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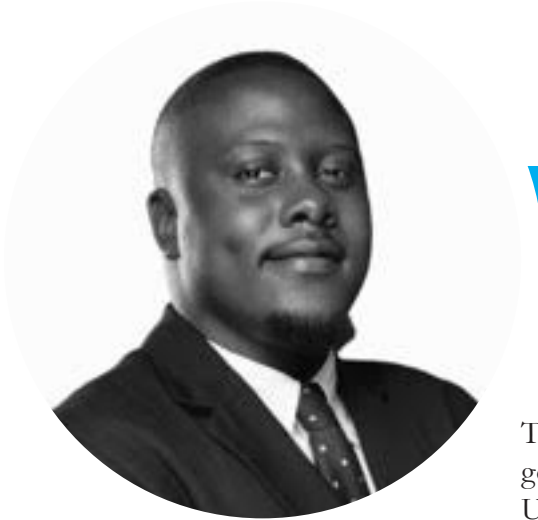
**Second edition coming July 2019**  
**Theme: Free Movement of Goods in the EAC**

Free movement of goods in the EAC is guaranteed by the EAC Customs Union Protocol and the EAC Common Market Protocol. Guarantees aside, free movement is enabled by specific measures undertaken to facilitate trade and a functional rules-based system backed by efficient dispute resolution. Accordingly, this digital symposium will discuss the present state of free movement of goods in the EAC.

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# Editorial



Dear reader,

This month's digital symposium entails a panel on the free movement of goods in the EAC. Naturally, the focus is on *British American Tobacco Uganda Limited v Attorney General of Uganda* [2019] Reference No. 7 of 2017 – the first substantive decision by the East African Court of Justice on free movement of goods in the EAC. The case introduces a much-needed commercial nuance to the Court's jurisprudence that has up to now been dominated by decisions on human rights and governance. Accordingly, the case must go down in history as one of the game-changers for East African integration and will be studied by generations of law students and cited by lawyers/judges for many years to come.

Rather befittingly, Richard Bibangambah, who was part of BAT's winning legal team opens the discussion with a synopsis of the Court's core findings and an assessment of the commercial implications that the judgment will have across the EAC.

Next, Victor Karara, a tax lawyer and consultant highlights the Court's approach to the case and, importantly, explains the customs angle of free movement of goods in the EAC – debunking the complex EAC Rules of Origin.

Lastly, Pooja Karia, a PhD researcher at the University of Cape Town explains the legislative context of the case – setting out the disputed provisions that formed the basis for this case.

This 15-minute guide to free movement of goods in the EAC is necessary reading for traders and professionals. Our August digital symposium will focus on free movement of services in the EAC.

Emmanuel Sebijjo Ssemmanda

Editor

AIRIS Digital Symposium

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# EAC REGIONAL INTEGRATION: A CASE STUDY ON THE FREE MOVEMENT OF GOODS

*Richard Bibangambah*



## Introduction:

The East African Community was established by the Treaty for the Establishment of the East African Community 1999 that came into force on 7 July 2000. The Treaty is implemented through its Protocols amongst which are the Protocol on the Establishment of the East African Customs Union and the Protocol on the Establishment of the East African Community Common Market. One of the main objectives of the Treaty and its enabling Protocols is to achieve free movement of goods in the Community as a trade block.

On 26th March 2019, the East African Court of Justice delivered a ground-breaking judgment in the jurisprudence of regional integration in the case of British American Tobacco Uganda Limited vs Attorney General of Uganda, Reference No 7 of 2017. The reference was an inaugural litigation of the provisions relating to free movement of goods and non-discrimination against goods of Partner State under the EAC Treaty.

The Reference filed by British American Tobacco Uganda Limited challenged the enactment and implementation of discriminatory provisions in the Excise Duty (Amendment) Act No 1 of 2017 which imposed a higher excise duty rate on British American Tobacco Uganda Limited's cigarettes, deemed as imports from Kenya compared to locally manufactured cigarettes.

## Decision of Court:

In its judgment, the East African Court of Justice made many important findings briefly as follows:

□ The Court reaffirmed the position that by accepting to be bound by the EAC Treaty provisions with no reservations, Uganda could no longer apply domestic legislation in ways that make its effects prevail over those of EAC law. The Court noted that it is an obligation on State Parties not to enact or sustain laws that completely negate the purpose for which the EAC Treaty was enacted.

□ The EACJ noted that it was the intention of the framers of the Treaty and Customs Union Protocol to establish the Community as a single economic area characterised by the free movement of goods, and in which goods from any Partner State were not treated as imports.

□ The Court further noted that every Treaty in force is binding upon the parties to it and must be performed by them in good faith and the actions of the Respondent acting through the Uganda Revenue Authority are likely to jeopardise the achievement of the Treaty's objectives, thus rolling back the gains of the Customs Union and Common Market that have been realised thus far in the Community.

□ The EACJ found that the Respondent violated the Treaty and Customs Union Protocol insofar as it sought to implement an administrative measure that discriminated against the Applicant's goods which amounted to a Treaty infringement and is unlawful.

□ The Court found that though the challenged law, the Excise Duty (Amendment) Act No 1 of 2017, was not in itself in contravention with the provisions of the EAC Treaty and its Protocols, its misconstruction and implementation by the Respondent did contravene and infringe the provisions of the EAC Treaty and its Protocols.

## *Implications:*

The decision of the East African Court of Justice shall have far reaching implications for the business community of East Africa. The decision of Court was a first in which the application of the national laws of a community member in a commercial context was found to be illegal and a commercial dispute was determined by the Court. This will provide clarity for the business community on the jurisdiction of the East African Court of Justice in handling matters of a commercial nature arising from Partner States that raise questions over implementation of the EAC Treaty.

The decision is a big step forward in implementing the principles of free movement of goods and removal of tariff barriers in the Community as set out by the EAC Treaty. The EACJ through its decision has provided clarity on the hierarchy of laws in Community Partner States, with State sovereignty becoming subject to the obligations of Partner States as provided in Community law.

The decision of the EACJ has also interpreted the actions of State organs such as the Revenue Authorities as actions of the Partner State which are subject to the jurisdiction of the Court. This is likely to lead to further litigation involving actions of State organs within the community.

The revenue authorities in the Partner States and other such organs of government have also been placed with a responsibility while applying local legislation, to take into consideration the community law contained in the EAC Treaty and Protocols and obligations created therein.

The decision of the EACJ should lead to more expansive cross-border trade in the East African Community, with more certainty and faith in the implementation of the Community law amongst the business community. Players in the trade and business community of East Africa shall take greater faith in the capability of the East African Community legal system to curtail Partner States from going against their obligations and the spirit of the formation of the Community and the remedial options available to them. This should attract greater investment in the Community to take advantage of access to

the greater regional market that should be treated as a single economic area.

Legislatively, the decision of the EACJ shall have serious implications for legislation of laws by the Parliaments of the Partner States. Partner States shall be responsible for ensuring that the obligations created under Community law and principles enshrined in the regional treaties such as free movement of goods and non-discrimination against goods of Partner States, shall be taken into consideration before the enactment of national legislation and its implementation. The Decision of the EACJ shall stand as a firm reminder to all Partner States to bring their domestic laws in conformity with their obligations under the Treaty.

In Conclusion, as was rightly noted by the EACJ, the case before it was one that canvassed matters of grave importance to the advancement of Community law and EAC intra-regional trade and in our opinion is a step forward in achieving the goal of regional integration. The decision of the EACJ shall open the eyes of the business community in the region to remedial options that can be sought through the East African Court of Justice under the EAC Treaty legal regime.

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## THE CUSTOMS UNION: WHAT YOU MUST KNOW ABOUT FREE MOVEMENT OF GOODS WITHIN THE EAC

*Karara Victor Buringuriza*



The Customs Union established under Article 75 of the Treaty for the Establishment of the East African Community, is the first Regional Integration milestone of the East African Community (EAC). The right to free movement of goods originating in Partner States is one of the fundamental principles of the Protocol on the establishment Of the East African Customs Union. Free movement of goods within the EAC was previously informed by the historical relationships between the Partner States and their efforts towards regional cooperation. Despite the different commitments through memberships to different trade regimes, there exists a framework to facilitate the free movement of goods within the region.

To accelerate economic growth through trade, EAC Partner States decided to remove technical barriers to trade, and to establish free trade (or zero duty imposed) on goods and services amongst themselves. They also established a Common External Tariff (CET), whereby imports from countries outside the EAC zone are subjected to the same tariff when imported into any EAC Partner State. Preferential treatment was nonetheless granted to imports under COMESA and SADC arrangements.

However, the above treatment is with respect to import duty, and goods will be subject to fees levied as a result of different laws and regulations of the individual Partner State to which they are consigned.

Customs bodies in Partner States and other such organs of government must ensure that in applying local legislation, they take into consideration the Community law contained in the EAC Treaty and Protocols and obligations created therein. This was emphasized by the East African Court of Justice (EACJ) in *British American Tobacco Uganda Limited vs Attorney General of Uganda*, Reference No 7 of 2017. In this case, British American Tobacco Uganda Limited challenged the enactment and implementation of discriminatory provisions in the Excise Duty (Amendment) Act No 1 of 2017 which imposed a higher excise duty rate on British American Tobacco Uganda Limited's cigarettes, deemed as imports from Kenya compared to locally manufactured cigarettes.

□ The Court reaffirmed the position that by accepting to be bound by the EAC Treaty provisions with no reservations, Uganda could no longer apply domestic legislation in ways that make its effects prevail over those of EAC law. The Court noted that it is an obligation on State Parties not to enact or sustain laws that completely negate the purpose for which the EAC Treaty was enacted.

□ The EACJ further affirmed that it was the intention of the framers of the Treaty and Customs Union Protocol to establish the Community as a single economic area characterised by the free movement of goods, and in which goods from any Partner State were not treated as imports.

□ The Court also pointed out that every Treaty in force is binding upon the parties to it and must be performed by them in good faith and the actions of the Respondent acting through the Uganda Revenue Authority were likely to jeopardise the achievement of the Treaty's objectives, thus rolling back the gains of the Customs Union and Common Market that have been realised thus far in the Community.

□ The EACJ found that the Respondent violated the Treaty and Customs Union Protocol in so far as it sought to implement an administrative measure that discriminated against the Applicant's goods which amounted to a Treaty infringement and is unlawful.

□ The Court found that although the Excise Duty (Amendment) Act No 1 of 2017 was not in itself in contravention with the provisions of the EAC Treaty and its Protocols, its misconstruction and implementation by the Respondent did contravene and infringe the provisions of the EAC Treaty and its Protocols.

That said, goods moving freely within the EAC must comply with the EAC Rules of Origin and with provisions of the Protocol for the Establishment of the East African Customs Union. The Rules of Origin are a set of guidelines used to determine the source of a product, and are also used to implement different trade policies such as anti-dumping, original marking and safe guarding measures. The duties and restrictions depend upon the source of the product or import.

In determining the origin of an item, four key features are considered after which a Certificate of Origin is issued in respect of the goods which have satisfied the criteria. This is so that they can be consigned from one Partner State to another without being subjected to import duty. First among these features is whether goods were wholly produced within a Partner State and do not contain any imported materials. In the case of animals, these should have been born and raised in a Partner State, while minerals should have been mined from the ground or seabed of a Partner State, and fish should be got from the waters of that country.

The next feature is the value added to items from within a Partner State. This mainly covers the use of raw materials imported from outside the Partner States. In this case, the CIF value of the raw materials should not exceed 60% of the total cost of the materials used in the production of these goods.

The change in tariff heading and level of transformation of an item into a final product from a Partner State are

the other features considered. Inputs and finished products should not fall under the same heading. For instance, if you have a raw material, and after processing it, it falls under a different tariff heading then you are considered to have substantially transformed an item and as such the product will qualify to originate from a Partner State.

In light of the above rules, it is important to note, that there are processes classified as "simple" under Rule 7 of the Rules of Origin which do not result in substantial transformation of goods. These include: packaging, mixing of ingredients, preservation operations (such as drying and freezing), marking or labeling of items and slaughter of animals among others.

In conclusion, the principles of mutual recognition, elimination of import duty, removal of technical barriers to trade, and the implementation of the EAC Rules of Origin are some of the steps that the Partner States put in place to continue the completion of the internal market.

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# ADVANCING EAC INTRA-REGIONAL TRADE: IS “FREE MOVEMENT OF GOODS” REALLY HAPPENING?

*Pooja Mahendra Karia*



The British American Tobacco Limited (BAT), a limited liability company incorporated in Uganda under its laws carries out business as a manufacturer and dealer of tobacco and its products in Uganda. It also imports cigarettes from its sister company, British American Tobacco Kenya PLC based in Kenya and manufacturing cigarettes in Nairobi.

While conducting its business and importation of cigarettes from Kenya, BAT was issued with tax assessment notices requiring it to pay excise duty for its cigarettes manufactured in Kenya and brought in Uganda. This was borne out of the enactment and commencement of the Excise Duty (Amendment) Act No 11 of 2017 that became operational from the 1st July 2017. The Act introduced amendments of excise duty on locally manufactured cigarettes (soft cup) to an amount of 55000 Ugandan shillings per 1000 sticks and 75000 Ugandan shillings per 1000 sticks for imports. And further introducing 80000 Ugandan shillings per 1000 sticks for hinge lid locally manufactured and Ugandan shillings 100000 per 1000 sticks for same but imported ones.

BAT filed a reference to the East African Court of Justice (EACJ) against the Government of Uganda for infringing the Treaty for the establishment of the East African Community, the Customs Union Protocol and the Common Market Protocol, Uganda being a state party to the said Treaty and Protocols.

The EACJ declared that the implementation of the provisions of the Excise Duty (Amendment) Act by misconstruction and wrongful re-classification of the applicant's cigarettes as imported goods contravene and infringe Art 1 and 75(6) of the treaty and Article 1(1), 15(1)(a) and (2) of the Customs Union Protocol and Article 6(1) of the Common Market Protocol. With this the issuance of the payment registration slips for additional taxes in respect of BAT's cigarettes is illegal and void.

The EACJ therefore ordered the government of Uganda to rescind and withdraw the assessments. It further ordered that the Excise Duty (Amendment) Act be interpreted with due regard for and in compliance with the applicable Community law and also align the Ugandan tax laws with Community laws applicable to goods from EAC Partner States.

With the above example, East African business community and consumers of goods should be assured of free movement of goods coming in their respective Partner States from other Partner States of the EAC.

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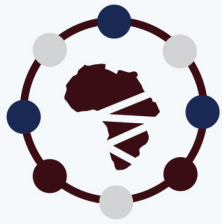
## **ART 75(6) of the TREATY**

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.

ART 15 (1)(a) and (2) of the Customs union Protocol

1. The 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

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.



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