DRAWBACK OF DIVERGENCE: CONTRASTING COMPETITION IMPACT ASSESSMENT STANDARDS FOR SUBSIDIES IN KENYA AND TANZANIA

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Abstract

This article probes the legal standards for the assessment of the impact on competition of subsidised goods imported from other Partner States in Kenya and Mainland Tanzania in light of the legal prescriptions of the East African Community. It applies comparative methodology in the examination of East African Community legal standards for such goods, as well as the national legal standards in the two Partner States. The article concludes that Kenya and Mainland Tanzania have divergent competition impact assessment standards for such goods. The gist of the article, therefore, is that unless the competition impact assessment standards applied by Kenya and Tanzania are harmonised, the disparity is likely to pervert the objective of a common market.

Key words: *competition, East African Community, Kenya, Partner States, subsidies, Tanzania*

1. INTRODUCTION

The East African Community (herein "EAC") is a common market.[1] As such, there should, in principle, be no obstacles to trade in

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goods between the national markets of the Partner States. This implies that throughout the Common Market, similar conditions of competition reinforced by uniform standards should be maintained for the benefit of undertakings trading in the market, otherwise distortion of market conditions may arise. In this regard, the market should also maintain common standards for the assessment of the impact of subsidies on competition.

Whether or not, in fact, common standards exist in the laws of Kenya and Mainland Tanzania, for the control of subsidised imported goods from other Partner States is the subject of this article. The article commences by outlining the basis of concern about competition in so far as subsidies are concerned. It then provides an overview of the competition impact assessment standards for subsidised goods from Partner States in the EAC. The legal standards set out in the laws of Kenya and Tanzania for the assessment of the impact of subsidised goods imported from other Partner States on competition are then examined. In the concluding part, the implications of the national legal standards are evaluated.

2. THE RELATIONSHIP BETWEEN SUBSIDIES AND COMPETITION

A subsidy is defined in the Treaty for the Establishment of the East African Community (herein "EAC Treaty")[2] as a financial contribution by Government or any public body within the territory of a Partner State or where there is any form of income or price

[1]See Protocol on the Establishment of the East African Community Common Market (EACCMP) <https://www.eac.int/documents/category//key-documents> (accessed 23 October 2019).
[2]Treaty for the Establishment of the East African Community (EAC Treaty), 2144 U.N.T.S. 255.

support in the sense of Article XVI of GATT 1994.[3] This Treaty definition is augmented by the Protocol on the Establishment of the East African Community Customs Union (herein "EACCUP"),[4] which defines a subsidy as assistance by a Government of a Partner State or a public body to the production, manufacture, or export of specific goods taking the form of either direct payments such as grants or loans, or of measures with equivalent effect such as guarantees, operational or support services or facilities, and fiscal incentives.[5] The definition in the EACCUP is also adopted in the East African Community Customs Management Act.[6]

The idea of assistance by Government or a public body in the EACCUP as well as the EACCMA is at the core of the nature of a subsidy and underscores the necessity of a benefit being conferred by a subsidy. Thus the Agreement on Subsidies and Countervailing Measures (herein "ASCM")[7] provides that a subsidy shall be deemed to exist where there is a financial contribution by a Government or public body within the territory of a member or any form of income or price support in the sense of Article XVI of GATT 1994, and a benefit is thereby conferred.[8]

Generally benefit denotes an advantage conferred by a subsidy. In this context, the Kenya Trade Remedies Act (herein "KTRA")[9]

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[3]Id, Article 2.
[4] Protocol on the Establishment of the East African Community Customs Union (EACCUP) available at <https://www.eac.int/documents/category/key-documents> (accessed 23 October 2019).
[5]Id, Article 1.
[6]East African Community Customs Management Act, No. 1 of 2005 [Rev 2009], Section 2(1).
[7] Agreement on Subsidies and Countervailing Measures (ASCM), 1869 U.N.T.S. 14.
[8]Id , Article 1.1.
[9] Kenya Trade Remedies Act (KTRA), No. 32 of 2017.

defines a subsidy as any financial or other commercial benefit that has accrued or will accrue, directly or indirectly, to persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of goods, as a result of any scheme, programme, practice, or thing done, provided, or implemented by a foreign government or body of the foreign government.[10]

Similarly, the requirement that subsidies comprising income or price support be limited to the sense of Article XVI of GATT 1994 signifies that the income or price support should operate directly or indirectly to increase exports of any product from, or to reduce imports of any product into the territory of a member country.[11] The notion of benefit, however, gives rise to concern about advantage that a subsidy confers on a recipient in relation to its competitors. It is now widely accepted that for a subsidy to affect competition, it must strengthen the position of an undertaking compared to other undertakings in competition with it in a market.[12] Thus the advantage obtained by an undertaking must exceed simple gain that an enterprise enjoys by reason of the subsidy. In the case of income or price support, for example, the advantage accruing to an enterprise from the subsidy should, therefore, exceed the mere increase in exports or reduction of imports of a product within the territory of a Partner State. It must affect the competitive relationship between the undertaking whose goods are involved and its competitors.

The advantage conferred by a subsidy may, nevertheless, have effect beyond the competitors only, and adversely affect the

[10]Id, Section 2.
[11]General Agreement on Tariffs and Trade 1994, 1867 U.N.T.S. 190, 33 ILM 1153, Paras 1 and 3.
[12]*Philip Morris v. Commission*, Case 730/79, [1980] ECR I-2671 at para. 11.

market. In the Tanzania Anti-Dumping and Countervailing Measures Act ('ADCMA'),[13] this extreme effect is expressed in terms of distortion of the market. The Act defines a subsidy as a financial contribution or income or price support by Government or public body that leads to market distortion.[14] The Act, therefore, recognises the critical connection between subsidies and market distortion. In this regard, market distortion may arise when a subsidy distorts the competitive relationship between firms in the market, or otherwise gives rise to inefficiency so that consumer welfare is adversely affected.[15] An example of the second type of distortion is where a subsidy leads to increased market power, thereby enabling an advantaged firm to fix monopoly prices to the disadvantage of the consumer.

In view of the foregoing, it is imperative that a common market should institute competition impact assessment standards for subsidies granted to enterprises that operate in it. In the next section, the competition impact assessment standards for subsidies in the EAC are examined.

3. COMPETITION IMPACT ASSESSMENT STANDARDS FOR SUBSIDIES IN THE EAC

The regulatory standards for subsidies in the EAC are provided in the EAC Treaty, the EACCUP, the East African Community Competition Act (herein "EACCA")[16] and the Protocol on the Establishment of the East African Community Common Market

[13] Anti-Dumping and Countervailing Measures Act (ADCMA), No. 1 of 2014.
[14]Id, Section 3.
[15]Friederiszick, H.W., Roller, H.L. and Verouden, A., *A General Theory of Trade and Competition: Trade Liberalisation and Competitive Markets*, London: Cameron Day, 2007, at p. 96.
[16] East African Community Competition Act (EACCA), No. 2 of 2006.

(herein "EACCMP").[17] These legal instruments provide different competition impact assessment standards for subsidised goods imported into the Community from third states, and those from a Partner State into other Partner States. The legal standards for the former goods are largely set out in the multilateral principles and rules of the ASCM, the Agreement on Agriculture,[18] and the Agreement on Safeguard Measures,[19] as well as some provisions of the EACCUP.

On the converse, the above mentioned EAC legal instruments govern subsidised goods from a Partner State which are traded within the Community. Their implications on the legal standards for the assessment of the impact of such goods traded between Partner States on competition are discussed next.

3.1 The Treaty on the Establishment of the East African Community

The EAC Treaty provides the essential principles of the East African Community. In this regard, it provides for people-centred and market driven co-operation, as well as the establishment of an export oriented economy for the Partner States in which there is free movement of goods, persons, labour, services, capital, information and technology as being among the operational principles of the Community.[20] For this purpose, the Treaty has provided for trade liberalisation in Chapter 11.

In its regime for trade liberalisation, the Treaty provides for the institution of a Protocol on the establishment of a customs union

[17] EACCMP above note 1.
[18] Agreement on Agriculture,1867 U.N.T.S. 410.
[19] Agreement on Safeguard Measures, 1869 U.N.T.S. 154.
[20] EAC Treaty, above note 2, Article 7.

that contains legal rules governing subsidies and competition, as well as the elimination of all forms of tariff and non-tariff barriers.[21] Within the same regime, it also provides for a common market encompassing the free movement of labour, goods, services, capital, as well as the right of establishment, the scope of which it requires to be defined in a Common Market Protocol.[22]

The EAC Treaty, accordingly, envisions a community of states based on a free market philosophy, and characterised by free trade. Since in a free market, the government intervenes only where there is market failure, EAC Partner States would, in accordance with the Treaty, only intervene in the market using subsidies to correct market failure.[23]

In this context, market failure is generally characterised by four phenomena in the market. Firstly, the inability of the market, mainly as a result of free-rider problems, to supply adequately or at all provisions which, however, produce substantial social and economic benefits and which once created, their use is costless.[24] As a result governments intervene to provide such "public goods" as education, healthcare, infrastructure and research.

Secondly, where the market is characterised by monopolies, whereby firms have unfettered economic power to raise prices or impose other onerous terms.[25] This arises because the market is not competitive and does not generate an efficient allocation of resources.[26] Thirdly, in circumstances involving externality or spill-over effect, also known as third party effect, where a person, while

[21]Id, Article 75.
[22]Id, Article 76.
[23]Veljanovski, C.G., *Economic Principles of Law*, Cambridge: Cambridge University Press, 2007, at p. 38.
[24]Ibid.
[25]Ibid.
[26]Ibid.

rendering a service to another who pays for the service, incidentally also renders service or disservice to other persons for which payment cannot be extracted or compensation enforced on behalf of the injured party.[27]

The fourth manifestation of market failure is information asymmetry.[28] In this instance, a party who is better informed than others is able to develop incentives for the revelation of this information to others; as a result it becomes difficult for those investing in better and new information to capture the financial returns, and the suppression of information leads consumers to make wrong choices and actions.[29]

3.2 The Protocol on the Establishment of the East African Community Customs Union

The EACCUP is the legal instrument that provides for the East African Community Customs Union. It sets out two important requirements concerning the regulation of economic subsidies. Firstly, it provides that if a Partner State grants or maintains any subsidy, including any form of income or price support which operates directly or indirectly to distort competition by favouring certain undertakings or the production of certain goods in the Partner State, it should notify the other Partner States in writing.[30]

It may be noted that the above requirement sets out the criterion for distortion of competition. Accordingly, a subsidy distorts competition by favouring certain undertakings or the production of certain goods. The requirement that a subsidy should distort

[27] Id, at p. 39.
[28] Id, at p. 40.
[29] Ibid.
[30] EACCUP, above note 4, Article 17.

competition when it favours an undertaking or the production of certain goods is consistent with the economic principle that an efficient firm will produce only until marginal cost, and consequently, a subsidy will only distort competition if it reduces the marginal cost of the recipient or increases its marginal revenue.[31]

In other words, for a subsidy to distort competition, it must provide the recipient firm or firms with an artificial competitive advantage by affecting their costs and revenues, thereby distorting the normal competitive process.[32] According to the EACCUP, therefore, a Partner State that grants or maintains a subsidy which has the said effect, is bound to notify the other Partner States.[33] The obligation for notification seems intended to enable the Partner States to challenge the granting of the subsidy, or otherwise take remedial measures.

Secondly, the Protocol enjoins the Partner States to prohibit any practice that adversely affects free trade including any agreement, undertaking or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Community.[34] It is clear that the Protocol does not itself prohibit the practices, but requires Partner States to identify and prohibit them. In this respect, it specifies agreements, undertaking or concerted practices which are distortionary of trade.

In addition, it may be noted that the requirement that the impugned practice should adversely affect free trade is so wide as

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[31]Rubini, L., *The Definition of Subsidy and State Aid. WTO and EC Law in Comparative Perspective*, Oxford: Oxford University Press, 2009, at pp. 382-383.
[32]Zampetti, B.A., "The Uruguay Round Agreement on Subsidies-A Forward Looking Assessment", *Journal of World Trade*, 1996, p. 5, at p. 24.
[33] EACCUP, above note 30.
[34] Id, Article 21.

to encompass not just actions by private entities, but also by states. Moreover, it may well be that the reference to agreement, undertaking or concerted practice, when construed *ejusdem generis* [as being of the same kind or nature], denotes that the impugned practices should involve joint action. In this context, it is implicit that subsidies in the EAC by their nature involve joint action between a government or public body giving the subsidy and the beneficiary, and, therefore, fulfill the requirement.[35]

The foregoing notwithstanding, it is important to note that the implementation of the obligation by the Partner States to prohibit practices that adversely affect free trade is required to be in accordance with the East African Community competition law and policy.[36]

3.3 East African Community Competition Act

The East African Community competition law and policy is encompassed in the EACCA. The Act applies to economic activities that have cross border effect.[37] Accordingly, it only applies to subsidies which affect trade between Partner States. In this regard, it should be noted that whereas in principle all economic activities carried on within member countries in a common market affect the common market, not all such activities actually affect trade between the member countries.

The Act prohibits any subsidy for the promotion of exports or imports between the Partner States, or which is granted on the basis of nationality or residence of a person, or country of origin of

[35]Id, Article 1.
[36] Id, Article 21(3).
[37]EACCA, above note 16, Section 4(1).

goods or services.[38] This is because of the obvious distortionary effect of these subsidies on intra-community trade. It also exempts subsidies granted in the exercise of the public authority of governments of the Partner States to address social and economic malaise within their territories.

Among the exempted subsidies are those for the development of small and medium sized enterprises, those granted to consumers of certain categories of products or services, those for restructuring, rationalising and modernising specific sectors of the economy, and for less developed regions, for the protection of the environment, for research and development and so on.[39]

As regards the competition impact assessment standards, the Act requires that a subsidy that distorts or threatens to distort competition should not be granted unless the Partner State can justify it to have been granted in the public interest.[40] It does not, however, expound on the criteria for distortion or threat of distortion of competition.

Nonetheless, a subsidy distorts competition if it provides the recipient firm with an artificial competitive advantage, affecting its cost and revenue structures, and thereby distorts the normal competitive process.[41] The lacunae in the Act identified above notwithstanding, the Act should be construed holistically, and in the context of the other legal instruments of the Community governing the regulation of subsidies which prescribe competition impact assessment standards.

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[38] Id, Section 16.
[39] Id, Section 17.
[40] Id, Section 14.
[41] Zampetti, B.A., "The Uruguay Round Agreement on Subsidies-A Forward Looking Assessment", above note 32.

3.4 The Protocol on the Establishment of the East African Community Common Market

The EACCMP consolidates the competition impact assessment standards for subsidies in the EAC. It provides that the Partner States should not grant any subsidy through resources in any form, which distort or threaten to distort effective competition by favouring an undertaking, so far as it affects trade between the Partner States.[42]

It may be noted that the Protocol affirms the criterion for distortion of competition in the EACCUP, namely that subsidies distort or threaten to distort competition by favouring an undertaking. It also affirms the obligation, relative to subsidies, imposed on the Partner States by the EACCUP, namely, to prohibit any practice that adversely affects free trade. However, in contrast to the EACCUP, it has altered the responsibility of the Partner States to prohibit subsidisation which adversely affects free trade between Partner States, and imposed an obligation enjoining them from granting such subsidies.

The Partner States should, therefore, not grant subsidies that both distort or threaten to distort competition and affect trade between Partner States. The prohibition in the EACCMP does not, however, apply to subsidies granted under authority of the EAC Treaty, Acts or policies of the Community, or decisions of the Council.[43]

It is apparent from the foregoing, that as between the Partner States, there are adequate regional standards governing the assessment of the impact of subsidies granted by Partner States

[42]EACCMP, above note 1, Article 34(1).
[43] Id, Article 34(2).

to goods traded between them, on competition. The competition impact assessment standards in Kenya and Tanzania for goods benefiting from subsidies that emanate from other Partner States are now considered in the next section, with a view to determining their conformity with the regional standards.

4. THE COMPETITION IMPACT STANDARDS FOR IMPORTED SUBSIDISED GOODS IN KENYA AND MAINLAND TANZANIA

As Partner States in the EAC Common Market, Kenya and Tanzania are expected to domesticate the regional competition impact standards applicable to imported subsidised goods traded within the EAC. In this context, Kenya and Tanzania have both enacted trade remedy laws which in part provide for the control of such goods. In addition, domestic trade remedy laws are expected to give effect to the general principle in the ASCM that if a prohibited or actionable subsidy, or subsidy liable to countervailing duty causes or threatens to cause material injury to the domestic industry of a Member producing a like product, or otherwise results in a material retardation of the establishment of such an industry, the Member is entitled to impose countervailing duties on the subsidised products to offset the subsidisation.[44]

The implication is that the legal standards for the assessment of the impact of subsidised imported goods on competition are to be found in the national laws governing trade remedies. In this context, it is critical to determine the extent to which the competition impact standards for subsidies are accommodated within the trade remedy laws applicable to such goods in Kenya and Mainland Tanzania.

[44]ASCM, above note 7, Articles 5 and 15.

For the purpose of determining the competition impact assessment standards for imported subsidised goods in the national laws of Kenya and Tanzania, this study has adopted an analytical framework encompassing three elements. The first element is to establish the juridical nature of injury to the domestic industry. The second aspect is to examine the legal criteria for determining injury to the domestic industry; and the third is to consider the legal criteria for determining the threat of injury to the domestic industry. These elements are addressed in the context of Kenya and Tanzania in the following sub-sections.

4.1 Competition Impact Standards for Imported Subsidised Goods in Kenya

The legal framework for controlling the importation of subsidised goods in Kenya comprises the Constitution of Kenya as well as the KTRA.[45] Whilst it is the Act that sets out the competition impact assessment standards for such goods, the Constitution of Kenya provides an important context for the application of the legal standards for the regulation of subsidies in the interest of competition.

4.1.1 *The Constitution of Kenya*

The architecture of the Constitution of Kenya has implications for economic subsidies and their impact on competition from three perspectives. First, the Constitution of Kenya provides for the establishment of two levels of government; the national government and devolved governments comprising of forty seven county governments.[46] While it then vests the mandate over certain aspects of trade development and regulation such as

[45] KTRA, above note 9.
[46] Constitution of Kenya, Articles 1(4), and 6.

marketing, licensing and fair trade practises on county governments, it, nevertheless, vests foreign affairs and international trade in the national government.[47]

The second relevant feature of the architecture of the Constitution of Kenya is that it provides for separation of powers between the executive functions, judicial functions and legislative functions.[48] In this respect, the Constitution mandates the President to exercise executive authority of the Republic, with the assistance of the Deputy President and the Cabinet Secretaries.[49] The President is, however, subject to the applicable laws in the exercise of his executive authority.[50]

With respect to executive functions, it is trite that in liberal constitutional theory, the formulation and implementation of policy as well as implementation of laws fall within the executive authority of the President.[51] Thus the implementation of laws governing international trade, such as those that regulate subsidisation internally, and provide for the control of goods imported into, or exported out of Kenya falls within the mandate of the executive. The President of Kenya, accordingly, exercises inherent constitutional powers of control over subsidisation based on the executive authority of the national government in international trade, in the absence of legislation by Parliament. In this regard, the KTRA, as the legislation concerned with

[47] Id, Fourth Schedule.
[48] Id, Article 1(3).
[49] Id, Article 131(1).
[50] Id, Article 145(1) provides that the President may be impeached for gross violation of the Constitution and any other law, or for committing a crime under national law.
[51] Craig, P. and Tomkins, A. (eds.), *The Executive and Public Law: Power and Accountability in Comparative Perspective*, Oxford: Oxford University Press, 2010, at p. 14.

controlling the importation of subsidised goods in Kenya is examined below.

4.1.2 *The Kenya Trade Remedies Act*

The KTRA largely seeks to implements the World Trade Organisation standards and principles governing subsidies and the application of trade measures. In this regard, it is instructive to determine whether the normative framework for determining injury caused by susbsidisation approximates to that of the WTO legal system. It is also important to establish whether the three elements identified earlier for ascertaining whether the competition impact assessment standards applicable to imported subsidised goods in Kenya reflect the standards of the WTO.

4.1.2.1 *Injury to the Domestic Industry*

The KTRA defines injury in the same manner as the ASCM, that is, as material injury to the domestic industry or a material retardation of the establishment of such an industry.[52] However, it is unlike the ASCM which treats serious prejudice to the industry of another member as a separate adverse effect of subsidies,[53] the others being injury to the domestic industry,[54] and nullification or impairment of benefits involving concessions bound under Article II of GATT 1994.[55]

In this context, the KTRA treats such prejudice as an aggravated form of injury to the domestic industry.[56] Such prejudice would be manifested in displacement or impediment of the importation of like product originating in Kenya into the market of the foreign

[52] KTRA, above note 9, Section 2. See also ASCM, above note 7, Footnote 45.
[53]ASCM, above note 7, Article 5(c).
[54] Id, Footnote 45.
[55]Id, Article 5(b).
[56] KTRA, above note 9, Second Schedule Paragraph 30(4) and (11).

subsidising country, significant price undercutting, price suppression, or price depression by the subsidised product in Kenya as compared to the price of like product made in Kenya, or lost sales by like product made in Kenya as compared to the subsidised product.[57]

4.1.2.2 *Determination of Injury to the Domestic Industry*

As regards the criteria for determining whether injury has resulted to the domestic industry as a result of the subsidy, the KTRA sets out factors such as volume of the subsidised imports, effect of the subsidised imports on prices in the domestic market for like products, and the consequent impact of the imports on the domestic producers of such products.[58] More fundamentally, it requires that for the purpose of establishing whether the subsidy is the cause of the injury, it should be demonstrated that the subsidised imports are, through the effects of subsidies, causing the injury.[59]

The latter requirement is similar to that in the ASCM for determining the causal relationship between a subsidy and injury.[60] In *Japan-Countervailing Duties on Dynamic Random Access Memories from Korea* ('*Japan-DRAMS (Korea)*')[61] the Appellate Body of the WTO Dispute Settlement Body held that the ASCM framework shows that for the purpose of determining whether the "subsidised imports are, through the effects of subsidies, causing injury" to the domestic industry, what is

[57] Id, Paragraph 30(4).
[58]Id, Paragraph 35.
[59] Id, Paragraph 37(1).
[60]ASCM, above note 7, Article 15.5.
[61]WT/DS336/AB/R, 17 December 2007 (Appellate Body Report).

required is only an examination of the effects of the subsidised imports on prices, and consequently on domestic producers.[62]

The effects of the subsidy in terms of volumes of the subsidised imports, effects on prices and the consequent impact of the imports on domestic industry are, therefore, relevant only for the purpose of isolating and excluding other factors besidesubsidation which may be the cause of the injury.[63] The exclusionary function of factors beside the effects of the subsidised imports on prices, is also explicitly acknowledged in the KTRA, which requires that any known factors other than the subsidised imports which are at the same time injuring the domestic industry, and the injuries caused by them, should not be attributed to the subsidised imports.[64]

The criterion requiring that the effects of the subsidised imports on prices and, therefore, on domestic producers be established, for the purpose of determining whether injury has been caused by subsidies granted to imported goods, is essentially an effects on rivals analysis, and is a competition analysis at its core. A competition analysis is also required for the cumulative assessment of the effects of subsidised imports where more than one country is involved.[65]

Besides the threshold value of the subsidy stipulated by the Act, it also requires that the effects of such imports should be appropriate in light of the conditions of competition between the imported products, and between the imported products and the

[62]Id, para. 264.
[63]Ibid.
[64] KTRA above note 9, Second Schedule, Paragraph 37(2).
[65]Id, Paragraph 35(4)(a).

like domestic products.[66] This requirement, arguably, imposes an obligation to determine the conditions of competition in the market.

In relation to the determination of the impact of the subsidised imports on the domestic market, the relevant economic factors include decline in such elements as output, sales and market share, factors affecting domestic prices, negative effects on cash flow, employment, wages and growth, and in the case of agriculture, whether there has been an increased burden on Government support programmes.[67]

4.1.2.3 *Determination of Threat of Injury to the Domestic Industry*
With respect to the determination of threat of injury, the Act requires that it should arise where a change of circumstances which would create a situation in which the subsidy would cause injury is clearly foreseen and imminent.[68] This criterion is, arguably, consistent with that in the ASCM.[69]

The Act prescribes several factors to be considered in determining such threat, including; the nature of the subsidy, the trade effects likely to arise, a significant rate of increase of subsidised imports into Kenya indicating likelihood of substantially increased importation, sufficient freely disposable, or an imminent, substantial increase in capacity of an exporter indicating the likelihood of substantially increased subsidised exports, whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices and would

[66]Id, Paragraph 35(4)(b).
[67]Id, Paragraph 35(5).
[68] Id, Paragraph 36(1).
[69] ASCM, above note 7, Article 15.7, Second Sentence.

likely increase demand for further imports, and inventories of the product being investigated.[70]

In light of the above factors, it seems that the determination of the threat of injury posed by a subsidy conferred on products imported into Kenya requires the examination of a broad range of factors which go beyond the cost-revenue-price triad that is applicable in a competition analysis.

4.2 Competition Impact Standards for Imported Subsidised Goods in Mainland Tanzania

In Mainland Tanzania, the legal framework for the control of subsidised imported goods comprises the Constitution of the United Republic[71] and the ADCMA.[72] Just like in Kenya, the Constitution in Tanzania provides an important context for the application of the legal standards for the regulation of imported subsidised goods in the interest of competition. However, it is the ADCMA that prescribes the standards. In the sub-sections below, the two legal instruments are examined for the purpose of determining their effects in so far as the legal standards are concerned.

4.2.1 *The Constitution of the United Republic*

The Constitution of the United Republic categorises foreign affairs and external borrowing and trade as union matters.[73] These matters, therefore, fall within the exclusive mandate of the Government of the United Republic. It also vests all the authority of the Government of the United Republic over all union matters in

[70] Id, Paragraph 36(2).
[71] Constitution of the United Republic of Tanzania, Cap 2 [Rev 2005].
[72] ADCMA, above note 13.
[73] Constitution of the United Republic, above note 71, First Schedule.

the President of the United Republic, who may exercise the authority personally or by delegation to other persons holding office in the service of the United Republic.[74] Such delegation by the President is, however, subject to any conferment of power on any person or authority made by Parliament.[75]

Accordingly, in Tanzania just like in Kenya, within the ambit of the executive power of the Government of the United Republic, the President of the United Republic has inherent constitutional authority to formulate and implement policy relating to the control of subsidisation internally in Tanzania. The President also has executive authority based on the constitutional power to regulate external trade, to control the importation into, and exportation out of, Tanzania of goods, including those that have benefited from economic subsidies. Nevertheless, legislation concerned with controlling subsidised imported goods also exists as discussed in the next sub-section.

4.2.2 *Anti-Dumping and Countervailing Measures Act*

In Mainland Tanzania, the legislative basis for the control of subsidised imported goods in Mainland Tanzania is the ADCMA.[76] In this regard, the Act also prescribes the competition impact assessment standards for subsidised imported goods in Mainland Tanzania. Moreover, as the definition of subsidy in the Act shows, the Act seems to be intended, in part, to prevent market distortion caused by such goods. It was thus noted that the Act defines a subsidy as being a financial contribution or income or price support by Government or public body that lead to market distort.[77]

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[74] Id, Article 34(3) and (4).
[75] Id, Article 34(5)(b).
[76] ADCMA, above note13.
[77] Id, Section 3.

In view of the foregoing, the three elements for ascertaining the competition impact assessment standards for imported subsidised goods in Mainland Tanzania are discussed below.

4.2.2.1 *Injury to the Domestic Industry*

The Tanzania Act defines injury in the same manner as the ASCM and the KTRA, namely, as material injury or threat of material injury to the domestic industry or material retardation of the establishment of such industry.[78] In this regard, therefore, there is convergence in Kenya and Tanzania regarding the essential mischief for which provisions governing subsidies in the Act were enacted.

4.2.2.2 *Determination of Injury*

The determination of whether a subsidy causes injury to the domestic industry under the ADCMA, however, applies a different criterion. The Act requires that countervailing measures be imposed when a foreign Government or public body gives financial assistance to specific firms and enterprises or industries which result in the sale of the exported products at a lower price than the comparable price charged for the like product to buyers in the exporting country, as a result of which there is an increase of exports of the product into Mainland Tanzania.[79]

For purposes of clarity, it should be noted that in *Korea-Taxes on Alcoholic Beverages*,[80] the Appellate Body of the Dispute Settlement Body viewed the notion of like product as expressing the need for equality of competitive opportunity between imports on the one hand, and directly competitive or substitutable products

[78] Ibid.
[79] Id, Section 10(3).
[80]WT/DS75/AB/R, WT/DS84/AB/R, 18 January 1999 (Appellate Body Report).

on the other hand.[81] This is also the essence of the concept under the ADCMA.[82]

The aforesaid notwithstanding, the standard for determining whether a subsidy given to products imported into Mainland Tanzania is the cause of the injury to the domestic industry has two elements. Firstly, the exported product should as a result of the subsidy be sold at a lower price than the comparable price charged for the like product to buyers in the exporting country. Secondly, as a result of such sale of the product, there should be an increase of exports of the product into Mainland Tanzania. These dual requirements appear to envisage a much broader criterion than that articulated in *Japan-DRAMS (Korea)*[83] where the AB stated that what is required is only an examination of the effects of the subsidised imports on prices, and consequently on domestic producers.[84]

The Act also provides that such determination of injury should be based on positive evidence involving an examination of the volume of the subsidised imports, and the effects of the subsidised imports on prices in the market for like products, as well as the resulting impact of these products on the local producers of such products.[85] In this context, the examination of the volume of the subsidised imports should be for the purpose of determining whether there has been a significant increase in the subsidised product relative to production or consumption.[86]

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[81] Id, para. 18.
[82] ADCMA, above note 13, Section 3.
[83] *Japan-DRAMS (Korea)* (Appellate Body Report), above note 61.
[84] Id, para. 264.
[85] ADCMA, above note 13, Section 23.
[86] Id, Section 24. See also Section 32(1).

As regards determining the effect of the subsidised imports on prices, it should be ascertained whether there has been price undercutting of the subsidised imports as compared to the price of like domestic products, or price depression or prevention of price increases, in addition to effect of sales, output, market share, productivity, return on investment, among other factors.[87]

The broad criteria prescribed by the ADCMA is reinforced by the requirement that the causal link between the subsidised investigated product and the injury to the domestic industry be based on an examination of all relevant evidence including the volume and prices of imported products identical to the investigated product, the change in demand or patterns of consumption of the investigated product, the existence of trade restrictive practices and competition between foreign and domestic producers, and the development in technology and the export performance and productivity of the industry.[88]

From the foregoing, it seems that the effect on competition as a basis for determining the injurious effects of subsidies given to imported products in Mainland Tanzania is limited, as there are several other factors that are considered. In any event, distortion of competition is only explicitly required by the Act for countervailable measures involving income or price support.[89] It also seems that the range of factors required to be considered so as to determine the causal link between subsidies and injury is consistent with the need to establish market distortion.

Moreover, just like in Kenya, it is in the context of the cumulative assessment of the effects of subsidised imports where more than

[87] Id, Section 32(2).
[88] Id, Section 26.
[89] Id, Section 10(3)(a)(v).

one country is involved that there is a requirement that the assessment should be appropriate in light of the conditions of competition between imported products, and between imported products and the like domestic products.[90] This requirement denotes a need to determine the conditions of competition in the market.

4.2.2.3 *Determination of Likelihood of Injury*

In relation to determining whether a subsidy is likely to cause injury, the ADCMA prescribes three conditions. Firstly, allegations must have been received relating to the imported products.[91] Secondly, the imported products should benefit from a specific subsidy which is countervailable and is granted to an enterprise or industry or group of enterprises or industries that are located within a designated geographical area of the government of the exporting country.[92] This condition would seem to imply that only goods emanating from designated geographical areas such as export processing zones or free trade areas are deemed likely to cause material injury to the local industry.

The third condition is that the imported products are, through the effect of subsidisation, likely to cause material injury to the local industry.[93] It should be borne in mind that the criteria for likelihood of injury in the ASCM is that granting of the subsidy portends a change of circumstances which would create a situation in which the subsidy would cause injury in a manner that is foreseeable and imminent.[94] The ACDMA makes no reference to any such change of circumstances, or to any other collateral factors that should be examined for that purpose.

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[90]Id, Section 25.
[91] Id, Section 22(a).
[92]Id, Section 22(b).
[93] Id, Section 22(c).
[94]ASCM, above note 7, Article 15.7.

It may well be that such a change of circumstances may be inferred in the requirement that the investigated products are, through the effects of subsidisation likely to cause material injury to the local industry. Whatever the construction that may be assigned to the requirement, the criteria for determining whether a subsidy is likely to cause injury in Mainland Tanzania is sufficiently broad as to be consistent with the essence of market distortion, namely effect on both consumers and competitors.

5. COMPETITION IMPACT STANDARDS FOR SUBSIDISED IMPORTED GOODS IN KENYA AND MAINLAND TANZANIA: AN ASSESSMENT

It was noted earlier that the EAC Treaty envisages a free market in the trade relations amongst the Partner States. The implementation of a free market presupposes a convergence of economic philosophy amongst the Partner States. It was also noted that the legal framework governing subsidies and their impact on competition in the EAC enjoins the Partner States not to grant any subsidy through resources in any form, which distorts or threatens to distort effective competition by favouring an undertaking in such manner as to affect trade between Partner States.

To fully give effect to this regional principle, it is essential that Partner States should in their domestic laws distinguish the legal principles and rules governing subsidisation amongst themselves from those that apply to subsidisation by third countries. In this regard, while Partner States are expected to domesticate the regional standards in their laws, it seems that neither Kenya nor Tanzania has made provision in her laws to accommodate or otherwise implement these standards in her relations with other Partner States. In the result, it seems that the laws of both

countries provide for the application of the same standards to subsidised imported goods emanating from other Partner States and third party countries.

Moreover, there seems to be a fundamental divergence in the economic imperatives underpinning the laws governing the control of subsidised imported products in these two largest economies in the EAC, with Kenya adopting a trade liberalisation policy that seeks to implement the WTO standards on free trade in its law on subsidies whereas, in contrast, Tanzania has adopted a policy revolving around the prevention of market distortion.

These divergent economic approaches are largely responsible for the disparate standards applicable to competition impact relative to subsidised imported goods originating in other Partner States in Kenya and Tanzania. The risk is that such disparate standards create non-tariff obstacles to the free movement of goods within the Common Market. In the result, they jeopardise the free trade ideal enshrined in the EAC Treaty.

6. CONCLUSION

This article has examined the legal standards for the assessment of the impact of subsidised imported goods on competition in Kenya and Tanzania. It has been contended that both countries do not accommodate or otherwise implement East African Community standards on imported subsidised goods in their domestic laws, but instead apply their own disparate standards largely influenced by their perceived economic imperatives.

It may be concluded that the divergences, as well as the application of disparate standards for the assessment of the impact of subsidies on competition in Kenya and Tanzania inhibit free movement of products within the Common Market as they

present dissimilar conditions for trade, and thereby jeopardise the free market philosophy in the EAC Treaty. This situation underscores the need for harmonisation of laws among the Partner States if the ideal of a functional common market is to be realised.