IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, DPJ; Audace Ngiye, Charles O. Nyawello & Charles Nyachae, JJ)

REFERENCE NO.7 OF 2017

BRITISH AMERICAN TOBACCO (U) LTD ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF UGANDA .....RESPONDENT

26th MARCH 2019

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This is a Reference by British American Tobacco Uganda Limited ('the Applicant') challenging the legality of section 2(a) and (b) of the Republic of Uganda's *Excise Duty (Amendment) Act No.11 of 2017* for contravening various provisions of the Treaty for the Establishment of the East African Community ('the Treaty'); the Protocol on the Establishment of the East African Customs Union ('the Customs Union Protocol), and the Protocol on the Establishment of the East African Community Common Market ('the Common Market Protocol').

2. The Applicant was incorporated in the Republic of Uganda in 1984 as a company limited by shares that would manufacture and otherwise deal in tobacco and tobacco products, and to date remains domiciled and operational in Uganda. It has since restructured its business operations to have its sister company in the Republic of Kenya (British American Tobacco Kenya Limited) manufacture and supply it with cigarettes for sale on the Ugandan market.

3. The Respondent is the Attorney General of Uganda and has been sued herein as the legal representative of the Republic of Uganda.

4. Both the Republic of Uganda and the Republic of Kenya are Partner States in the East African Community (EAC), and signatories to the Treaty, Customs Union Protocol and Common Market Protocol.

5. At trial the Applicant was represented by Mssrs. Kiwanuka Kiryowa, Peter Kawuma and Richard Bibangamba of M/s K & K Advocates, while Ms. Margaret Nabakooza, Principal State Attorney; Mr. Sam Tusubira, Senior State Attorney and Ms. Maureen Ijang, State Attorney appeared for the Respondent.

B. **BACKGROUND**

6. In 2014 the Republic of Uganda enacted the *Excise Duty Act No.11 of 2014* that sought to consolidate the law applicable to excise duty and related matters. An *Excise Duty (Amendment) Bill No.6 of 2017* that was subsequently introduced by the same Partner State sought to have all tobacco products manufactured within the EAC region have a uniformly applicable excise duty rate, with an increment of the duty chargeable on soft cap cigarettes from Ushs. 50,000 per 1,000 sticks to Ushs. 55, 000 for the same number of sticks.

7. The Bill was eventually passed by the Parliament of Uganda, duly assented to and enacted into the *Excise Duty (Amendment) Act No.11 of 2017* with such amendments as *inter alia* created differential treatment between goods 'locally manufactured' in Uganda and 'imported' goods, whereby a higher excise duty was chargeable in respect of the latter category of goods.

8. Following the enactment of the Excise Duty (Amendment) Act, the Uganda Revenue Authority (URA) issued the Applicant Company with tax assessment notices that re-classified as imported goods the company's cigarettes that had hitherto been categorized, assessed and taxed as locally manufactured products.

9. Aggrieved by the differential treatment introduced by the amendment, the Applicant filed the present Reference on the premise that the differentiation of the excise duty applicable to goods that originate from Uganda as opposed to like goods from elsewhere in the region was discriminatory and a violation of the Treaty, the Customs Union and Common Market Protocols.

C. APPLICANT'S CASE

10. It is the Applicant's case that the definition of the term 'import' in the Excise Duty Act, when read together with the definition of the same term in the *Value Added Tax Act, Cap 349* (VAT Act) is such as would categorise goods from Kenya as imported goods thus attracting a higher excise duty thereon than is applicable to goods locally manufactured in Uganda, notwithstanding prevailing Community law that requires goods from the EAC Partner States to attract uniform tax rates within the region.

11. The Applicant further contends that section 2 of the Excise Duty (Amendment) Act is unlawful, discriminatory and negates the purpose for which the Treaty was promulgated, and the same legal provision violates Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Articles 15(1) and (2) of the Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the Common Market Protocol. It takes issue with both the enactment of the impugned law to the extent that it violates the foregoing Treaty and Protocol provisions, as well as its implementation by URA in so far as it poses a threat to its business operations, condemning it to the payment of exorbitant excise duty simply on account of its cigarettes being manufactured in Kenya.

12. The Applicant seeks the following reliefs:

a. *A declaration that the provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act No. 11 of 2017 contravene and infringe Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Articles 15(1) and (2) of the Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the Common Market Protocol.*

b. *A declaration that the provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act No. 11 of 2017 are null and void to the extent that they infringe Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Articles 15(1) and (2) of the Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the Common Market Protocol.*

c. *An order directing the Respondent to immediately take the necessary measures to ensure that the Applicant's rights under the Treaty are not violated by the application of the provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act No. 11 of 2017.*

d. *An order that the costs of this Reference are paid by the Respondent.*

13. The Reference is supported by the Affidavit of Mathu Kiunjuri, the Managing Director of the Applicant Company, essentially re-stating the Applicant's case as briefly highlighted above and adducing in evidence the documents referred to thereunder. Mr. Kiunjuri elaborates that section 2 of the impugned law is unlawful, discriminatory and at cross-purposes with the Treaty in so far as it

designates a higher excise duty on cigarettes from Kenya than it imposes on cigarettes that are locally manufactured in Uganda; its illegality being further entrenched by its violation of section 23 of the *Tobacco Control Act No. 22 of 2015*. He attests to URA having initially classified and assessed the excise duty payable towards his company's cigarettes at the rate of locally manufactured cigarettes but, following the enactment of the Amended Act, it re-classified them as imported cigarettes. The deponent furnished the pre- and post-amendment tax assessment notices in proof thereof.

14. It is also Mr. Kiunjuri's averment that despite correspondence from his company; the Principal Secretary, EAC Integration, and the Director General (Customs and Trade) of the EAC Secretariat that brought the erroneous categorization of the Applicant's cigarettes to the attention of various industry stakeholders (including URA); as well as the assurances of Uganda's Ministry of Finance, Planning and Economic Development, no measures have been taken to redress the anomaly.

D. **RESPONDENT'S CASE**

15. In its Response to the Reference, the Respondent contends that when Uganda's Parliamentary Committee on Finance, Planning and Economic Development considered the Excise Duty (Amendment) Bill, it recommended the differential treatment for locally manufactured viz imported goods to bring it in tandem with the practice that purportedly prevails in other countries in the region, as well as to counteract the practice of smuggling and its adverse effects on locally manufactured cigarettes, cigarette prices

in those countries being lower than those in Uganda. In the same vein, the Committee sought to promote the growth of local industries, encourage more companies to invest in Uganda and promote the consumption of locally manufactured cigarettes. It is the Respondent's case that when the Committee Report was subsequently presented to the Ugandan Parliament, it agreed with the reasoning of the Committee as highlighted above and endorsed the charging of higher excise duty on imported goods than similar locally manufactured ones.

16. The Respondent denies that the Excise Duty (Amendment) Act is unlawful, discriminatory or negates the purpose for which the Treaty was enacted; and denies that the same Act violates Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Article 15(1) and (2) of the Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the Common Market Protocol. It is the Respondent's contention that the impugned law was passed in good faith, was well intentioned and was intended for the benefit of the Republic of Uganda and the EAC as a whole, and accordingly seeks to have the Reference dismissed with costs.

17. The Response to the Reference is supported by the affidavit of Ms. Jane Kibirige, the Clerk to the Parliament of Uganda, which essentially restates the averments in the Response to the Reference from her personal knowledge of what transpired during the enactment of the impugned law. She does, vide her affidavit, adduce in evidence the Parliamentary Committee's Report, as well as a certified copy of the Hansard (Parliamentary Debate) Report in which the impugned Act was debated and passed.

E. ISSUES FOR DETERMINATION

18. At a Scheduling Conference held on 12th June 2018, the Parties framed the following issues for determination:

a. *Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the Excise Duty (Amendment) Act No. 11 of 2017 are unlawful, discriminatory or negated the purpose for which the Treaty was enacted, as alleged or at all.*

b. *Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the Excise Duty (Amendment) Act No. 11 of 2017 violate and/ or infringe Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty, as alleged or at all.*

c. *Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the Excise Duty (Amendment) Act No. 11 of 2017 violate and/ or infringe Article 15(1) and (2) of the Customs Union Protocol, as alleged or at all.*

d. *Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the Excise Duty (Amendment) Act No. 11 of 2017 violate and/ or infringe Articles 4, 5, 6 and 32 of the Common Market Protocol, as alleged or at all.*

e. *What remedies are available to the Parties.*

F. COURT'S DETERMINATION

Issue No. 1: Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the *Excise Duty (Amendment) Act No. 11 of 2017* are unlawful, discriminatory or negated the purpose for which the Treaty was enacted, as alleged or at all.

19. The Applicant faults the Respondent State for enacting and seeking to implement section 2 of the impugned law in such a manner as would introduce different excise duty rates for locally manufactured viz imported cigarettes, and re-classifying and purporting to tax the Applicant's cigarettes that are manufactured by its sister company in Kenya as imported goods contrary to the provisions of the Treaty, Customs Union and Common Market Protocols. It was argued for the Applicant that whereas, on the one hand, Uganda's tax laws that URA apparently sought to apply broadly defines the term 'imports' as goods from any foreign country; the Treaty and Customs Union Protocol restrict the applicability of the same term to goods that are brought into a Partner State or the 'customs territory' from beyond the Partner States. This argument was reinforced with the contention that in so far as both the Treaty and Customs Union Protocol define the term 'foreign country' as 'any other country other than a Partner State', it did follow that Kenya, being an EAC Partner State, was not a foreign country, goods from which would warrant consideration by the Respondent State as imports. To that extent, it was the Applicant's contention that Uganda's tax law regime[1] was not

[1] The *Excise Duty Act No. 11 of 2014* read together with the *VAT Act, Cap 349.*

aligned with the relevant provisions of the Treaty and Customs Union Protocol and the categorization of its viz the locally manufactured cigarettes, an anomaly that could be redressed by re-categorising the Applicant Company's cigarettes as locally manufactured products.

20. Citing the House Committee Report on the Excise Duty (Amendment) Bill, as well as the Parliamentary Hansard of 10th May 2017, learned Counsel for the Applicant argued that the parliamentary debate manifested the discriminatory intentions of the House in contravention of the provisions of the Treaty, Customs Union and Common Market Protocols, which place clear and unambiguous obligations on each Partner State. It was opined that such international treaty obligations were further entrenched in Uganda's legal regime by Objective xxiii(i)(b) of the Uganda Constitution. Articles 8(1); 75(1), (4), (5) and (6), and 127(2)(b) of the Treaty, as well as section 23 of the Tobacco Control Act were invoked as legal provisions that had been contravened by the enactment and purported implementation of the impugned law, rendering it unlawful and discriminatory. We reproduce these legal provisions later in this judgment.

21. The case of **Burundi Journalists Union vs. The Attorney General of Burundi, EACJ Ref. No. 7 of 2013** was cited by learned Counsel for the Applicant to underscore the point that the fundamental principles outlined in Articles 6 and 7 of the Treaty are justiciable and binding on the Partner States. The Applicant relied on the following decision therein:

By acceding to the Treaty .... Partner States ... are obligated to abide and adhere by each of the fundamental and operational principles contained in Articles 6 and 7 of the Treaty and their National Laws must be enacted with that fact in mind. In stating so, we have previously held that whereas this Court cannot superintend the organs of Partner States in the way they enact their laws, it is an obligation on their part not to enact or sustain laws that completely negate the purpose for which the Treaty itself was enacted.

22. The Applicant did also refer us to the case of **Samuel Mukira Muhochi vs. The Attorney General of Uganda, EACJ Ref. No. 5 of 2011**, where it was held that by accepting to be bound by Treaty provisions with no reservations, Uganda could no longer apply domestic legislation in ways that make its effects prevail over those of Community Law.

23. Conversely, the Respondent made reference to Uganda's being a signatory to the *World Health Organisation Framework Convention on Tobacco Control* (WHO FCTC) to portend that Article 6 thereof recognizes that price and tax measures are an effective and important means of reducing tobacco consumption. It was argued for the Respondent that in so far as the Guidelines promulgated for the implementation of Article 6 of the WHO FCTC not only recognize the sovereign right of (states) parties to determine their own tax policies, but also encourage such tax prices as would inhibit tobacco consumption for health reasons; the Ugandan Parliament rightly increased the excise duty on both locally manufactured and imported cigarettes to protect young, vulnerable

groups from its consumption. Learned Counsel for the Respondent similarly applauded the Parliament of Uganda for seeking to control smuggling, arguing that its reasoning in that regard was in tandem with Article 15 of the WHO FCTC to the extent that the said Convention acknowledges the need to eliminate such illicit trade practices. Thus, it was the contention of learned Counsel for the Respondent that the enactment and implementation by the Respondent State of section 2 of the Excise Duty (Amendment) Act was lawful in so far as it complied with the WHO FCTC legal regime.

24. With regard to the allegedly discriminatory character of the section 2 of the impugned law and its purported negation of the Treaty's purpose, Ms. Nabakooza relied upon the decision in **Mangin vs. Inland Revenue Commissioner (1997) 1 All ER 197**, to argue that tax laws should be considered on 'as is' basis and there was nothing in the impugned Act to suggest discrimination as had been alleged. In that case it was *inter alia* held:

> **One has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax period. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used.**

25. She maintained that the purpose of the impugned law was not to discriminate against the Applicant but, rather, was clearly stated in the Parliamentary Committee's Report as highlighted above. In a direct response to Mr. Kiunjuri's contrary attestations, learned Counsel further argued that the views of one (1) Member of

Parliament as reflected in the Hansard did not and could not be held to represent the views of the entire House. In conclusion, she urged that in seeking to implement the impugned law in respect of the Applicant Company, URA was simply exercising its mandate in compliance with a duly enacted law.

26. In a brief reply, we understood it to have been argued for the Applicant that the reasons that had purportedly informed the enactment of the impugned law (as advanced by learned Counsel for the Respondent) were well recognized and might have been applauded had they not had a discriminatory effect on the Applicant. It was Mr. Kiryowa's contention that a law that treats cigarettes from Kenya differently from cigarettes from Uganda seemingly suggests that cigarettes from Uganda are less harmful to consumers' health than those from Kenya. We understood him not to take issue with the health considerations advanced, but rather the differentiation in treatment of like goods from the region, the express provisions of the Treaty and related Protocols notwithstanding. In his view, this was both unlawful and discriminatory.

27. On our part, having carefully considered the very elaborate arguments of either Party on this issue, it seems to us that an understanding of what would amount to an unlawful Act of Parliament under the EAC legal regime is critical to a determination of whether the impugned tax law is indeed *unlawful* or, in effect, at cross-purposes with the EAC Treaty. We find apposite instruction on this question from the Treaty itself.

28. Article 27(1) of the Treaty defines the jurisdiction of this Court as **'the interpretation and application of the Treaty'**. On the other hand, Article 30(1) demarcates the acts that would give rise to a cause of action before this Court. It reads:

> **Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty.**

29. It seems to us that a cause of action under Article 30(1) of the Treaty would arise where the legality of the acts designated therein is in issue on account of being unlawful *per se* or an infringement of a Treaty provision. Whereas a Treaty violation would give rise to a fairly obvious cause of action, what is envisaged as an unlawful act under Article 30(1) is not as readily apparent. Our construction of that legal provision is that such an unlawful act would arise from a violation of any other laws – domestic or international.

30. We are fortified in that regard by the decision in **Simon Peter Ochieng & Another vs. Attorney General of Uganda, EACJ Ref. No. 11 of 2013**, where a matter was held to be justiciable before this Court if it was one ***'the legality of which is in issue viz the national laws of a Partner State,* or one that constitutes an infringement of any provision of the Treaty**.' Although that

case alludes only to a cause of action arising from the breach of national laws, in **B. E. Chattin (USA) vs. United Mexican States, 1927, UNRIAA, vol. IV, p.282 at 310** the violation of international laws was similarly acknowledged as a sustainable international claim, so that a court or tribunal was required to determine **'whether there exists an injury and whether the act which causes it violates any rule of international law'**.

31. Consequently, it becomes abundantly clear that two (2) categories of acts would give rise to a sustainable cause of action before this Court: first, a claim arising from an act that contravenes and thus calls for the interpretation and application of any Treaty provision and, secondly, a claim that arises from an act that violates any law – international or municipal.

32. In the instant case, by dint of the issue under consideration presently, the legality of an Act of Parliament (the impugned Act) has been challenged on account of its enactment and implementation having been allegedly laced by discriminatory considerations in contravention of the definition of the terms 'import' and 'foreign country' under Article 1 of the Treaty and Article 1(1) of the Customs Union Protocol. This infringement has in turn been suggested to negate the purpose of the Treaty as expounded in Articles 2, 8, 75 and 127 thereof. In Submissions, though not pleaded, it was also argued that the said Act was enacted and implemented in contravention of Objective xxiii(i)(b) of the Constitution of Uganda and section 23 of Uganda's Tobacco Control Act.

33. Given our finding above that an illegality that gives rise to a cause of action can accrue either from a Treaty violation or the contravention of a domestic or international law, a determination of Issue No. 1 hereof would hinge on an interrogation as to whether the Treaty, the invoked international instruments – the Protocols, as well as Ugandan domestic law have indeed been contravened by the impugned law. Aside from the contested definition of the term 'import' and the invoked municipal law, which would ensue hereunder; the bulk of the Treaty and Protocol violations that are in question in this Reference accrue under Issues 2, 3 and 4. Thus, a determination of Issues 2, 3 and 4 must of necessity precede and inform the conclusive resolution of Issue No.1.

34. The Applicant delineated Articles 2; 8(1)(c); 75(1), (4), (5) and (6), and 127(2)(b) as the provisions that represent the Treaty's purpose, which would thus stand negated by the enactment and implementation of the impugned law. Curiously, the highlighted subsections of Article 75 are also directly invoked under Issue No. 2. We shall therefore address them at that stage. Nonetheless, for ease of reference, we reproduce Articles 2, 8(1)(c) and 127 of the Treaty below:

Article 2

1. *By this Treaty the Contracting Parties establish among themselves an East African Community hereinafter referred to as 'the Community.'*
2. *In furtherance of the provisions of paragraph 1 of this Article and in accordance with the protocols to be concluded in this regard, the Contracting Parties shall establish an East*

African Customs Union and a Common Market as transitional stages to and integral parts of the Community.

Article 8

1. *The Partner States shall:*
   (a).....
   (b).....
   (c) Abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of this Treaty.

Article 127

1. .....
2. *For purposes of paragraph 1 of this Article, the Partner States undertake to:*
   a. .....
   b. Stimulate market development through infrastructural linkages and the removal of barriers and constraints to market development and production.

35. The violation of municipal law does give rise to a cause of action either under Article 30(1) to the extent that it amounts to an 'unlawful' act *per se*, or under Article 6(d) of the Treaty in so far as it would constitute a violation of the principle of rule of law enshrined therein. We understood the Applicant in the instant case to have contested the legality of section 2(a) and (b) for contravening Objective xxiii(i)(b) of the Constitution of Uganda and section 23 of Uganda's Tobacco Control Act. It thus sought to invoke a cause of action under Article 30(1) of the Treaty. On the other hand, learned Counsel for the Respondent contended that the alleged breach of the Tobacco Control Act had not been

pleaded by the Applicant and could not, therefore, be entertained at this stage of the proceedings. She remained silent on the invoked constitutional provision.

36. We have carefully scrutinized the Reference. It is indeed apparent that no mention whatsoever was made in it to either the Constitution of Uganda or the Tobacco Control Act. Whereas reference to the cited Act only arose in the affidavit in support of the Reference, no mention whatsoever is made to the constitutional provision in question till the Applicant's submissions. Clearly there is discordance between the Applicant Company's pleadings on the one hand, and its evidence and submissions, on the other hand.

37. It is a well established rule of procedure that parties to a dispute are bound by their pleadings. The rationale behind this rule could not be stated better than it was in **Captain Harry Gandy vs. Caspair Air Charter Ltd (1956) 23 EACA 139** as follows:

> **The object of pleadings is of course to ensure that both parties shall know what are the points in issue between them so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent.**

38. Moreover, Rule 37(1) of this Court's Rules of Procedure does detail a mandatory requirement for every pleading to contain '**a concise statement of the material facts upon which the party's claim or defence is based**' while, in the same vein, Rule 38(2)(b) enjoins parties to '**plead every matter which if not specifically pleaded would take opposite party by surprise.**' It is our

considered view, therefore, that purporting to raise a new matter either in evidence or in submissions would run afoul of the foregoing Rules of Procedure and established judicial process. It seems to us that the Applicant's complaints in relation to Objective xxiii(i)(b) of the Ugandan Constitution and section 23 of the Tobacco Control Act were belated afterthoughts. In the premises, we respectfully decline the invitation to make a determination on them.

39. With regard to the contested construction of the term 'import', it would appear that in interpreting that term as it did, URA relied on its definition in section 2 of the Excise Duty Act and section 1(j) of the VAT Act, to the exclusion of the relevant Treaty and Protocol definitions. The relevant provisions of those 2 tax laws read:

> Section 2 of the Excise Duty Act, 2014
>
> **"Import" as used in relation to goods has the meaning assigned to it in the Value Added Tax Act.**
>
> Section 1(j) of the Value Added Tax Act, Cap. 349
>
> **"Import" means to bring, or cause to be brought, into Uganda from a foreign country.**

40. For completion, we do also reproduce the definition of the same term under the Treaty and Customs Union Protocol.

> Article 1 of the Treaty
>
> **"Import' with its grammatical variations and cognate expressions means to bring or cause to be brought into the territories of the Partner States from a *foreign country*.** *(Our emphasis)*

"Foreign Country" means any country other than a Partner State.

Article 1(1) of the Customs Union Protocol

"Import' with its grammatical variations and cognate expressions means to bring or cause goods to be brought into the *customs territory*. *(Our emphasis)*

"Customs Territory" means the geographical area of the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania and any other country granted membership of the Community under Article 3 of the Treaty.

41. It will suffice to note that unlike the VAT Act, the Treaty and Protocol go a step further to clarify what would amount to a 'foreign country' under the EAC dispensation. It is manifestly clear that the intention of the framers of the Treaty and Customs Union Protocol was to establish the Community as a single economic area characterized by the free movement of goods, and in which goods from any of the Partner States were not treated as imports. Indeed, under Article 2(2) of the Treaty, the Partner States undertake to '**establish an East African Customs Union and a Common Market as transitional stages to and integral parts of the Community.**' This commitment is reiterated in Article 5(2) where the Partner States undertake to establish a Customs Union and Common Market as conduits to a Monetary Union and ultimately a Political Federation.

42. In the *Vienna Convention on the Law of Treaties*, States Parties are admonished that '**every treaty in force is binding upon the**

parties to it and must be performed by them in good faith'.[2] The gist of that provision is reflected in Article 8(1)(c) of the Treaty, which enjoins EAC Partner States to abstain from any measures that are likely to jeopardize the achievement of the Treaty's objectives or the Treaty's implementation at all. Further, Article 27 of the Vienna Convention succinctly constrains a party to a treaty from invoking **'the provisions of its internal law as justification for its failure to perform a treaty.'** Article 27 of the Convention resonates firmly with Article 8(4) of the Treaty that gives pre-eminence to Community Laws in the following terms:

> **Community organs, institutions and *laws* shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty.**

43. A Customs Union, as was envisaged under Article 2(2) of the Treaty and Article 2(4) of the Customs Union Protocol, consists of a region or geographical area in which the cooperating (Partner) States engage in trade amongst themselves that is free from tariff and non-tariff barriers, and apply a common external tariff on goods from non-Partner States.[3] On the other hand, a Common Market, as was anticipated in the same Treaty provision and Article 2(4) of the Common Market Protocol, is a customs territory that is characterized by free trade as underscored under a Customs Union, the free movement of goods, capital, labour, services and persons, as well as EAC nationals' right of residence and establishment.

[2] Article 26 of the Vienna Convention
[3] See **Ssempebwa, Edward F., East African Community Law, 2015, LexisNexis, p.21**

44. By purporting to construe the cited domestic tax laws to the exclusion of the applicable Treaty and Customs Union Protocol, URA acted in a manner that is likely to jeopardize the achievement of the Treaty's objectives, thus rolling back the gains of the Customs Union and Common Market that have been realized thus far. A negation of the benefits of such regional trade initiatives would be an unfortunate trajectory for the EAC. The dichotomy between the commitments made under the Treaty and attendant Protocols, on the one hand, and the reality posed by the conflicting misapplication of domestic legislation, on the other hand, does not augur well for EAC integration.

45. We do therefore find that the misconstruction of the term 'import' that has been attributed to URA is misconceived and constitutes an infringement of Article 1 of the Treaty and Article 1(1) of the Customs Union Protocol. To that extent, it is unlawful and negates the objectives of the Treaty as encapsulated in Articles 2(2), 5(2) and 8(1)(c) of the Treaty. It is so held.

46. On the other hand, the WHO FCTC was cited by learned Counsel for the Respondent as an international instrument that justifies the enactment of the impugned law. We shall address that defense forthwith, prior to a determination of the issues as proposed above. The cited provisions of the WHO FCTC are reproduced below for ease of reference.

Article 6

(1) The Parties recognize that price and tax measures are an effective and important means of reducing tobacco

consumption by various segments of the population, in particular young persons.

(2) Without prejudice to the sovereign right of the Parties to determine and establish their tax policies, each party should take into account its national health objectives concerning tobacco control and adopt or maintain as appropriate, measures which may include:

Implementing tax policies and where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption.

Article 15

The Parties recognize that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to subregional, regional and global agreements, are essential components of tobacco control.

Guidelines promulgated under Article 6

i. All parts of the guidelines respect the sovereign right of the Parties to determine and establish their taxation policies, as set out in Article 6.2 of the WHO FCTC.

ii. Effective taxes on tobacco products that lead to higher real consumer prices (inflation-adjusted) are desirable because they lower consumption and prevalence, and thereby in turn reduce mortality and morbidity and improve the health of the population. Increasing

tobacco taxes is particularly important for protecting young people from initiating and continuing tobacco products.

47. To be clear, we do abide by the foregoing provisions of the WHO FCTC and its attendant Guidelines, particularly to the extent that they duly recognize the sovereign right of nation states to formulate and implement their own national tax laws and policies. We do not and cannot fault this well established principle of international law. Indeed, Article 15 of the WHO FCTC, to which we were referred by learned Counsel for the Respondent, in no uncertain terms acknowledges nation states' sovereign right to develop and implement national laws in addition to sub-regional, regional or global agreements to which they are party. To that extent, though an international instrument itself, the WHO FCTC does recognize the concurrent obligations upon nation states in respect of sub-regional, regional and international treaties to which they are signatories. We are in absolute agreement with this principle as encapsulated in the Framework Convention. We might add that the EAC Treaty is undoubtedly one such treaty, the obligations accruing from which the EAC Partner States are each required to honour and observe.

Issues 2 & 3: **Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the Excise Duty (Amendment) Act No. 11 of 2017 violate and/ or infringe Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty, and Article 15(1) and (2) of the Customs Union Protocol, as alleged or at all.**

48. The Applicant contests the legality of section 2 of the impugned law in so far as it allegedly violates Articles 6(d) and (e); 7(1)(c); 75(1), (4) and (6), and 80(1)(f) of the Treaty. It did also delineate Articles 2, 8(1)(c) and 127(2)(b) as the Treaty provisions, the objectives inherent in which are negated by the enactment and implementation of the impugned law. Accordingly, the Treaty violations alleged in Issue No. 2 shall be evaluated against that yardstick, as will the alleged violation of Article 15(1) and (2) of the Customs Union Protocol under Issue No. 3 and (subsequently) the invoked Articles 4, 5(2), 6(1) and 32 of the Common Market Protocol under Issue No. 4.

49. Turning to Issue No. 2, with regard to Article 6(d) and (e) the Respondent State is faulted for its failure to avail the Applicant with the same opportunities as were made available under the impugned law to local cigarette manufacturers in Uganda, as well as its failure to ensure the equitable distribution of the benefits of the same law to all cigarette manufacturers from the EAC Partner States, to the detriment of the Applicant's business. The Applicant does also fault the impugned law for undermining the free movement of goods in the region that is underscored in Article 7(1)(c) of the Treaty.

50. A fleeting reference was made to the non-compliance of the impugned law with the Respondent State's obligations under Article 75(1)(b) and (c) of the Treaty to eliminate internal tariffs and related charges, as well as non-tariff barriers; and barely any mention was made in submissions to the provisions of Article 75(4). As we understood it, the mainstay of the Applicant's argument was that the enactment of the impugned law and the

attempt by the URA to implement it, were indicative of the Respondent State's perceived disregard for its obligation under Article 75(6) of the Treaty to refrain from the enactment of laws or application of administrative measures that have the effect of discriminating against like products from within the EAC. Finally, the Applicant suggested that in enacting and seeking to implement the impugned law, the Respondent State omitted to institute measures that would harmonise and rationalize the investment incentives available to imported and locally manufactured products with a view to promoting the Community as a single investment area, thus running afoul of Article 80(1)(f) of the Treaty.

51. On its part, without any substantiation whatsoever, the Respondent made blanket denials about its alleged breach of Articles 6(d) and (e) or 7(1)(c) of the Treaty. With regard to Article 75, we did understand learned Counsel for the Respondent to argue that Article 75(4) was inoperative and ineffective given that no date had as yet been designated by the Council of Ministers, upon which Partner States were expected to cease the introduction of new taxes or duties, or make increments to existing ones. In the same vein, Ms. Nabakooza argued that the progressive, futuristic and aspirational nature of the obligations imposed under Article 80(1)(f) was such that they were not yet operational, therefore the allegation that they had been contravened by the Respondent State was unsustainable. In conclusion, she opined that URA's endeavour to collect taxes from the Applicant Company is well within its legal mandate and cannot be equated to a mere administrative measure. Learned Counsel made no reference to sub-Articles (1) and (6) in Written

Submissions, simply denying quite emphatically in her oral highlights thereof any incidence of discrimination as denoted in Article 75(6) and Article 15(1)(a) of the Customs Union Protocol.

52. We are constrained, from the onset, to underscore a pertinent evidential rule. The burden of proof in international claims was articulated in the case of **Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia & Montenegro), Judgment, ICJ Reports 2007, p.43** as follows:

> **On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of** Military and para-military Activities in and against Nicaragua (Nicaragua vs. United States of America[4], **"it is the litigant seeking to establish a fact who bears the burden of proving it."**

53. Citing with approval **Shabtai Rosenne, 'The Law and Practice of the International Court', 1920 – 2005, Vol. III, Procedure, p.1040**, this preposition was re-echoed by this Court's Appellate Division in **Henry Kyalimpa vs. Attorney General of Uganda EACJ Appeal No. 6 of 2014** as follows:

> **Generally ... the court will formally require the Party putting forward a claim or particular contention to establish the elements of fact and of law on which the decision in its favour is given.**

[4]Judgment, ICJ Reports 1984, p.437, para. 101

54. Within the context of international trade disputes, such as the present one, the burden of proof was most persuasively summed up by the Appellate Body of the WTO Dispute Settlement Body in ***United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Appellate Body Reports, 1997, p.14** in the following terms:

> **Various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that a party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof** *(footnote omitted).* **Also, it is a generally accepted canon of evidence in civil law, common law and in fact, most jurisdictions, that the burden of proof rests with the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.**

55. Stated differently, the burden of proof rests with a complainant to establish an alleged violation by demonstrating that the parameters encapsulated in the relevant treaty or trade agreement have not been complied with. The general rule is that the complaining party should establish a *prima facie* case of inconsistency with a cited treaty or agreement, before the burden shifts to the opposite party to demonstrate its consistency. *See* ***Trebilcock, Michael J. and Howse, Robert, The Regulation of***

International Trade, 1999 (2nd Ed.), Routledge, p. 68. A *prima facie* case is deemed to have been established once a contestation has been '**supported by sufficient evidence for it to be taken as proved should there be no adequate evidence to the contrary**.' *See* ***Oxford Law Dictionary, 2009 (7th Ed.), Oxford University Press, p. 422.***

56. Neither Party in the present case disputes the fact that the impugned law increased the excise duty applicable to both locally manufactured and imported goods, or that it established two different levels of taxation in that regard. This is clearly and unambiguously stated in paragraph 3(o) of the Reference and conceded by the Respondent in paragraph 4(i) of its Response to the Reference. The main thrust of the Reference is simply to question the validity of the enactment, substance and implementation of the impugned law for being unlawful and discriminatory. This is set forth in paragraph 3(r), (s), (t) and (u) of the Reference.

57. The Applicant adduced evidence before this Court that sought to establish that the Ugandan Parliament had been driven by discriminatory considerations when it enacted the impugned law; the substance or content of the law does indeed reflect such discrimination, and URA erroneously sought to implement the impugned law in such a manner as would entrench the alleged discrimination. To that end, the Applicant presented the Excise Duty (Amendment) Bill that had proposed the uniform increment of all soft cap cigarettes from Ushs.35,000/= to Ushs.55,000/= per 1,000 sticks, with no distinction between domestic and imported cigarettes. For comparative purposes, it did also adduce in

evidence the Excise Duty (Amendment) Act that emanated therefrom, depicting the introduction of different prices for domestic and imported cigarettes.

58. The Applicant also produced an April 2017 Report of the Committee on Finance, Planning and Economic Development that included the following statement:

> ***The Committee recommends that, in accordance with its neighbours in the region, excise duty on locally manufactured cigarettes should not be the same rate with imported cigarettes. This will promote growth and encourage more companies to invest in the country and provide market for tobacco farmers.***

59. The Applicant further produced the Parliamentary Hansard of 10th May 2017 that attributed to a Member of the House (Hon. Nandala Mafabi) the following justification for the disparity in treatment of goods imported from Kenya:

> ***BAT are my friends but they decided to shift the company from here to Kenya and we lost jobs to Kenya. We should make it very hard for them to export to Uganda. Therefore, my proposal is that the locally manufactured cigarettes should be taxed Shs. 60,000 per 1,000 sticks and the imported ones Shs. 90,000 per 1,000 sticks so that we promote the local cigarettes and deter imported ones.***

60. Finally, the Applicant attached tax assessment notices from the URA that had initially classified its cigarettes as locally manufactured goods, as well as 2 Payment Registration Slips in

which its cigarettes had been re-classified as imported cigarettes. URA sought to have the Applicant pay the outstanding taxes due from that re-classification.

61. Conversely, the Respondent did similarly rely on the April 2017 House Committee Report and the Hansard of 10th May 2017 albeit with different emphasis. From the Respondent's perspective, far from demonstrating any form of discrimination against the Applicant's goods, the Hansard portrayed a House that was driven by altruistic considerations in the enactment of the impugned law, including encouraging the growth of the tobacco sector; securing increased investment in the country, and discouraging young people from the dangerous practice of smoking. It thus sought to discredit the inference of discrimination drawn by the Applicant from the contribution of Hon. Nandala Mafabi to the parliamentary debate (as highlighted above), asserting that the contribution of 1 Member of the House was not indicative of the views of the entire House.

62. The Respondent did also rely on the impugned law itself to support its contention that it was not discriminatory in content or substance. Further, it sought to rebut the Applicant's contrary position in respect of the tax assessment notices on record by construing them to have been issued in compliance with the law as duly reflected in the Excise Duty (Amendment) Act, which compliance was neither unlawful nor discriminatory.

63. We have carefully scrutinized the totality of the evidence on record. We are appropriately mindful of the onus upon the Applicant to establish a *prima facie* case of the alleged Treaty

violations, prior to the shifting of the burden to the Respondent to counteract this position.[5] We are also aware that a *prima facie* case is established by evidence that sufficiently establishes the contestations of a complaining party in the absence of contrary evidence by opposite party.[6] Nonetheless, ultimately (as with all civil cases) this Reference shall be determined on a balance of probabilities. We do bring these evidential rules to bear as we evaluate the evidence before us.

64. Similarly, we are duly cognizant of the preposition in Article 31(1) of the Vienna Convention that a treaty should be interpreted '**in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose**.' We do abide by this canon of treaty interpretation. It is to the impugned Treaty and Customs Union Protocol provisions that to which we now revert.

65. With regard to Articles 6(d) and (e) of the Treaty, the Applicant did demarcate the principles of *equal opportunities* and *equitable distribution of benefits as* the specific obligations that have been violated by the enactment, content and purported implementation of section 2 of the impugned law. We reproduce the cited legal provisions below for ease of reference:

Article 6: *The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:*

(a).....

(b).....

[5] See **Trebilcock, Michael J. and Howse, Robert, The regulation of international trade** (supra)
[6] See **Oxford Law Dictionary** (supra)

(c) .....

(d) Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

(e) Equitable distribution of benefits.

66. A clear understanding of these terms is critical to determination of whether they have indeed been contravened. Collin's English Dictionary defines the term 'equal opportunity' as '**the policy of giving everyone the same opportunities for employment, pay and promotion without discriminating against particular groups.**' For comparative purposes, this definition resonates well with the following definition of the same term in Uganda's *Equal Opportunities Commission Act, 2007*:

> **Having the same treatment or consideration in the enjoyment of rights and freedoms, attainment of access to social services, education, employment and physical environment or the participation in social, cultural and political activities regardless of sex, age, race, colour, ethnic origin, tribe, birth, creed, religion, health status, social or economic standing, political opinion or disability.**

67. In a nutshell, it seems to us that the concept of equal opportunity is wont to curtail discrimination in a person's access to social services on account of numerous factors including age, gender,

race creed etc. In our considered view, the evidence on record does lend credence to the supposition herein that by virtue of its identity the Applicant had been denied access to or otherwise, disadvantaged in its cross-border cigarette-sale activities. It would appear from the Hansard Report on record that the Applicant's business decision to restructure its operations so as to sale on the Ugandan market cigarettes that were manufactured in Kenya did influence the debate in the Ugandan Parliament to introduce a disparity in the excise duty applicable to locally manufactured viz imported cigarettes. However, to the extent that the dispute in issue herein accrues from a purely commercial transaction as opposed to the socio-political thrust of the considerations inherent in the notion of equal opportunities, we are constrained to disallow the suggestion that there is an infringement of Article 6(d). Having so held, we do not deem it necessary to determine whether the impugned law is at cross-purposes with the establishment of a Customs Union or Common Market as is the deduced objective of Article 2(2) and 8(1)(c), or the removal of barriers and constraints to market development as is the import of Article 127(2)(b).

68. By the same token, the term 'equitable distribution' that is inherent in the notion of 'equitable distribution of benefits' in Article 6(e) would, in its literal sense, denote a fair and just allotment that seeks to redress apparent imbalances. This literal interpretation, as advocated by Article 31(1) of the Vienna Convention, is reinforced by the observations made by this Court in the case of **Rwenga Etienne & Another vs. The Secretary General of the East African Community, EACJ Ref. No. 5 of 2015**. In that case, it did transpire that the EAC operates an *Operational Manual*

for the Implementation of the Quota System in the Recruitment of Staff in the East African Community, which allocates recruitment quotas to each Partner State to ensure the equitable distribution of jobs to nationals of each of the countries. This Court observed:

> **The Operational Manual that regulates the quota system appears to have been formulated to give effect to the provisions of Article 6(e) of the Treaty, which enumerates the 'equal distribution of benefits' as a fundamental principle of the Community. Indeed clause 2.0 of the Operational Manual explicitly expounds its legal basis as being grounded in Article 6(e) of the Treaty. ... Article 31(3)(a) of the Vienna Convention on the Law of Treaties does take due cognizance of *'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.'* The Operational Manual was enacted on the recommendation of Council to operationalise the quota system now operational in the EAC.** *(Our emphasis)*

69. Accordingly, it is our considered view that in so far as the Operational Manual was rooted in Article 6(e) of the Treaty, it is indicative of the meaning that the states parties to the Treaty sought to attach to the phrase 'equitable distribution of benefits' that is espoused in that legal provision. That interpretation would be instructive to our construction of the same term in the present context.

70. Against that background, it would appear that the notion of 'equitable distribution of benefits' alludes to the elimination of

imbalances that could accrue from the very existence of the EAC that are not necessarily trade-related. To suggest that the equitable interventions that are envisaged under Article 6(e) could accrue to commercial transactions would, in our judgment, be to run afoul of Article 7(1)(a) of the Treaty, which seeks to entrench a 'market-driven cooperation' in the EAC. Indeed, the Treaty makes specific provision for trade-related imbalances in Article 77 of the Treaty. Article 77 reads:

> **For purposes of this Article, the Partner States shall within the framework of the Protocols provided for under Articles 75 and 76 of this Treaty, take measures to address the imbalances that may arise from the application of the provisions of this Treaty.**

71. That legal provision was never in issue in the present Reference. However, Article 75 was invoked by the Applicants as having been infringed by the Respondent. We do revert to a detailed interrogation thereof, as well as the relevant provisions of the Customs Union and Common Market Protocols later herein. For present purposes it will suffice to note that in the matter before us, the tax assessment notices that were adduced in evidence do demonstrate that between 6th July 2017 and 2nd August 2017 the Applicant sought to bring 2 batches of soft cap cigarettes into Uganda through the Busia border post, in respect of which taxes – Excise Duty and VAT – had (prior to the re-classification of the cigarettes as imports) been assessed at Ushs. 995,604,352/=. This evidence does *prima facie* establish the movement of goods from Kenya to Uganda for commercial purposes. Given the express provisions of Article 77 of the Treaty that make provision for any

imbalances arising from the establishment of a Customs union and Common market in the EAC, we take the view that the Applicant's cross-border trade activities are not the sort of activities that were envisaged by the Treaty framers for intervention under Article 6(e), the inhibition of which would give rise to a justiciable claim thereunder. To that extent, the impugned law does not, either by its enactment or implementation by the Respondent, contravene the spirit and letter of Article 6(e) of the Treaty, so as to be at cross-purposes with the Treaty as alleged. We so hold.

72. We now turn to a determination of Articles 7(1)(c) and 80(1)(f) which we consider to be inter-related. They read:

> **Article 7**
>
> *1. The principles that shall govern the practical achievement of the objectives of the Community shall include:*
>
> *(a).....*
>
> *(b).....*
>
> *(c) The establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology.*

Article 80

1. *For purposes of Article 79 of this Treaty, the Partner States shall take measures to:*

   (a).....

   (b).....

   (c).....

   (d).....

   (e).....

   (f) Harmonise and rationalize investment incentives including those relating to taxation of industries particularly those that use local materials and labour with a view to promoting the Community as a single investment area.

73. Article 7(1)(c) imposes an obligation upon Partner States to establish *an export oriented economy characterized by free movement of goods, persons, labour, services, capital, information and technology.* In like vein, Article 80(1)(f) imposes the obligation to *harmonise and rationalize investment incentives including those relating to taxation of industries with a view to promoting the Community as a single investment area.* The gist of these legal provisions is to impress it upon Partner States to establish an export oriented economic dispensation in the EAC region and pursue such investment policies as would entrench the EAC as a single investment area.

74. The question would be whether the evidence on record supports the notion that these lofty policy aspirations were indeed obviated by the impugned law. We are acutely mindful of the fact that the

EAC integration process is significantly tempered by the principles of variable geometry and asymmetry that are encapsulated in Article 7(1) of the Treaty '**to ensure that economies that were relatively less developed were not swamped by goods from the relatively better economies.**' *See* ***Aloo, Leonard Obura, East African Community Law: Institutional, Substantive and Comparative EU Law Aspects, Brill, 2017, p.306.*** The principle of variable geometry is captured under Article 7(1)(e) as an operational principle in the implementation of the Treaty that '***allows for progression*** **in cooperation among groups within the Community for wider integration schemes in various fields and** ***at different speeds***.' On the other hand, the principle of asymmetry is succinctly interpreted in Article 1(1) of the Customs Union Protocol to mean '**the principle which addresses variances in the implementation of measures in an economic integration process for purposes of achieving a common objective**.' It does become apparent, then, that the implementation of the Treaty provisions relating to intra-regional trade was anticipated by the Treaty itself to be progressive and, in some instances, differential.

75. A few examples would suffice. First, Article 10 of the Customs Union Protocol subrogates the obligation therein for the Partner States to '**eliminate all internal tariffs and other charges of equivalent effect on trade among them**' to the exceptions in Article 11 of the same Protocol. Article 11(1) in turn makes explicit provision for the progressive implementation of the Customs Union Protocol during a 5-year transitional period during which differential

tariff treatment would be extended to goods from the (then) 3 EAC Partner States under Article 11(2).

76. To compound matters, section 111(1) of the *East African Community Customs Management Act of 2004*[7] acknowledges the interim tariff permitted by Article 11 of the Customs Union Protocol as spelt out above, and states that '**goods originating from the Community shall be accorded *Community tariff treatment* in accordance with the Rules of Origin provide for under the (Customs Union) Protocol.**' Whereas it is well recognized herein that Article 11 of the Customs Union Protocol represents a transitional arrangement the import of which should not be legally tenable any more, it is hoped that that is indeed the position in practice in the Community.

77. Secondly, and more specifically related to the promotion of an export-oriented economy as stipulated in Article 7(1)(c) of the Treaty, Article 25(1) of the Customs Union Protocol provides for the establishment of Export Promotion Schemes in the following terms:

> **The Partner States agree to support export promotion schemes in the Community for the purposes of accelerating development, promoting and facilitating export oriented investments, producing export competitive goods, developing an enabling environment for export promotion schemes and attracting foreign direct investment.**

[7] A Community Act that makes provision for customs management and administration.

78. Most significantly, Article 25(2)(b) permits the levying of duties and other charges upon the goods benefitting from export promotion schemes in the event that they are sold within the Partner States. It reads:

> **In the event that such goods are sold in the customs territory such goods shall attract full duties, levies and other charges provided in the Common External Tariff.**

79. Neither of the Parties herein saw it fit to avail the Court with evidence in proof, rebuttal or clarification of the seeming avenues under which the imposition of 'qualified' duties may be permissible under the EAC trade regime. In the absence thereof, this Court is unable to determine whether in fact the impugned law violates the principles enumerated in Articles 7(1)(c) and 80(1)(f) of the Treaty. The onus lay with the Applicants to prove its case in that regard but, in our considered view, this burden was not sufficiently discharged. In the result, we find that the violations inferred under Articles 7(1)(c) or 80(1)(f) have not been sufficiently proven.

80. We now turn to the provisions of Article 75(1), (4) and (6). We reproduce the Article below:

> **Article 75**
>
> *1. For purposes of this Chapter, the Partner States agree to establish a Customs Union details of which shall be contained in a Protocol which shall, inter alia, include the following:*
>
> *(a) .....*
>
> *(b) The elimination of internal tariffs and other charges of equivalent effect;*

(c) The elimination of non-tariff barriers;

(d) .....

2. .....

3. .....

4. With effect from a date to be determined by the Council, the Partner States shall not impose any new duties and taxes or increase existing ones in respect of products traded within the Community and shall transmit to the Secretariat all information on any tariffs for study by the relevant institutions of the Community.

5. .....

6. *The Partner States shall refrain from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of other Partner States.*

81. We construe the obligation imposed under Article 75(1)(b) and (c) to enjoin the Partner States to conclude a Customs Union Protocol that would make provision for the elimination of internal tariffs and other charges of equivalent effect, as well as non-tariff barriers. That is the primary obligation on the Partner States under that legal provision. The Partner States did indeed enact the Customs Union Protocol in 2004. We do take judicial notice of this. In the present Reference, we did not hear the Applicant to challenge the enacted Protocol for not making provision for the elimination of tariffs and non-tariff barriers, as required by Article 75(1)(b) of the Treaty. Rather, it is the legality of the impugned law that is in issue, on the basis of its alleged non-compliance with Article 15(1) and (2) of the Protocol. We do revert to a determination of that

issue shortly. However, for present purposes, we are hard pressed to appreciate how Article 75(1)(b) and (c) have been violated by the Respondent State yet the primary obligation therein has since been realized. We would, therefore, disallow this claim.

82. On the other hand, as quite rightly argued by learned Counsel for the Respondent, Article 75(4) imposes an obligation upon the Partner States that is conditional upon the Council of Ministers designating a date by which such obligation accrues. No evidence was furnished by the Applicant as would demonstrate that the Council of Ministers has ever designated such date of accrual. There is a primary duty upon the Applicant to establish its case in that regard, before the evidential burden can shift to the Respondent to discredit the Applicant's evidence. In the absence of such proof by the Applicant, any claim arising thereunder would be unsustainable. We so hold.

83. Turning to Article 75(6) of the Treaty and Article 15(1) and (2) of the Customs Union Protocol, we reproduce the cited Protocol provisions below:

Article 15:

(1) Partner States shall not:

(a) Enact legislation or apply administrative measures which directly or indirectly discriminate against the same or like products of other Partner States; or

(b) Impose on each other's products any internal taxation of such nature as to afford indirect protection to other products.

(2)No Partner State shall impose, directly or indirectly, on the products of other Partner States any internal taxation of any kind in excess of that imposed, directly or indirectly, on similar domestic products.

84. It will suffice to note that Article 15(1)(a) of the Protocol is more or less identical to Article 75(6) of the Treaty, save that the Protocol provision is couched in conclusively mandatory terms. In any event, both legal provisions explicitly prohibit the enactment of legislation that has the effect of discriminating against like products originating from other Partner States. Stated differently, Partner States are prohibited from providing preferential treatment to domestic products viz a viz like products from other Partner States.

85. We construe Articles 75(6) of the Treaty and 15(1)(a) of the Customs Union Protocol to delegitimize discrimination not so much attendant to the process of promulgating a law *per se*, but that in respect of the substance and content of the law that is ultimately formulated. In the present case, however, we understood the Applicant to challenge both the law-making process, as well as the substance or content of the resultant enactment or impugned law. In this regard, learned Counsel for the Applicant did rely upon the decision in **Mangin vs. Inland Revenue Commissioner** (supra), where it was held that '**the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.**' We are constrained to point out that the decision in that case pertains to the principles governing the interpretation and application of tax laws to deduce the intention of the law-makers as to the incidence of a tax obligation. It does not necessarily apply to the construction of treaties, which, as we have

held earlier herein, is primarily governed by the Vienna Convention on the Law of Treaties.

86. Nonetheless, for completion, we do evaluate the process of enactment as challenged by the Applicant. The Hansard Report on record does establish that although the allegedly discriminatory statement that was cited in the Reference is attributable to only 1 Member, it was endorsed by virtually all the Members of the House that contributed to the debate on the Committee Report. To that extent, therefore, it does appear to reflect the thinking of the House and we cannot fault the Applicant for considering it to be indicative of the House's position on the issue of differential tax rates.

87. The question, however, is whether the predisposition of the House in that regard sufficiently demonstrates the intent of the Honourable Members of Parliament to discriminate against the Applicant's cigarettes? With respect, we are inclined to answer this question in the affirmative. It seems quite clear to us that a reasonable person reading the parliamentary debate as reflected in the Hansard of 10th May 2017 at its face value, in the absence of any evidence to the contrary, cannot but come to the conclusion that the Honourable Members had been well persuaded as to the need to purportedly redeem Uganda's fortunes from the tobacco industry by introducing higher rates for goods that were not locally manufactured therein. Whereas we do appreciate the well intentioned albeit misconceived considerations that informed the Honourable Members' position, it is abundantly clear that they were oblivious to Uganda's Treaty obligations or the dictates of Community Law as appositely encapsulated in the **Burundi Journalists Union** case. It is to be hoped that in future the House

would be appropriately mindful of the legal implications of laws enacted by it viz a viz the Respondent State's international and regional obligations.

88. Be that as it may, would the pronouncements of the Honourable Members in themselves lead to the conclusion that the impugned law is legally non-compliant with Article 75(6) of the Treaty? We think not. The evidence on record does establish that the impugned law introduced differential treatment in the taxation of domestic and imported goods, which did not exist in the Excise Duty (Amendment) Bill. This is borne out by a comparison of section 2 of the Bill with the same section in the impugned law. However, a plain reading of section 2 of the impugned law does not establish for a fact that cigarettes from any of the other Partner States would be classified as imported goods so as to impute discrimination on the said law. There is no provision in the impugned law that expressly demarcates goods from other Partner States as imported goods. On the contrary, when properly applied within the ambit of the definition of imports in Article 1 of the Treaty and Article 1(1) of the Customs Union Protocol, it becomes undoubtedly clear that the reference in section 2 to imported goods pertains to goods from 'third-party states' or countries outside the Community. To be categorically clear, the tone of the parliamentary debate and deduced intention of the House notwithstanding, the substance or content of the impugned law is neither discriminatory nor unlawful. We cannot therefore fault the enactment thereof.

89. The parliamentary discourse is moot in this regard given that the case of **Mangin vs. Inland Revenue Commissioner** (supra), to

which we were referred by both Parties, quite rightly portends that tax laws should be given a literal interpretation; '**words should be given their ordinary meaning .... One has to look merely at what is clearly said. There is no room for any intendment. ... There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied.**' Similarly, the impugned law must be evaluated by a look at only what is stated therein; nothing is to be read into it, nothing is to be presumed. Consequently, in the absence of a provision that succinctly demarcates goods from Partner States as imported goods, we are satisfied that the enactment of the impugned Act did not violate Article 75(6) or Article 15(1)(a) of the Customs Union Protocol. We so hold.

90. In terms of the contested implementation of the impugned law, we draw apposite instruction from the principle of non-discrimination as propounded under the World Trade Organisation (WTO) General Agreement on Tariffs and Trade (GATT) legal regime. Whereas Article 1 of GATT depicts the most favoured nation (MFN) principle of discrimination that generally constrains the proffering of preferential treatment to any member(s) of an international trading bloc to the exclusion of other members; the national treatment principle of discrimination that is espoused in Article 3 of GATT seeks to forestall the adoption by a member of an international trading bloc of such domestic policies as are designed to favour its domestic producers viz a viz 'foreign' producers.[8] It is the latter principle that is in issue in the present Reference. We reproduce Article 3.2 of GATT below:

[8] See **Trebilcock, Michael J. and Howse, Robert,** The regulation of international trade, Ibid., at pp.27, 29

Article III of GATT

2. *The products of the territory of any contracting party* (Member State) *imported into the territory of any other contracting party* (Member State) *shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party* (Member State) *shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

91. A preview of how that legal provision was recently enforced by the WTO dispute settlement regime is instructive. In ***Brazil – Certain Measures concerning Taxation and Charges*, Appellate Body Report, 2018, p. 29**, the Appellate Body of the WTO Dispute Settlement Body was faced with imported finished ICT products that had been subjected to a higher tax burden than like domestic products. Having deduced the imported products to have indeed been 'taxed in excess of like domestic finished ICT products, contrary to Article III:2, of the GATT 1994', the Appellate Body held:

> **Article III:2, first sentence, of the GATT 1994 is concerned with the protection of "the equal competitive relationship between imported and domestic products".** *(footnote removed)* **... "the words of the first sentence require an examination of the conformity of an internal tax measure with Article III" by determining, first, "whether the taxed imported and domestic products are**

'like"' and, second, "whether the taxes applied to the imported products are 'in excess of' those applied to the like domestic products".[9] With respect to the second element, the Appellate Body has found that "even the smallest amount of 'excess' is too much".[10] A determination of whether an infringement of Article III:2, first sentence, exists must be made on the basis of an overall assessment of the actual tax burdens imposed on imported products, on the one hand, and like domestic products, on the other hand.[11]

92. The foregoing decision essentially portends that a determination of the conformity of an internal tax measure with Article 3.2 of the GATT must of necessity entail a two-fold test: whether the taxed imported and domestic products are 'like' and, if so, whether the taxes applied to the imported products are 'in excess of' those applied to like domestic products'. It sums up this two-fold analysis with the preposition that a determination as to whether an infringement of Article 3.2 exists must be premised on an overall assessment of *actual* tax burdens imposed on the imported products viz a viz contrary tax rates applicable to domestic products, on the other hand.

93. Turning to the present Reference, Article 15(1)(a) of the Customs Union Protocol and Article 75(6) of the Treaty are in form and substance acutely similar to the provisions of Article 3.2 of the GATT. This would underscore the pertinence of the principles laid down in the case of ***Brazil – Certain Measures concerning***

[9] See **Appellate Body Report, Japan – Alcoholic Beverages II, pp.18 - 19**
[10] Ibid., at p.23
[11] See **Appellate Body Report, Argentina – Hides and Leather, para.11.184**

Taxation and Charges (supra) to the present dispute. The present Applicant is thus required to satisfactorily prove that the implementation of the impugned law resulted in *de jure* tax discrimination: that an overall assessment of the *actual* tax burdens imposed on its cigarettes yields differential and discriminatory treatment viz a viz the tax rates applicable to like cigarettes that are locally manufactured in Uganda.

94. The tax assessment notices that were adduced in evidence under paragraph 23 of Mr. Kiunjuri's Affidavit in support of the Reference reveal that 2 packages of cigarettes of customs reference 06/07/2017 C15733 and 02/08/2017 C17820 respectively were declared by the Applicant in or about July 2017, and the applicable taxes (Excise Duty and VAT) in respect thereof were assessed in the sum of Ushs. 862,706,849/= and Ushs. 132,897,503/= respectively. *See Assessment Notices marked Annex 16 and 17 to Mr. Kiunjuri's affidavit.* URA subsequently sought to collect additional taxes in the sum of Ushs. 294,528,000/= in respect of the package of cigarettes under Reg. No.C15733 of 07/06/2017 and Ush. 80,240,000/= under Reg. No.C16032 of 07/11/2017. *See Memoranda dated 7th August 2017 and marked Annex 18 and 19 to the same deponent's affidavit.* There are also 2 Payment Registration Slips on record that require payment of Ushs. 294,528,000/= under reference C15733 (06/07/2017) and Ushs. 30,680,000/= under **Reference No.C17820 of 02 AUG.2017**.'

95. It seems quite clear to us that the batch of 1,070 packages of cigarettes that was originally taxed at Ushs. 862,706,849/= under customs reference 06/07/2017 C 15733 is indeed the same batch of cigarettes in respect of which additional taxes in the sum of

Ushs.294,528,000/= was sought under the Payment Registration Slip in Annexure 20. Our view is informed by the fact that the latter document captions the same reference C15733 under which that batch of the Applicant's cigarettes was originally assessed. The Payment Registration Slip is indicative of the assessed additional taxes. With regard to the batch of 130 packages of cigarettes that was initially assessed under customs reference 02/08/2017 C17820 and is reflected in Annex 17, we find that the customs reference therein does correspond to Ref. No. C17820 of 2nd August 2017 as reflected in the Payment Registration Slip in Annex 21.

96. Whereas we are constrained to underscore the need for consistency in the entries made in URA's Payment Registration Slips, we are satisfied, nonetheless, that both batches of cigarettes that were initially taxed as locally manufactured goods under customs references 06/07/2017 C15733 and 02/08/2017 C17820 respectively are the same batches of cigarettes in respect of which additional taxes in the sum of Ushs. 294,528,000/= and Ushs. 30,680,000/= are sought under the Payment Registration Slips captioned C15733 (06/07/2017) and C17820 OF 02 AUG 2017 respectively, and adduced in evidence as Annexes 20 and 21. To that extent, the alleged discrimination against the Applicant's cigarettes does pertain to 'the same' goods, as envisaged under Article 75(6) of the Treaty and Article 15(1)(a) of the Customs Union Protocol. We so hold.

97. The second aspect of the two-pronged test in ***Brazil – Certain Measures concerning Taxation and Charges*** (supra) relates to whether the taxes applicable to the imported products are in fact 'in

excess of those applied to like domestic products' thus passing the '*de jure*' test advocated in that legal precedent. The Payment Registration Slips in Annexes 20 and 21 represent the additional taxes payable against the Applicant's cigarettes, and depict an actual disparity in taxes arising from the re-classification in the total sum of Ushs.325,208,000/=. This sum represents the actual tax burden due to the Applicant, which is clearly in excess of the tax applicable to like cigarettes that are locally manufactured in Uganda.

98. It is apparent that in re-classifying the Applicant's cigarettes as imported goods, the URA acted in absolute oblivion of and disregard for the provisions of Article 15(2) of the Customs Union Protocol. That legal provision succinctly forestalls the imposition of any tax liability on goods from other Partner States that is in excess of the tax imposed on similar or like domestic goods. It thus essentially enjoins EAC Partner States to extend uniform tax liabilities to each other's products. As we held earlier herein, the letter of the impugned law *per se* did not impute an obligation upon URA to apply a differential tax rate to the Applicant's cigarettes. Rather, in complete disregard for applicable Community Law, URA seemingly misconstrued the Excise Duty Act and the VAT Act to suggest that goods from EAC Partner States would correspond to the definition of imports. To that extent, URA misapplied Ugandan tax laws, stepped out of legal purview and the ambit of its legal mandate, and thus its attempt to implement the impugned law becomes tantamount to a purely administrative measure or intervention.

99. Consequently, having found that the tax liability accruing from the Payment Registration Slips was in excess of the tax applicable to like cigarettes that are locally manufactured in Uganda, we are satisfied that the Respondent's interpretation and purported implementation of section 2 of the impugned law violates Article 15(2) of the Customs Union Protocol, and is to that extent flawed and unlawful. We therefore find that the Respondent did violate Article 75(6) of the Treaty and Article 15(1)(a) of the Customs Union Protocol in so far as it sought to implement an administrative measure that discriminated against the Applicant's goods. That administrative measure amounts to a Treaty infringement and is, to that extent, unlawful. It thus obviates the purpose for which the Treaty was promulgated in so far as it inhibits progression towards the establishment of a Customs Union or Common Market as propounded by Article 2(2) and 8(1)(c), and/ or the removal of barriers and constraints to market development as advocated by Article 127(2)(b). In the result, Issue No. 2 fails in relation to the contested enactment, but does succeed with regard to the unlawful implementation of section 2 by URA, contrary to Article 75(6) of the Treaty and Article 15(1)(a) of the Customs Union Protocol.

100. We do also find that the Respondent State's implementation of section 2 thereof did result in *de jure* tax discrimination against the Applicant's cigarettes; violated Article 15(2) of the Customs Union Protocol; was to that extent unlawful and, for the same reasons espoused above, at cross purposes with the principles and objectives of the Treaty. In the result, having also found that the administrative measure that URA sought to implement violated

Article 15(1)(a) of the Customs Union Protocol, we do answer Issue No. 3 in the affirmative.

Issue No. 4: Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the Excise Duty (Amendment) Act No. 11 of 2017 violate and/ or infringe Articles 4, 5, 6 and 32 of the Common Market Protocol, as alleged or at all.

101. Whereas in its pleadings the Applicant invoked the provisions of Articles 4, 5, 6 and 32 of the Common Market Protocol, in Submissions we understood learned Counsel for the Applicant to specifically contest the legality of the impugned law with regard to Articles 4, 5(1)(a), 6 and 32 of the Common Market Protocol. We reproduce the cited legal provisions below.

Article 4

In accordance with Articles 76 and 104 of the Treaty, this Protocol provides for the following:

1. *The overall objective of the Common Market is to widen and deepen cooperation among the Partner States in the economic and social fields for the benefit of the Partner States.*
2. *The specific objectives of the Common Market are to:*
   (a) Accelerate economic growth and development of the Partner States through the attainment of the free movement of goods, persons and labour, the rights of establishment and residence and the free movement of services and capital;

(b) Strengthen, coordinate and regulate the economic and trade relations among the Partner States in order to promote accelerated, harmonious and balanced development within the Community;

(c) Sustain the expansion and integration of economic activities within the Community, the benefit of which shall be equitably distributed among the Partner States;

(d) Promote common understanding and cooperation among the nationals of the Partner States for their economic and social development, and

(e) Enhance research and technological advancement to accelerate economic and social development.

3. In order to realize and attain the objectives provided for in this Article, the Partner States shall cooperate in, integrate and harmonise their policies in areas provided for in this Protocol and in such other areas as the Council may determine in order to achieve the objectives of the Common Market.

Article 5

1. .....

2. For the purpose of paragraph 1 and pursuant to paragraph 4 of Article 2 of this Protocol, the Partner States agree to:

(a) Eliminate tariff, non-tariff and technical barriers to trade; harmonise and mutually recognize standards and implement a common trade policy for the Community.

Article 6

1. *The free movement of goods in the Community shall be governed by the Customs Law of the Community as specified in Article 39 of the Protocol on the Establishment of the East African Community Customs Union.*

Article 32

The Partner States undertake to progressively harmonize their tax policies and laws to remove tax distortions in order to facilitate the free movement of goods, services and capital and to promote investment within the Community.

102. It was briefly argued for the Applicant that by enacting and implementing the impugned law, the Respondent State obviated its obligation to progressively harmonise tax policies and laws to remove tax distortions that impede the free movement of goods and promote investment; and similarly, negated its obligation to eliminate tariff, non-tariff and technical barriers to trade. Conversely, the Respondent sought to counteract this argument with the contention that the invoked provisions provide for the progressive harmonization of Partner States' tax policies and laws to remove distortions, an undertaking that is 'work in progress' and 'cannot happen overnight'.

103. It seems to us that the determination of this issue is premised on proof that the enactment and implementation of the impugned law did indeed circumvent the progressive harmonization of Partner States' tax policies and laws, as well as the elimination of tariff, non-tariff and technical barriers to trade. This is a question of fact that must be established as such. In the instant case, we construe the obligations on Partner States that are encapsulated in Article

4(1) and (2) of the Common Market Protocol to be hinged *inter alia* on their cooperation and the harmonization of their tax policies as espoused in Article 4(3) of the same Protocol. The envisaged harmonization of tax laws and policies is expressly governed by Article 32 of the Protocol, which allows for the progressive realization of that obligation. In our considered view, proof thereof would necessitate the demonstration of what steps (if any) have been taken to date with regard to the progressive harmonization of tax laws and policies, and if indeed the Respondent State is in violation thereof. We found no such evidence on record and cannot presume that no steps whatsoever have been taken to date in that regard. We therefore find no infringement of Articles 4 and 32 of the Protocol.

104. Similarly, the obligation under Article 5(2)(a) to eliminate tariffs, non-tariff and technical barriers to trade appears to be conditional upon such cooperation between Partner States as is prescribed under Articles 2(4) and 5(1) of the Protocol. Article 5(1) essentially makes the Common Market Protocol applicable to activities 'undertaken in cooperation by the Partner States' to achieve the free movement of goods, labour, services and capital and to enjoy the rights of establishment and residence of their nationals within the Community as espoused in Article 2(4). It thus appears to make such cooperation an important precondition to the attainment of the obligations imposed under the Protocol. The Applicants did not furnish sufficient proof of such cooperation between the Republics of Kenya and Uganda having been the cornerstone of the commercial activity it established before us, so as to make the

provisions of Article 5(2) applicable to the resultant dispute under consideration presently.

105. Whereas it was argued that the restructuring of its business operations had been premised on the promulgation of the Treaty, we take the view that the Treaty provides for the EAC integration in general terms, the details of which were subsequently ironed out in applicable Protocols. It is in that context that the framers of the Treaty deemed it necessary to make specific provision for a Common Market guided by the express provisions of the Common Market Protocol. We therefore find no proof of the infringement of Article 5(2) of the Protocol.

106. On the other hand, the provisions of Article 6(1) would appear to be a sum collection of the laws applicable to the free movement of goods. That seems to represent the crux of the present dispute; the interface between Community Law and National Laws. With utmost respect, we are constrained to observe here that URA's interpretation and application of Ugandan tax laws to the exclusion of the Respondent State's obligations under Community law is misconceived and not legally tenable. As we did state earlier herein, under the Vienna Convention the Partner States' domestic laws cannot be invoked as justification for failure to perform a treaty obligation. The gravity of institutional barricades to the EAC integration process could not have been captured any better than it was in the World Bank/ EAC Secretariat East African Common Market Scorecard 2014 as represented below:[12]

[12] See **Aloo, Leonard Obura, East Afrcan Community: Institutional, Substantive and Comparative EU Aspects, Ibid., at p.324**, making reference to an **East African Common Market Scorecard 2014: Tracking EAC compliance in the movement of capital, services and goods, (Vol. 2), The World Bank/ EAC Secretariat, p.4.**

The 2014 Score Card notes that the laws and regulation of the Partner States continue to be a barrier to increased cross-border trade. The progress to eliminating restrictions is slow and new measures are introduced despite the provisions of the protocols. ... The 2014 Score Card notes that, although formally all Partner States have eliminated tariffs on intra-regional trade, measures of equivalent effect to tariffs still remain. ... The general consensus is that more could be done by the Partner States for the Community in order to fully realise free movement of goods within the EAC.

107. Perhaps more importantly, the EAC Treaty and attendant Protocols are effectively domesticated into Uganda's national laws under section 3 of the *East African Community Act No. 13 of 2002* and have the force of law in the Respondent State. There is therefore no logical excuse for their circumvention by relevant state agencies. Section 3 reads:

a. **The Treaty as set out in the Schedule to this Act shall have the force of law in Uganda.**

b. **Without prejudice to the general effect of subsection (1) of this section, all rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaty and all the remedies and procedures from time to time provided for by or under the Treaty, shall be recognized and available in the law and be enforced and allowed in Uganda.**

108. Last, but by no means least, as was ably articulated by this Court in the case of **Samuel Mukira Muhochi vs. The Attorney General of Uganda,** (supra), by accepting to be bound by Treaty provisions with no reservations, Uganda (or indeed any Partner State) can no longer apply domestic legislation in ways that make its effects prevail over those of Community Law. We must point out here that in matters of Treaty interpretation, Article 33(2) of the Treaty succinctly grants supremacy to the decisions of this Court over the decisions of national courts in the following terms:

> **Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter.**

109. Consequently, a matter like the present Reference that seeks the interpretation and application of the Treaty and attendant Protocols on the legality of designated actions would fall squarely within the jurisdiction of this Court.

110. For present purposes, the Community Law espoused in Article 39 of the Customs Union Protocol, by dint of cross-reference in Article 6(1) of the Common Market Protocol, includes:

> a. *Relevant provisions of the Treaty;*
> b. *This Protocol and its annexes;*
> c. *Regulations and directives made by the Council;*
> d. *Applicable decisions by the Court;*
> e. *Acts of the Community enacted by the Legislative Assembly, and*
> f. *Relevant principles of international law.*

111. Having established the violation of Article 75(6) of the Treaty and Article 15(1) and (2) of the Customs Union Protocol under our consideration of the preceding issues, we are satisfied that the Respondent is in contravention of Article 39(a) and (b) of the Common Market Protocol. In the result, Issue No. 4 fails with regard to the claims under Articles 4, 5 and 32, but succeeds in respect of the claim under Article 6(1) of the Common Market Protocol. We so hold.

112. Finally and in summation, we did adjudge the URA's misconstruction of the impugned law to run counter to the definition of 'imports' and 'foreign country' in Article 1 and 1(1) of the Treaty and Customs Union Protocol respectively, constitute a violation of Article 2(2) and 5(2) of the Treaty and thus negate the objectives and purpose of the Treaty. In the same measure, having determined the *implementation* of section 2 of the impugned Act to contravene Article 75(6) of the Treaty, and Article 15(1)(a) and (2) of the Customs Union Protocol; section 2 is indeed in violation of both the Treaty and international law (the Protocol being an international instrument), is to that extent unlawful and does thereby constitute an infringement of Article 30(1) of the Treaty. Quite clearly, the implementation of a law that is in violation of the highlighted Community Law amounts to the imposition of an illegal barricade to the realization of the Customs Union as advanced under Article 2(2) and 5(2) of the Treaty. Such an eventuality would be an absolute negation of the objectives of the Treaty.

113. In the result, we are satisfied that the implementation of section 2 of the Excise Duty (Amendment) Act, 2017 in the manner sought

to be applied to the Applicants by the Respondent is unlawful, discriminatory and does negate the objectives of the Treaty. We do therefore answer Issue No. 1 in the affirmative.

Issue No. 5: What remedies are available to the Parties?

114. The Applicant sought Declarations that:

a. The provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act No. 11 of 2017 contravene and infringe Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Articles 15(1) and (2) of the Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the Common Market Protocol.

b. The provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act No. 11 of 2017 are null and void to the extent that they infringe Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Articles 15(1) and (2) of the Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the Common Market Protocol.

115. The Applicant did also seek the following Orders:

a. An order directing the Respondent to immediately take the necessary measures to ensure that the Applicant's rights under the Treaty are not violated by the application of the provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act No. 11 of 2017.

b. An order that the costs of this Reference are paid by the Respondent.

116. We did not find any infringement of Articles 6(d) and (e); 7(1)(c); 75(1) and (4), or 80(1)(f) of the Treaty, neither was the alleged infringement of Articles 4, 5(2) or 32 of the Common Market Protocol established before us. We therefore decline to grant a declaration that there was contravention or infringement of the Treaty or the Common Market Protocol in respect of those legal provisions. We are similarly disinclined to grant a declaration regarding the alleged nullity of the invoked provisions of the impugned law given our findings on the absence of any Treaty or Protocol infringement in respect thereof.

117. On the other hand, having held as we have that the Applicants have sufficiently proven the infringement of Articles 1 and 75(6) of the Treaty, Articles 1(1) and 15(1)(a) and (2) of the Customs Union Protocol and Article 6(1) of the Common Market Protocol by the purported implementation of the Excise Duty (Amendment) Act, we would grant a declaration to that effect as sought by the Applicant.

118. The Applicant did also seek a declaration that the provisions of section 2 are null and void to the extent that they infringe the invoked Treaty and Protocol provisions. However, the infringement that was established before this Court pertains to URA's misconstruction of section 2 of that law and not the enactment or substance of the law. In tandem with our findings, therefore, it would be disingenuous of the Court to declare a nullity an enactment that has not been faulted. We are therefore disinclined to grant such a declaration. Nonetheless, the Payment Registration Slips seeking the payment of additional taxes, emanating as they do from the misconstruction and misapplication of section 2 of the Excise Duty (Amendment) Act by the URA, are

illegal, null and void. We would, therefore grant a declaration to that effect, as well as the directional Order sought by the Applicant in that regard.

119. On the question of costs, we are mindful of Rule 111(1) of this Court's Rules, which postulates that costs should follow the event '**unless the Court, for good reason, decides otherwise**'. In the instant case, where the Reference has succeeded in part with the Applicant emerging wholly successful in Issues 1 and 3, and partially successful in Issues 2 and 4, the costs awardable to the Parties might have been determined on a *pro rata* basis. However, this is a case that has canvassed matters of grave importance to the advancement of Community law and EAC intra-regional trade, which would be of significant public interest to a cross section of stakeholders within and beyond the EAC regional bloc. We would therefore exercise our discretion to order each Party to bear its own costs.

CONCLUSION

120. In the final result, the Reference is hereby partially allowed with the following Orders:

a. A Declaration doth issue that the implementation of the provisions of section 2(a) and (b) of the *Excise Duty (Amendment) Act, No. 11 of 2017*, by the misconstruction and wrongful re-classification of the Applicant's cigarettes as 'imported goods', does contravene and infringe Articles 1 and 75(6) of the Treaty; Articles 1(1) and 15(1)(a) and (2) of the Customs Union Protocol, and Article 6(1) of the Common Market Protocol.

b. A Declaration doth issue that the misapplication of the provisions of section 2(a) and (b) of the *Excise Duty (Amendment) Act, No. 11 of 2017* by the issuance of Payment Registration Slips for additional taxes in the sum of Ushs. 325,208,000/= in respect of Applicant's cigarettes is illegal, null and void.

c. The Respondent is directed:

   a. With immediate effect, to rescind and withdraw the Payment Registration Slips captioned C15733 (06/07/2017) and Ref. No. C17820 of 02 AUG 2017 respectively in the total sum of Ushs. 325,208,000/=, and issued against the Applicant's 1,170 packages of soft cap cigarettes under even caption and/ or reference.

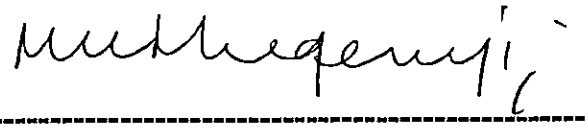
   b. To forthwith ensure the interpretation and application of *Excise Duty (Amendment) Act, No. 11 of 2017* with due regard for and in compliance with applicable Community Law, and

   c. To align the Ugandan tax laws with Community Law applicable to goods from EAC Partner States.

d. Each Party shall bear its own costs.

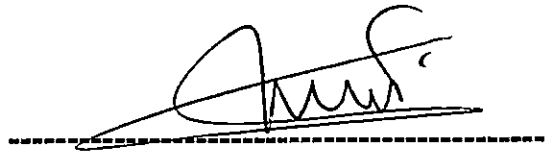
It is so ordered.

Dated, delivered and signed at Arusha this 26th Day of March 2019.



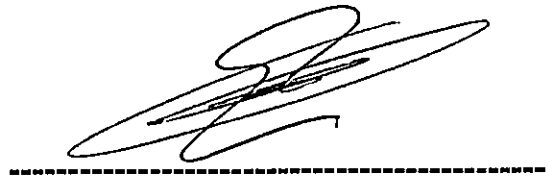
Hon. Lady Justice Monica K. Mugenyi

PRINCIPAL JUDGE



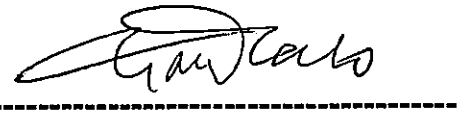
Hon. Justice Dr. Faustin Ntezilyayo

DEPUTY PRINCIPAL JUDGE



Hon. Justice Audace Ngiye

JUDGE



Hon. Justice Dr. Justice Charles O. Nyawello

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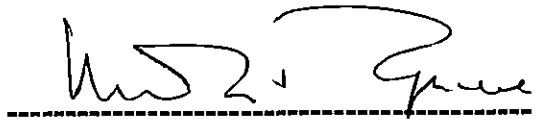

Hon. Justice Justice Charles Nyachae

JUDGE