SUGAR ACT

(No. 10 of 2001)

SUGAR IMPORTS RETURNS (CONFIDENTIAL)

1. Name of importer:
2. Address:
3. Details of sugar / by-products imports
 - (a) Port and Country of origin
 - (b) Manifest Numbers at Gazetted entry points
 - (c) Category of import Quantity
 - (d) C.I.F. value
4. Utilization of imports. Please give detailed breakdown of utilization under following categories: (If space is inadequate provide attachment)
 - (a) Direct human consumption (give a full list of purchasers, addresses, physical location and quantities purchased)

.....

.....
 - (b) Industrial manufacturing (specify type of products in which sugar was used and production returns for the period)

.....
 - (c) Raw sugar for processing (specify quality of raw sugar processed into mill white, refined sugar, brown sugar or other by-products. Also give a full list, addresses and physical locations of all the end users of the processed goods.)

.....

.....
 - (d) Transit sugar (provide full details of the quantities imported and exported including the dates of actual export at entry and exit points. Also attach copies of re-export certificates duly signed)

.....

.....
5. Full name and address of buyer and consignee.....
6. Name and address of warehouse where sugar can be inspected

.....

.....

7. Sugar short shipment if (any):

<i>Manifest Numbers</i>	<i>Invoice No.</i>	<i>Type</i>	<i>No. of Bags</i>	<i>Net Weight (kilograms)</i>
(a)
(b)
(c)
(d)
(e)

(If space provided is not adequate provide an attachment)

NB: Applicant to attach certificate copies of the following documents for verification:

- (a) Sale contract
- (b) Letter of credit / Telegraphic Transfer Documents
- (c) Commercial invoice
- (d) Brokers invoice; and
- (e) Sheet (where applicable)
- (f) Sugar Development Levy payment slip.

Full Names: Signature:

Date:

For official use:

AUTHENTICATION BY
THE KENYA SUGAR BOARD

..... Date:
SIGNATURE AND STAMP

FORM F

(r.7)

THE SUGAR ACT

(No. 10 of 2001)

SUGAR EXPORTS RETURNS (CONFIDENTIAL)

1. Name of exporter
2. Address:
3. Physical Location:
4. Business License of the Company:
5. Certificate of registration by the Board:
6. Category of sugar / by-product:
7. Origin of sugar / by-product:
8. Quantity of sugar intended for export:
9. Ex-factory price:
10. Mode of transport:
11. FOB value of exports:
12. Dates and quantities actually exported: Destination:.....
13. Port of export / exit:
14. Attach copies of certified export documents at exit points.
15. I certify that the information provided is true and correct to my belief.
16. (a) Sale contract number:
- (b) Sale contract date:
- (a) Unit price US\$/Stg. Pound
- (b) Terms of payment
- (c) Port and country of destination
- (If space provided is not adequate provide an attachment)
17. Full name and address of buyer

NB: Applicant to attach certificate copies of the following documents for verification:

APPENDIX IV

**LETTER REF KSB/COM/1A/A OF
NOVEMBER 14, 2005 TO THE
MINISTRY OF AGRICULTURE
CONVEYING THE PROPOSAL OF
KILIMO HOUSE MEETING**



CEO
Did the committee
commit to basis for
the Gazette

E

KSB/COM/1A/A

14th November 2005

The Permanent Secretary
Ministry of Agriculture
Kilimo House
NAIROBI

Dear Sir,

**RE: COMESA (IMPORTS, EXPORTS & BY-PRODUCTS)
REGULATIONS, 2003**

Reference is made to the above Regulations.

Following the meeting held in Kilimo House under your chairmanship between the Officers of Kenya Sugar Board and the Ministry of Agriculture, it was agreed that there was need to amend the Sugar (Imports, Exports & By-Products) Regulations, 2003 in conformity with Kenya's commitment under existing trade protocols.

In arriving at that decision, members took cognizance of the various communications from the COMESA Secretariat dating back to 2002. The members also took into account the numerous court cases filed against the various arms of Government and the issues that were raised therein, particularly the fact that the regulations amount to a Non-Tariff Barrier and contravene the COMESA Treaty.

The consensus and recommendation of members therefore was that Regulation 6 (2), (3) and (4) be amended to remove the three existing options for the administration of imports by way of quota allocation, tenders and auctions as these go against the

spirit of free trade and a liberalized market. It was recommended that the same be replaced with a new sub-regulation 6(2) that reads:

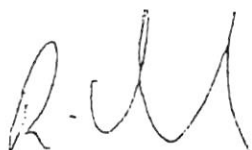
"The Board shall facilitate the importation of raw/mill white and white refined sugar by registered importers/millers on a non-discriminatory and liberalized basis."

This version takes into account the pros and cons of the three alternatives that were hitherto provided for under the current sub-regulations 6(2) and (3), and comparatives in other countries within the region.

Lastly, it may be necessary to invite comments from the Attorney General's office, who have been involved in all the court cases and are aware of the issues at hand.

Enclosed are relevant documents for your perusal.

Yours faithfully,



R. MKOK
FOR: CHIEF EXECUTIVE OFFICER

Encl.

APPENDIX V

**LETTER REF KSB/C/25/(B)VOL.
111 OF 13TH JANUARY, 2006 TO
THE MINISTRY OF AGRICULTURE
CONVEYING THE RESOLUTION OF
THE BOARD'S 60TH SITTING**

RE: KSB/C/25(B) VOL.111

13th January 2006

Romano M. Kiome (Phd, MBS)
The Permanent Secretary
Ministry of Agriculture
Kilimo House
NAIROBI

Dear *Romano*

RE: COMESA SUGAR IMPORTS ALLOCATION MODALITY

The Kenya Sugar Board has finalized its deliberations on the administration of imports from COMESA at their 60th meeting held today 13th January 2005. The following is an outline of the criteria that it has adopted for the process and which it intends to publicize to all stakeholders.

1. Determine and make public vide a gazette notice our domestic needs, both refined and mill white sugar having taken into account our shortfall.
2. Application be made to Treasury seeking exemption from the 28 day period requirement for advertisement of tenders as we are constrained by time.
3. Kenya Sugar Board issues a notice in the three main local dailies (the Standard, Daily Nation and Kenya Times) inviting all "Registered Importers" to come forward and apply for quotas specifying the quantities and timings of actual entry by month with regard to Treasury's approved advert time limit.
4. Immediately the applications are closed, evaluation be undertaken using the below stated criteria and the tender committee be convened to adjudicate accordingly. The results be made public within 24 hours to avoid interference and lobbying.

The suggested parameters for evaluation and scoring the applicant are: **importer qualification, importer capability / resources, past performance, storage and tax compliance.**

A. IMPORTER QUALIFICATION

Verify the applicant against the Register of importers to confirm that the candidate qualify as such, and eliminate any applicant who does not hold a valid imports certificate.

B. IMPORTER CAPABILITY/ RESOURCES

To eliminate briefcase importers, examine and confirm that the applicant has the ability to import. Peruse Tender Security, Bank statements, Audited accounts and establish ability to raise required funds to import within a specified period.

C. PAST PERFORMANCE

- (i) For those who benefited from the quota last year, examine;
- How much the applicant imported in the last quota.
 - Their returns to confirm that they satisfactorily complied with the provisions of Regulation 7 of the Sugar (Imports, Exports and By-products) Regulations on filling of returns.
 - The conduct of the applicant in the last quota to determine whether they followed the laid down rules or not. e.g. whether one used the licence to import the wrong type of sugar, whether one imported without a valid import licence.

D. STORAGE

Evidence of adequate storage facility. Whether own go-down or hired go-down and their capacity vis a vis quantity the applicant wants to import.

E. TAX COMPLIANCE

Certificate of Tax compliance from KRA. Since the applicants are benefiting from Tax-free imports, they must prove that they have always paid their taxes as required.

The Board in their deliberations decided that for those who will qualify and in the interest of equity, a maximum allocation of 5,000MT be applied. However, this quantity can be varied depending on total number of applicants qualifying for the importation exercise.

Based on the foregoing the Board resolved that it shall:

- Prepare and sell the tender documents at a non-refundable fee of Kshs. 10,000.
- Communicate the outcome to each applicant both successful and unsuccessful.
- Communicate to the successful applicants stating the quantity and month of importation and consequence of non-compliance.
- Submit to KRA a list of successful applicants after publishing the same in the Kenya gazette. Thereafter, strict surveillance and monitoring by KSB be done at the Port of Mombasa and other designated port of entries to guard against paper clearance. Only the quantities allocated to arrive at a particular time should be cleared.

The Board further resolved that the importation of the sugar quota be spread throughout the year i.e. from March 2006 to February 2007. Attached is a list of the registered Sugar Importers/Exporters as at 11th January 2006 to whom this exercise will be applied.

The purpose of this letter is to communicate this resolution and the approved modalities for the administration of the sugar imports under COMESA arrangement for the year 2006/07.

Yours

Sincerely,


A. O. OTIENO

CHIEF EXECUTIVE OFFICER



APPENDIX VI

**INTENDED PRESS RELEASE BY
THE KENYA SUGAR BOARD ON THE
POSITION OF THE BOARD ON
LEGAL NOTICE NO. 2 OF 2006.**

**KENYA SUGAR BOARD'S POSITION ON THE ADMINISTRATION OF
COMESA SUGAR IMPORTS FOR THE YEAR 2006 AT SUKARI PLAZA,
NAIROBI**

The Kenya Sugar Board at a meeting held today the 18th January 2006 has considered the contents of legal Notice No. 2 issued by the Hon. Minister for Agriculture dated 12th January 2006 whose contents reads as follows:

"IN EXERCISE of the powers conferred by section 33 of the Sugar Act, the Minister for Agriculture, in consultation with the Board, makes the following Regulations-

**THE SUGAR (IMPORTS, EXPORTS AND BY-PRODUCTS)
(AMENDMENT) REGULATIONS, 2006.**

1. These Regulations may be cited as the Sugar (Imports, Exports and By-Products) (Amendment) Regulations, 2006.
2. The Sugar (Imports, Exports and By- Products) Regulations, 2003 are amended by deleting regulation 6 and substituting therefore the following new regulations-

"6 The Board shall facilitate the importation of raw or mill white and refined sugar by registered importers and millers on a non-discriminatory and liberalized basis."

The Kenya Sugar Board rejects this Legal Notice in its entirety and the following is its unanimous position:

1. In order to regulate the inflow of imports into the already saturated domestic market the Board passed a resolution and maintains that the administration of imports be by way of a regulated, transparent and predictable process that conforms with the laid down Public Procurement Regulations.
2. That, Legal Notice No.2 of 2006 was a unilateral decision by the Minister for Agriculture and at no material time was it issued in consultation with the Kenya Sugar Board as stated therein.
3. Its contents clearly contradict the Board resolution on the administration of imports through a quota system.
4. The notice goes against the spirit of Section 27 of the Sugar Act, which provides that all sugar imports shall be controlled by the Board.

5. The domestic sugar stocks in Metric Tonnes worth approximately Kshs. 72,800,525.00 held by the local factories as at Monday 16th January 2006 are as follows:

Mumias	16,486.00
Nzoia	9,148.00
West Kenya	566.00
Muhoroni	2,389.48
Chemelil	146.92
South Nyanza	383.81
<u>TOTAL</u>	<u>29,120.21</u>

6. It is for this reason that the Board resolved that the imports for the current year be staggered through out the year from March 2006 to February 2007 to allow the disposal of the evidently high factory stocks and facilitate timely payment of farmers for their cane deliveries.
7. The Minister's Legal Notice in its current form does not support this resolution as it provides for a free and liberalized market without the above stated regulation. It is therefore not in the interest of the farmers nor the wider Kenyan public.

It is for this reason that the board stands by its earlier resolution to regulate the inflows and not go for the "Free for All". Legal Notice No. 2 dated 12th January 2006 is therefore rejected by the Kenya Sugar Board.

In the interest of the sugar industry and as the custodians of the stakeholder's interests, the Board is seeking an appointment with the Minister for Agriculture to prevail upon him to revoke the same forthwith.

Finally, the Board's attention has been drawn to allegations in both the print and electronic media suggesting that some of its membership may have been compromised to vary their resolution on this very critical issue. The Board takes this opportunity to confirm to all stakeholders that none of its members have been so compromised.

~~On behalf of the Kenya Sugar Board I wish to reassure farmers and the rest of the industry of our unwavering support on matters affecting their livelihood.~~

JOSEPH MBAI
CHAIRMAN
KENYA SUGAR BOARD

APPENDIX VII

EXCERPTS OF SUGAR ACT, 2001

"grower" means a person who produces sugar-cane or any scheduled crop in Kenya for the manufacture of sugar but does not include an out-grower institution;

"industry" means the sugar industry in Kenya and includes the growing of sugar-cane and any other sugar producing crop, the manufacturing, refining, marketing and disposal of sugar and its by-products;

"interested parties" means the Government, millers, growers or out-grower institutions;

"licence" means a licence issued by the Board to a miller;

"member" means a member of the Board appointed under section 5;

"miller" means a person licensed to operate a sugar mill or a jaggery mill in Kenya for the production of sugar including refined sugar and other by-products;

"Minister" means the Minister for the time being responsible for matters relating to agriculture;

"out-grower" means a person who has a sugar-cane farm in a zone and who has in force a cane supply contract in respect of the sugar-cane grown on such farm;

"out-grower institution" means an out-grower institution registered under the Companies Act, the Co-operative Societies Act, Trade Unions Act or any other organization registered under any other law that the annual general meeting may approve;

"refined sugar" means sugar, which complies with the specifications set by the body for the time responsible for setting standards;

"scheduled crop" has the meaning assigned to it in section 2 of the Agriculture Act;

"sugar" means crystalline or liquid sucrose in any of its recognized commercial forms, intended for human consumption or other uses;

"sugar-cane" means any plant or part of a plant of the genus *Saccharum* or any hybrid of sugar-cane;

"Tribunal" means the Sugar Arbitration Tribunal established under section 31;

"zone" means the area within a radius of up to a maximum of forty Kilometres of a sugar mill.

PART II - ESTABLISHMENT, POWERS AND FUNCTIONS OF THE KENYA SUGAR BOARD

3.(1) There is established a board to be known as the Kenya Sugar Board. Establishment and incorporation of the Board.

(2) The Board shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of -

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;

- (c) borrowing or lending money; and
- (d) doing or performing all such other acts necessary for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.

(3) The Board shall be the successor to the Kenya Sugar Authority established by the Kenya Sugar Authority Order (now revoked) and subject to this Act, all rights, duties, obligations, assets and liabilities of the Kenya Sugar Authority existing at the commencement of this Act shall be automatically and fully transferred to the Board and any reference to the Kenya Sugar Authority in any contract or document shall, for all purposes, be deemed to be a reference to the Board established under subsection (1).

4.(1) The object and purpose for which the Board is established is to-

- (1) (a) regulate, develop and promote the sugar industry;
- (b) co-ordinate the activities of individuals and organizations within the industry;
- (c) facilitate equitable access to the benefits and resources of the industry by all interested parties.
- (2) Without prejudice to the generality of subsection (1), the Board shall-
- (a) participate in the formulation and implementation of overall policies, plans and programs of work for the development of the industry;

- (b) act as an intermediary between the industry and the Government;
- (c) facilitate the flow of research findings to interested parties through the provision of effective extension services;
- (d) monitor the domestic market with a view to identifying and advising the Government and interested parties on any distortions in the sugar market;
- (e) facilitate the arbitration of disputes among interested parties;
- (f) facilitate the export of local sugar;
- (g) promote and encourage the use of environmentally friendly technologies in the industry;
- (h) provide advisory services to growers, out-grower institutions and millers;
- (i) facilitate an equitable mechanism for the pricing of sugar-cane and appropriation of proceeds from the disposal of the by-products of sugar production between millers and growers as stipulated in the guidelines;
- (j) represent the industry in such organizations as are relevant for the promotion of the industry;
- (k) oversee the formulation of standard provisions governing the mutual rights and obligations of growers, millers and other interested parties;

- (l) collect, collate and analyze industry statistics and maintain a data base for the industry;
- (m) licence sugar mills;
- (n) promote the efficiency and development of the industry through the establishment of appropriate institutional linkages; and
- (o) perform such other functions as may, from time to time, be assigned by the interested parties.

5.(1) The Board shall consist of -

- (a) a non-executive Chairman elected by the Board from among the representatives of growers representatives on the Board and appointed by the Minister;
- (b) seven representatives elected by growers and appointed by the Minister;
- (c) three representatives elected by millers and appointed by the Minister;
- (d) the Permanent Secretary in the Ministry for the time being responsible for matters relating to agriculture;
- (e) the Permanent Secretary to the Treasury;
- (f) the Director of Agriculture; and

(g) the Chief Executive of the Board appointed under section 10 who shall be an *ex-officio* member and the secretary to the Board.

(2) The Board shall elect a vice-chairman from amongst its members.

(3) A member of the Board other than an *ex-officio* member shall hold office for a period of three years, on such terms and conditions as may be specified in the instrument of appointment, but shall be eligible for re-appointment or re-election, as the case may be.

6. The Board shall have all the powers necessary for the proper performance of its functions under this Act and in particular, but without prejudice to the generality of the foregoing, the Board shall have power to -

- (a) impose a levy or levies upon growers and millers for the purposes of giving effect to the provisions of this Act;
- (b) control, supervise and administer the assets of the Board in such manner and for such purpose as best promotes the purpose for which the Board was established;
- (c) receive any grants, gifts, donations or endowments and make legitimate disbursements therefrom;
- (d) determine the provisions to be made for capital and recurrent expenditure and for the reserves of the Board;

Powers of
the Board.

(6) An auditor appointed under subsection (3) shall report directly to the Auditor-General (Corporations) on any matter relating to the directions given under subsection (5).

(7) Within a period of six months after the end of each financial year, the Auditor-General (Corporations) shall report on the examination and audit of the accounts of the Board to the Minister and where an auditor has been appointed under subsection (3), such auditor shall transmit a copy of the report to the Auditor-General (Corporations).

(8) The fee payable to an auditor, appointed under subsection (3) shall be determined and paid by the Board.

(9) Nothing in this Act shall be construed to prohibit the Auditor-General (Corporations) from carrying out an inspection of the records and accounts of the Board whenever it appears to him desirable.

(10) Notwithstanding anything in this Act, the Auditor-General (Corporations) may transmit to the Minister a special report on any matters incidental to his power under this Act and section 19(3) and (4) of the Exchequer and Audit Act shall, *mutatis mutandis*, apply to any report made under this section.

24.(1) The Board shall, within three months after the end of each financial year, prepare and submit to the Minister a report of the operations of the Board for the immediate preceding year.

(2) The Minister shall lay the report submitted to him under subsection (1) before the National Assembly within three months of the day the Assembly next sits after the receipt of the report.

PART V - MISCELLANEOUS PROVISIONS

25.(1) The Board shall, at least once in every year, convene an annual general meeting of representatives of millers and growers for the purposes of considering the annual report and accounts of the Board and for the purposes of transacting such other business of which notice shall be given.

(2) The Board may convene special meetings in addition to the meetings mentioned in subsection (1) for such purposes and at such times as it may deem fit.

(3) Subject to this Act and any regulations made thereunder, the Board may make rules for the regulation of the conduct of business and procedure at the general meetings convened pursuant to this section.

26. All sugar produced locally or imported into the country shall comply with the prevailing-

- (a) quality standards as set by the body for the time being responsible for setting standards;
- (b) safety and health standards as set by the body for the time being responsible for public health;
- (c) environmental issues as set by the body for the time being responsible for environmental matters.

27.(1). Subject to such regional and international trade agreements to which Kenya is a party, all sugar imports into the country shall be subject to the prevailing import duties, taxes and other tariffs and such imports shall be controlled by the Board.

Annual general meeting.

Quality, safety and health control measures

Safeguard measures.

- (d) the functions to be executed by the Board in the execution of the agreement;
- (e) the granting of powers to the Board to impose penalties prescribed in the agreement for the contravention of, or failure to comply with any term of the agreement; and
- (f) the imposition of levies upon growers and millers for the purpose of enabling the Board to fulfil any obligation incurred by it in accordance with its constitution.

Rights of growers. — 30. Notwithstanding any other provision in this Act or any other written law to the contrary, growers shall be entitled to at least -

- (a) 51% shareholding of all privatized sugar factories;
- (b) 51% representation on the Boards of Directors of milling companies.

Establishment and constitution of Tribunal. — 31. (1) There is established a tribunal to be known as the Sugar Arbitration Tribunal for the purpose of arbitrating disputes arising between any parties under this Act.

- (2) The Tribunal shall consist of -
- (a) a chairman who shall be a person qualified for appointment as a judge of the High Court of Kenya; and
 - (b) two other members, being persons with expert knowledge of the matters likely to come before the Tribunal and who are not persons with a direct material interest in the sugar industry,

all of who shall be appointed by the Minister in consultation with the Attorney-General.

(3) The members of the Tribunal appointed under subsection (2) shall hold office for such period, not exceeding three years, on such terms and conditions as shall be specified in the instrument of appointment but shall be eligible for re-appointment for one further term of a period not exceeding five years.

(4) The provisions set out in the Third Schedule shall have effect with respect to the meetings and procedure of the Tribunal.

(5) Except as provided in the Third Schedule, the Tribunal shall regulate its own procedure.

32. The Minister may, on the recommendation of the Board, by order in the Gazette, amend the Second Schedule.

33. The Minister may, in consultation with the Board, make regulations generally for the better carrying out of the provisions of this Act and without prejudice to the generality of the foregoing, such regulations shall provide for-

- (a) the regulation and control of the production, manufacturing, marketing, importation or exportation of sugar and its by-products;
- (b) the forms of licences to be issued under this Act, and the form and manner of application therefor;
- (c) the fees which may be charged for any activity relating and incidental to the development, products, marketing and distribution of sugar and its by-products.

Amendment
of Second
Schedule.
Regulations.

SECOND SCHEDULE

(s.29)

GUIDELINES FOR AGREEMENTS BETWEEN PARTIES IN THE SUGAR INDUSTRY

PART 1

INTRODUCTION AND SCOPE OF AGREEMENTS

scope of agreement.

interpretation.

1. The agreements define the linkages among the different institutions in the industry and govern the operations of interested parties in the industry and any disputes arising in relation thereto shall be referred to the Tribunal.

2. In these agreements, unless the context otherwise requires-

"cane supply contract" means a contract for the supply of sugar-cane to a miller;

"cane farming contract" means a contract between a grower and an out-grower institution or miller;

"*force majeure*" means events that cannot be reasonably anticipated or controlled and includes acts of war or enemies, riots, strikes, embargoes, acts of God, acts of the Government or of any authority or agency thereof;

"grower member" means a member of an out-grower institution;

Cap.486. "Kenya Sugar Research Foundation" means the Kenya Research Foundation incorporated under the Companies Act with the principal object of promoting research and investigating all problems relating to sugar in Kenya;

Cap.108. "Kenya Sugar-Cane Growers Association" the Kenya Sugar Cane Growers Association registered under the Societies Act;

"Kenya Sugar Manufacturers Association" means the Kenya Sugar Manufacturers Association registered under the Societies Act.

PART 2

ROLES OF INSTITUTIONS IN THE INDUSTRY

The role of the Kenya Sugar Board.

- 3. The role of the Kenya Sugar Board is to -
 - (a) co-ordinate the activities of the various organizations concerned with the industry, both in the private and the public sector;
 - (b) support the general development of out-grower institutions and enable them become effective intermediaries for providing financial assistance and extension services to growers;
 - (c) review, on a regular basis, the economic and financial performance as well as the problems and prospects of the industry;
 - (d) promote a more extensive use of sugar and its by-products;
 - (e) promote the manpower development of farmers and employees in the industry through establishment and co-ordination of a central training institute;
 - (f) facilitate dispute arbitration between interested parties;
 - (g) license mills;
 - (h) facilitate negotiations on cane pricing between growers, out-grower institutions and millers;
 - (i) facilitate studies and investigations in respect of any specific or general issue affecting the industry;
 - (j) facilitate long-term master plans for the rehabilitation, rationalization of factories and marketing of sugar, with due regard to the interest of all parties concerned;
 - (k) collect information and evaluate any fixed investment to be made in the sugar sector by any individual.

- (l) examine and advise on the operating costs of any organization concerned with the industry;
- (m) monitor the production, importation and consumption of sugar and its by products with a view to ensuring a viable industry;
- (n) ensure that millers and outgrower institutions look into the welfare of its members and infrastructural development of the regions where they are situated.
4. The role of the Kenya Sugar Research Foundation includes -
- (a) breeding of sugarcane varieties suited for various agro-ecological zones of Kenya;
- (b) conducting research on nutritional requirements of sugarcane in order to provide recommendations on the appropriate fertilizers;
- (c) appraising technologies on land preparation, drainage and water management for economical cane production;
- (d) studying and monitoring of pests and diseases that affect sugarcane and recommending appropriate control strategies;
- (e) developing agronomic packages for sugarcane maintenance and management;
- (f) instituting socio-economic investigations to improve human resource management and enhance development of the sugar industry as an agribusiness;
- (g) testing, designing and evaluating of farm machinery and factory equipment for efficient sugar production;
- (h) promoting the transfer of sugar technology based on applied research through relevant extension mechanisms;

The role of the Kenya Sugar Research Foundation.

- (i) fostering research on sustainable productivity, environmental issues, human safety at field and factory levels; and
- (j) collaborating with the Government, the industry, universities and other national and international organizations for the purpose of furthering the Foundation's mission.
- (2) In addition to research, the Foundation shall undertake to -
- (i) raise funds to support research;
- (ii) analyse soil and plant samples for advisory purposes; and
- (iii) offer modular courses on various aspects of cane management and practices.
5. The functions and role of out-grower institutions include -
- (a) promoting and representing the interests of growers;
- (b) negotiating or arranging, on behalf of such grower members, the terms of supply of sugar-cane to the factory and the co-ordination of the production, harvesting and transport thereof;
- (c) providing financial credit or otherwise arranging finance for such grower members in connection with the production of their sugar-cane, including land clearance and preparation, planting, cultivation and tending, harvesting, transport and the supply of goods and services relating thereto;
- (d) providing or procuring services, advice and assistance for such grower members as may be required, to carry out or procure the carrying out of such operations for such members;
- (e) providing or procuring accounting services and books or records for members in respect of their individual operations;

The role of out-grower institutions.

THIRD SCHEDULE

(S.29)

PROVISIONS AS TO THE MEETINGS AND PROCEDURE OF THE TRIBUNAL

1. Any member of the Tribunal may, at any time, by notice in writing to the Minister, resign his office.

2.(1) If a member of the Tribunal becomes a member of the Board or, in any case where a member other than the chairman is appointed to the service of the Government or the Commission his office shall become vacant.

(2) The chairman or a member of the Tribunal may be removed from office by the Minister if he is -

- (a) unable to discharge the functions of his office by reason of mental or physical infirmity; or
- (b) an undischarged bankrupt; or
- (c) convicted of an offence involving fraud or dishonesty; or
- (d) convicted of a criminal offence and sentenced to imprisonment for a term exceeding six months or to a fine exceeding ten thousand shillings.

(3) In the event of the inability of any member of the Tribunal to attend for the purpose of any particular proceedings, the Minister may appoint another person to be a member of the Tribunal for the remainder of the term of the member whose vacancy caused the appointment.

3. If any member of the Tribunal has any interest in any particular proceedings before the Tribunal he shall so inform the Minister and the Minister may, after considering that interest, appoint another member in his place for the purpose of the particular proceedings.

4. Where the office of any member becomes vacant, whether by death or otherwise, the Minister may appoint another person to be a

member of the Tribunal for the remainder of the term of the member whose vacancy cause the appointment.

5. In the event of the inability of any member of the Tribunal *Temporary members.* to attend for the purpose of any particular proceedings, the Minister may appoint a temporary member for the purposes of those proceedings.

6. The decision of the Tribunal shall be that of the majority *Majority decisions.* and shall be signed by the members thereof agreeing thereto.

7. No proceedings of the Tribunal shall be invalid by reason *Proceedings to be valid.* only of a vacancy among the members thereof.

8. The Tribunal shall have the powers of the High Court - *Powers.*

- (a) to administer oaths to the parties and witnesses to the proceedings;
- (b) to summon witnesses and to require the production of documents;
- (c) to order the payment of costs; and the provisions of the law relating to Commissions of Inquiry in Kenya with respect to:-
 - (i) the protection of the members of the Tribunal from suit;
 - (ii) the form of summonses to witnesses;
 - (iii) to giving or fabricating of false evidence;
 - (iv) the duty and indemnity of witnesses, and the penalty for contumacy, insult or interruption of proceedings; and
 - (v) the appearance of advocates; shall with any necessary adaptations or modifications, apply to the members of, the witnesses before, and the proceedings before, the Tribunal in like manner as they apply to Commissions of Inquiry.

APPENDIX VIII

REGULATIONS 4, 5, 49, 55, 57, 60 AND 61 OF THE COMESA FTA TREATY



ARTICLE 4

Specific Undertakings

In order to promote the achievement of the aims and objectives of the Common Market as in Article 3 of this Treaty and in accordance with the relevant provisions of this Treaty, the Member States shall:

1. In the field of trade liberalisation and customs co-operation:
 - (a) establish a customs union, abolish all non-tariff barriers to trade among them and establish a common external tariff; co-operate in customs procedures and activities;
 - (b) adopt a common customs bond guarantee scheme;
 - (c) simplify and harmonize their trade documents and procedures;
 - (d) establish conditions regulating the re-export of goods from third countries with the Common Market;
 - (e) establish rules of origin with respect to products originating in the Member States;
 - (f) recognise the unique situation of Lesotho, Namibia and Swaziland within the context of the Common Market and to grant temporary exemptions to Lesotho, Namibia and Swaziland from the full application of specified provisions of this Treaty.

In the field of transport and communications:

- (a) foster such co-operation among themselves as would facilitate the production of goods and facilitate trade in goods and services and the movement of persons;
- (b) make regulations for facilitating transit trade within the Common Market; and
- (c) adopt a Third Party Motor Vehicle Insurance Scheme.

3. In the field of industry and energy:

- (a) eliminate rigidities in the structures of production and manufacturing so as to provide goods and services that are of high quality and are competitive in the Common Market;
- (b) provide an appropriate enabling environment for the participation of the private sector in economic development and co-operation within the Common Market;
- (c) co-operate in the field of industrial development;
- (d) adopt common standards, measurements systems and quality assurance practices in respect of goods produced and traded within the Common Market; and
- (e) provide an enabling stable and secure investment climate.

4. In the field of monetary affairs and finance:

- (a) co-operate in monetary and financial matters and gradually establish convertibility of their currencies and a payments union as a basis for the eventual establishment of a monetary union;
- (b) harmonise their macro-economic policies;
- (c) remove obstacles to the free movement of services and capital within the Common Market; and
- (d) recognise the unique situation of Lesotho, Namibia and Swaziland within the context of the Common Market and to grant temporary exemptions to Lesotho, Namibia and Swaziland from the full application of specified provisions of this Treaty.

5. In the field of agriculture:

- (a) co-operate in the agricultural development;
- (b) adopt a common agricultural policy;
- (c) enhance regional food sufficiency;
- (d) co-operate in the export of agricultural commodities;
- (e) co-ordinate their policies regarding the establishment of agro-industries;
- (f) co-operate in agricultural research and extension; and
- (g) enhance rural development.

6. In the field of economic and social development:
- (a) harmonise the methodology of collection, processing and analysis of information to meet the objectives of the Common Market;
 - (b) harmonise or approximate their laws to the extent required for the proper functioning of the Common Market;
 - (c) promote the accelerated development of the least developed countries and economically depressed areas through the implementation of special programmes and projects in various fields of economic development;
 - (d) adopt a regional policy that will look into all possible economic problems that Member States may face during the implementation of this Treaty and propose ways and means of redressing such problems in a manner that will satisfy the conditions of equitable and balanced development within the Common Market;
 - (e) remove obstacles to the free movement of persons, labour and services, and the establishment for investors and right of residence within the Common Market;
 - (f) promote co-operation in social and cultural affairs between themselves;
 - (g) co-operate in tourism and wildlife development and management;
 - (h) co-operate in the development and management of natural resources, environment; and
 - (i) take, jointly, such other steps as are necessary to further the aims of the Common Market.

ARTICLE 5

General Undertakings

1. The Member States shall make every effort to plan and direct their development policies in view to creating conditions favourable for the achievement of the aims of the Common Market. They shall implement the provisions of this Treaty and shall abstain from any measures likely to jeopardise the achievement of the aims of the Common Market or the implementation of the provisions of this Treaty.
2. Each Member State shall take steps to secure the enactment of and the continuous application of legislation to give effect to this Treaty and in particular:
 - (a) to confer upon the Common Market legal capacity and personality required for the performance of its functions; and
 - (b) to confer upon the regulations of the Council the force of law and the necessary effect within its territory.
3. Each Member State shall:
 - (a) designate a Ministry with whom the Secretary-General may communicate with any matter arising out of the implementation and application of this Treaty and refer such designation to the Secretary-General;
 - (b) transmit to the Secretariat copies of all relevant existing and future legislative and administrative official gazettes; and
 - (c) where it is required under this Treaty, supply or exchange information to the Secretary-General and Member State and send copies of such information to the Secretariat.

ARTICLE 49

Elimination of Non-tariff Barriers on Common Market Goods

1. Except as may be provided for or permitted by this Treaty, each of the Member States undertakes to remove immediately upon the entry into force of this Treaty, all the then existing non-tariff barriers to the import into that Member State of goods originating in the other Member States and thereafter refrain from imposing any further restrictions or prohibitions.

2. For the purposes of protecting an infant industry, a Member State may, provided that it has taken all reasonable steps to overcome the difficulties related to such infant industry, impose for the purposes only of protecting such industry for a specified period to be determined by Council, quantitative or like restrictions or prohibitions on similar goods originating from the other Member States:

Provided that the measures are applied on a non-discriminatory basis and that the Member State shall furnish to Council proof that it has taken all reasonable steps to overcome the difficulties faced by such an infant industry.

3. The Council shall adopt criteria for determining that an industry is an infant industry.

4. The Secretariat shall keep under constant review the operation of any quantitative or like restriction or prohibitions imposed under the provisions of paragraph 2 of this Article and deliver an opinion to the Member State concerned and report the matter to the Council with its recommendations.

5. Notwithstanding the provisions of paragraph 1 of this Article, if a Member State encounters balance-of-payments difficulties arising from the application of the provisions of this Chapter, that Member State may, provided that it has taken all reasonable steps to overcome the difficulties, impose for the purpose only of overcoming such difficulties for a specified period to be determined by the Council, quantitative or the like restrictions or prohibitions, on goods originating from the other Member States.

Article 27 Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

SECTION 2. INVALIDITY OF TREATIES

Article 46

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

