Case Summary: East African Court of Justice Decision, British American (U) Tobacco Limited vs The Attorney General of Uganda, First Instance Division, Reference No. 7 of 2017 (Judgment delivered 26th January 2019)

By:

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Summary of Facts

The British American (U) Tobacco Limited (Applicant) referred a claim to the East African Court of Justice (EACJ) challenging the consistency of Uganda's Excise Duty Amendment Act No. 11 of 2017 (the challenged legislation) and the application of this legislation with the EAC Treaty, the Protocol for the

Establishment of the EAC Customs Union and the Protocol on the Establishment of the EAC Common Market. The challenged legislation increased the excise duty chargeable on cigarettes. Further, it distinguished between imported cigarettes and domestically produced cigarettes, with the latter attracting a lower excise duty. During assessment of the Applicant's cigarettes for taxation, Uganda classified cigarettes manufactured in Kenya as imported goods, which resulted in imposition of higher duties.

Summary of Findings

This is a summary of the findings made by the First Instance Division of the EACJ.

- Whether the challenged legislation is unlawful, discriminatory or negated the purpose for which the EAC Treaty was enacted
    - *Objectives of EAC Integration*

Uganda's treatment of cigarettes from Kenya as *imported products*was held to be inconsistent with the objectives of the EAC Treaty, which defined imported products as those which were introduced into the EAC from countries other than Partner States. The EACJ held that the interpretation of Uganda's tax laws to the exclusion of EAC laws negates the benefits of EAC integration.

- *Principles of Equal Opportunities and Equitable Distribution of Benefits*

The EACJ disallowed the Applicant's claims that the challenged measure and its application violated the principles of equal opportunities and equitable distribution of benefits contained in Article 6(d) and (e) of the EAC Treaty. This was on the basis that while the Applicant had been disadvantaged in its cross-border activities, the dispute arose from a "*purely commercial transaction as opposed to the socio-political thrust of the considerations inherent in the notion of equal opportunities*". The EACJ also held that the principle of equal distribution of benefits alludes to the "*imbalances that could accrue from the very existence of the EAC that are not necessarily trade-related*". Such imbalances would entail, *inter alia*, employment opportunities in EAC organs. This interpretation appears to have been a miss by the EACJ. The chapeau of Article 6 of the EAC Treaty states that "[t]he fundamental principles that shall govern the achievement of the objectives of the Community by the Partner

States shall include…" These principles therefore underscore the substantive obligations encompassed in EAC community law. The EACJ could have, in the least, acknowledged the role of these principles in interpretation of EAC community law. They provide context, and reflect the object and purpose of EAC laws. Nothing in the wording of Article 6 (d) and (e) implies that these provisions preclude trade-related provisions. In fact, borrowing from jurisprudence of the World Trade Organization (WTO) which the EACJ relies on, the purpose of rules on non-discrimination are aimed at ensuring equality of competitive conditions. These specific provisions of the EAC Treaty appear broad enough to apply to trade within the EAC.

- *Violation of the Non-Discrimination Provisions*

In its response, Uganda cited the World Health Organization Framework Convention on Tobacco Control (WHO FCTC) and its recognition that price and tax measures are an effective and important means of reducing tobacco consumption. Uganda argued that its measures aimed at protecting 'young and vulnerable groups from tobacco consumption'. The EACJ pointed out that according to the WHO FCTC, measures taken to combat smoking must be in line with regional and international treaties, including EAC treaties. While the EACJ agreed with the Applicant that this discriminatory intent could be inferred from the parliamentary Hansard, it found that this in itself was not sufficient to make a finding of discrimination. It therefore proceeded to examine the text and application of the challenged legislation. The challenged legislation imposed higher excise duty on imported products as compared to domestically produced like -products, but did not define products sourced from other EAC member states as *imported* products. The EACJ found that on this basis, a finding of discrimination against products from Kenya could not be reached. The EACJ then assessed for *de facto* discrimination[1] by drawing from the decision of the Appellate Body of the WTO *Brazil – Taxation*. The Appellate Body reiterated that an analysis under Article III:2 of the General Agreement on Tariffs and Trade (GATT 1994) required an analysis of whether the products at issue were like products and whether taxation imposed on imported goods was *in excess of*that imposed on domestic goods. The wording of Article III:2 of the GATT (1stsentence) is very similar to that of Article 15(2) of the EAC Customs Union Protocol. In making a finding for likeness, the EACJ First Instance Division considered that from the Payment Registration Slips presented by the

Applicant, the goods were the ‘same’ consignments as evidenced by the customs reference numbers. Regarding the second test, the EACJ First Instance Division found that reclassification of the cigarettes from domestic goods to imported goods attracted an additional tax burden and therefore met the requirement for *taxation in excess*, thus the application of the measure was inconsistent with the non-discrimination provisions of the EAC Treaty and Protocols. While Uganda alleged that it introduced its measure in order to reduce smoking amongst its population, it is not clear from the Decision whether this justification was advanced further. Article 22 of the EAC Customs Union Protocol allows member states to impose measures *affecting*the protection of public health and human life, provided such measures are not imposed or executed in order to restrict the free movement of goods within the EAC. Granted, countries across the world have put in place measures to curb cigarette smoking due to its detrimental effect on health. However, borrowing from WTO jurisprudence, this measure would not meet the required threshold, as the discrimination would not be justifiable, would be arbitrary and would therefore be a disguised restriction to international trade. The application of the challenged legislation, which allowed a lower excise duty on domestically produced cigarettes, waters down the would-be stated objective.

- Whether the challenged measure violated Uganda’s Obligations under the Protocol on the Establishment of the EAC Common Market

The Applicant sought from the EACJ a determination that the challenged measure circumvented the progressive harmonization of tax policies and laws, as well as elimination of tariff, non-tariff and technical barriers to trade. These claims were dismissed as the Applicant did not demonstrate steps taken towards harmonization of tax policies and laws and the Respondent’s violation of the same. Neither did the Applicant demonstrate that cooperation between Kenya and Uganda was the *cornerstone*of their commercial activities. Drawing from its findings of violation of the non-discriminatory requirements, the EACJ held that Uganda had violated its obligations to allow for the free movement of goods.

Implications of this Decision

This EACJ Decision is fundamental in today's EAC climate. Despite the existing EAC legislation, citizens continue to face challenges to movement of goods and persons across the borders. The ability of EAC citizens to enforce these trade commitments has been grossly underused, and such disputes have been referred to diplomatic means for resolution. It can only be hoped that moving forward, more persons will seek legal redress for such disputes. At the end of the day, when trade agreements do not work, it is *persons*who suffer. The EACJ decision did not address Uganda's purported justification of the challenged measure, which was protection of its public health. Granted, this justification would not have sufficed due to its structure and application as illustrated above. However, being an issue raised by the Respondent and provided for in the EAC Customs Union Protocol, the EACJ should have addressed it and made a finding. Afterall, governments' right to protect populations to their desired level cannot be compromised, as long as it is done within the confines of the Protocol.

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[1]While in paragraph 93 of the Decision the EACJ states that the Applicant was required to prove *de jure* discrimination, it went on to state "… that an overall assessment of the **actual** tax burdens imposed on its cigarettes yield differential and discriminatory treatment…" The analysis that follows is therefore one of *de facto* discrimination.

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